

# Making the Declaration Work

## The United Nations Declaration on the Rights of Indigenous Peoples

Edited by Claire Charters and  
Rodolfo Stavenhagen



# MAKING THE DECLARATION WORK:

The United Nations Declaration  
on the Rights of Indigenous Peoples

**Claire Charters and Rodolfo Stavenhagen  
(eds)**

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## The United Nations Declaration on the Rights of Indigenous Peoples

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# INTRODUCTION



# THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: HOW IT CAME TO BE AND WHAT IT HERALDS

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Claire Charters and Rodolfo Stavenhagen

The UN Declaration on the Rights of Indigenous Peoples, adopted by the UN General Assembly (UNGA) in September 2007, is the most comprehensive and advanced of international instruments dealing with indigenous peoples' rights, and it is the latest addition to a growing body of international human rights law. In a first for international law, the rights bearers, indigenous peoples, played a pivotal role in the negotiations on its content, and many of them are co-authors of this book.

The rights of indigenous peoples were latecomers to the process of building up the international edifice for the recognition, protection and promotion of human rights. It was for a long time held that the situation of indigenous peoples was solely the concern of states and that, as long as governments adhered to the general principles of universal individual human rights, there was no role or responsibility for the UN. During the decades that the UN concerned itself with decolonization, it was believed that the indigenous people living in the former European colonies would benefit from national liberation. In many cases, all the peoples in the colonies were considered to be "indigenous". It was only later that states collectively recognized the existence of "indigenous and tribal" peoples in some independent states. At the international level, indigenous peoples were taken under the wing of the International Labour Organisation, which adopted Convention 107 on "indigenous and tribal people in independent countries" in 1957.

The UN's Human Rights Commission initially concerned itself only slightly with the question of minorities and hardly at all with indigenous peoples. This changed in the 1970s when indigenous peoples, some government delegates and UN experts drew attention to the continuing human rights problems facing indigenous peoples in a number of countries. At the time, indigenous peoples were struggling for recognition at the national level, and their concerns were increasingly framed in the language of human rights. This is how several delegations of indigenous peoples from various parts of the world, supported by sympatheti-

cally-minded civil society organizations, came to visit the UN headquarters in Geneva to state their grievances and demand attention to their plight. This activity led to the establishment of the Working Group on Indigenous Populations within the Human Rights Commission, where the first draft of the UN Declaration was prepared. This intricate story, in which psychological, political, legal and cultural issues came together with national interests and international diplomacy, is aptly told in this book by some of the participants who played special roles in developing the agenda of the rights of indigenous peoples in the UN over more than a quarter of a century.

Indeed, this is a book on the Declaration by authors who, for many years, were directly involved in the process of its drafting and adoption by the Human Rights Council and the UNGA: the Declaration is the outcome of years of advocacy by indigenous peoples and their leaders at the UN, as well as state and civil society representatives. It thus tells the story of the Declaration from the inside, bringing together the details of its history, the negotiations, its content and its broader social, cultural and political significance into the future. The perspectives of the contributors combine various disciplines – from the legal and political to historical and anthropological – bringing different approaches to the analysis of the significance and implications of this Declaration coming, as they do, from all corners of the world. While many cover the same ground in terms of substance, they each do so from their own unique perspective.

This book is designed to be accessible to a general and wide audience, be it scholars, human rights activists, diplomats, government officials, practitioners, journalists, students or any person who seeks a better understanding of the process and content of the Declaration. It is also an object lesson in how certain human rights issues get placed on the UN agenda.

## Beginnings

The story begins when a young lawyer from Guatemala, interested in human rights, got a job at the UN in the 1950s. Augusto Willemsen-Díaz tells us in Chapter 1 how he worked on the *Study on the Problem of Discrimination Against Indigenous Populations* with José R Martínez Cobo, from Ecuador, then the rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission), and how his efforts contributed to the establishment of the Working Group on Indigenous Populations (WGIP). In his chapter here, Willemsen-Díaz, gives us a detailed account of how the idea of getting the UN mechanism to concern itself with the rights of indigenous peoples was introduced step-by-step into the work of the UN Secretariat and the agenda of the UN Commission on Human Rights.

The WGIP's first Chair, Asbjørn Eide from Norway, examines in Chapter 2 the importance of the WGIP within the context of the UN at that time, and how he was able to engineer support for the participation of indigenous peoples' representatives at the various sessions of the WGIP in Geneva, alongside indigenous peoples themselves. Here, Eide reviews the development of indigenous peoples' rights from 1982 to the present day. Subsequently, Erica-Irene Daes became the Chair of the WGIP, a position she held for twenty years. A professor of international law from Greece, in Chapter 3 Daes provides a description of the evolution of the draft declaration within the WGIP up to the adoption of a draft by the UN Sub-Commission in 1993.

## Negotiating the Declaration

The draft declaration was then submitted to the Commission on Human Rights, which in 1995 set up the Working Group on the Draft Declaration (WGDD). It was here that the negotiations between indigenous peoples and states, between states, and also between indigenous peoples, became particularly protracted and intense, as is described by authors in part two of this book. John Henriksen, a Saami from Norway, describes in Chapter 4 some of the dynamics within the indigenous caucus during the period when indigenous peoples began to accept changes to the draft text that had been approved by the UN Sub-Commission. Andrea Carmen, a Yaqui, follows with her recollections, sometimes of similar incidents but from a different perspective to that of Henriksen, finishing by describing how the Declaration can be of real use to indigenous communities (Chapter 5). Luis Enrique Chávez, from Peru, was the final, and highly-skilled, Chair of the WGDD. In 2006 he submitted a Chair's text, which encapsulated much of the consensus reached on declaration language between indigenous peoples and states, but also some compromise language, to the Human Rights Council. In his paper, Chapter 6, he describes in detail how this was done and the obstacles that had to be overcome. Ambassador Luis Alfonso de Alba Góngora, from Mexico, was elected the inaugural Chair of the UN Human Rights Council, a vantage point from which he guided the draft declaration, in 2006, to its adoption by the Council. His Chapter 7 provides a step-by-step account of how this was accomplished. Adelfo Regino Montes and Gustavo Torres, an indigenous leader and government official in indigenous affairs respectively, both from Mexico, provide an account in Chapter 8 of the period during which intense negotiations took place between government delegates and indigenous representatives to push the draft declaration through the complex UN mechanisms. The next stage came when the declaration proceeded to the UNGA, where it encountered unexpected opposition from some of the African states. In Chapter 9 Albert Barume, a human rights advocate from the Democratic Republic of Congo and consultant for the African Commission on Human and Peoples'

Rights, analyses the process followed in the UNGA and the ways in which the African states' concerns were addressed.

## **The rights of indigenous peoples**

The UN Declaration on the Rights of Indigenous Peoples is comprehensive in the sense that it covers the full range of civil, political, economic, social, cultural and environmental rights. Further, it recognises indigenous peoples' rights as inherent. It is innovative in that it expresses the individual and collective rights of indigenous peoples, which, for example, the UN Declaration on the Rights of Persons belonging to Minorities does not. The Declaration not only elaborates on these rights but also imposes obligations on states and on international organisations and inter-governmental bodies as well.

In the third part of this book, various indigenous leaders comment on the significance of the content of the rights expressed in the Declaration from the perspective of their respective indigenous regions. This part opens with Chapter 10, by James Anaya, Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people since 2007, who places the Declaration's recognition of indigenous peoples' right to self-determination within its international legal context. Mattias Åhrén, from the Swedish side of Sápmi, President of the Saami Council, examines the Declaration's recognition of indigenous peoples' rights to lands, territories and resources in Chapter 11. Chandra Roy, a Chakma from the Chittagong Hill Tracts in Bangladesh, who is currently the head of the UN Development Program's regional initiative on indigenous peoples' rights and development in Asia, examines rights and development challenges for indigenous peoples in that region (Chapter 12). Henriette Rasmussen, an Inuk from Greenland and minister in the former Greenland home rule government, provides in Chapter 13 an analysis of the Declaration from the perspective of education and cultural rights. In Chapter 14, the Premier of Greenland, Kuupik Kleist, discusses the operationalisation of the Declaration under Greenland Self Rule in his 2009 speech to the UN's Expert Mechanism on the Rights of Indigenous Peoples. In Chapter 15, Naomi Kipuri, a Maasai and member of the Working Group on Indigenous Populations/Communities of the African Commission on Human and Peoples' Rights also analyses the Declaration, and its adoption, from her perspective.

## **Implementing the Declaration**

The final chapters of this book examine the future significance of the Declaration and, in particular, its implementation. Dalee Sambo Dorough, an Inuk from Alas-

ka who has held various positions in indigenous governance and been deeply involved in the development and negotiation of the Declaration since the 1980s, provides her view of the significance of the Declaration for indigenous peoples generally (Chapter 16). Claire Charters, a Maori international lawyer from New Zealand, applies mainstream international relations and international law theory to assess the legitimacy of the Declaration in Chapter 17. Julian Burger, in Chapter 18, brings his experience as the long-time head of the Indigenous and Minorities Unit at the UN Office of the High Commissioner for Human Rights in Geneva to assess the role of the UN Secretariat in promoting the Declaration. Then, Luis Rodriguez-Piñero, who also worked for several years in the UN Office of the High Commissioner for Human Rights, examines the problems regarding the monitoring of indigenous peoples rights in Chapter 19. In Chapter 20, Bartolomé Clavero, the Spanish appointee to the UN Permanent Forum on Indigenous Issues and Professor of Law at the University of Seville, discusses the constitutional framework of Latin American legislation in relation to the rights of indigenous peoples as set out in the Declaration. Finally, in Chapter 21, Rodolfo Stavenhagen, the former UN Special Rapporteur on the human rights and fundamental freedoms of indigenous people from 2001-2007, provides some ideas as to how to make the Declaration a useful instrument for the protection of indigenous rights.

In the final part of the book we include Chief Wilton Littlechild's address to the Human Rights Council on the occasion of the sixtieth anniversary of the UN Declaration on Human Rights. Littlechild was part of the indigenous delegation from Canada that achieved entry into the Palais des Nations in Geneva back in 1977 (Chapter 22).

As editors of this volume, we would like to thank all our contributors for their interest and enthusiasm. The idea of this book arose during a pleasant dinner in Geneva in October 2007, when a group of us were celebrating the adoption of the Declaration and thought that there might be some public interest in learning how this amazing feat had come about, and what it could mean for indigenous peoples in the future. When we approached Lola García Alix, the director of IWGIA, she responded to the idea with great enthusiasm, and we would like to express our warmest thanks to Lola for her continuing stimulation and support. We also especially thank Kathrin Wessendorf of IWGIA's human rights and communication program for her limitless patience, professionalism, eye-for-detail and good humour during the editing process. ○

# BEGINNINGS

**PART ONE**

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# HOW INDIGENOUS PEOPLES' RIGHTS REACHED THE UN<sup>1</sup>

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**Augusto Willemsen Diaz\***

## **Introduction**

**F**riends and colleagues, both indigenous and non-indigenous, have often insisted that I should write down for posterity how I came to offer my professional services to the UN and my personal experiences of initiating the work that I tried to achieve within the UN with regard to indigenous rights: the goals, aspirations and ways and means of channelling the UN's efforts in relation to indigenous peoples. I will here try to satisfy their curiosity. I have to confess that it has been strange and rather difficult to express these things in the first person singular but these are "personal experiences" which, necessarily, the person talking or writing has to express in this way.

## **Drawing the UN's attention to indigenous peoples**

I was a post-graduate student at the Latin American Law Institute at New York University in the 1950s when a notice appeared on the news board stating that the UN was seeking lawyers with mother-tongue Spanish, and interested parties were invited to attend an interview on the days indicated. I duly attended the UN offices where, after three days of interviews, I was offered a contract in what was then the Human Rights Division, an area that had always attracted me. I was employed to work in the General Secretariat as a Human Rights Officer, basically conducting research and writing documents. I was assigned to the section working with the Sub-Commission for Prevention of Discrimination and Protection of Minorities (the Sub-Commission). At that time, the Sub-Commission had decided to prepare studies into discrimination in relation to specific rights, under the responsibility of different members of the Sub-Commission as Special Rapporteurs,

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\* Augusto Willemsen Diaz was until his retirement an official of the Human Rights Centre of the United Nations in Geneva, where he promoted and guided the inclusion of the rights of indigenous peoples at the international level. He is the author of numerous position papers and reports prepared by the Secretariat on indigenous human rights. He served as ombudsman for indigenous peoples in his country, Guatemala.

and so I became involved in this work. I worked on six of the seven studies of this kind (the first, on education, was already completed),<sup>2</sup> and I wrote monographs on numerous countries and tried, without much success, to include information on indigenous rights in the corresponding reports.

In particular, I worked on the *Special Study on Racial Discrimination in the Political, Economic, Social and Cultural Spheres* (the UN Study on Racial Discrimination) for which I wrote Chapter IX “Measures adopted in relation to the protection of Indigenous Peoples.”<sup>3</sup> The objective of insisting that there should be a chapter on indigenous peoples in this Study, whilst also still referring to them throughout the book, was to use it as a basis on which to insist on a specific study on indigenous peoples (given that the phenomenon of violent military defeat (conquest) and subsequent colonization, present in many cases, including amongst the peoples of Abya Yala (America) in the 15th century onwards, had intensified, expanded and accentuated age-old features of racism and racial discrimination). The inclusion of indigenous peoples in the UN Study on Racial Discrimination was not easy and was included at the last minute, between the draft and final reports. The preparation of a special study on indigenous peoples was sought so that international legal instruments containing their different rights could be formulated and adopted and necessary measures could be initiated to help indigenous peoples fully enjoy the human rights and fundamental freedoms common to all human beings, especially to assist in obtaining recognition of indigenous peoples’ collective, historic and specific rights, which are of such importance to these peoples.

### **Relevant international legal precedents for indigenous peoples’ rights**

Some of the international instruments that would become important to the indigenous rights movement included articles 1(3), 13 (1, b), 55 and 56, among others, of the UN Charter of 1945 as they recognised the principle of equality of rights and self-determination of peoples. Then, on 10 December 1948, by means of Resolution 217 A (III), the UN General Assembly (UNGA) adopted the Universal Declaration of Human Rights. It had also, the day before, on 9 December of that year, adopted the Convention on the Prevention and Punishment of the Crime of Genocide, via UNGA Resolution 260 (III). Among the relevant human rights instruments adopted in the 1960s were the International Convention on the Elimination of All Forms of Racial Discrimination (1965) and, of greater importance, the two international human rights covenants (1966).<sup>4</sup> The latter have their identical Article 1 enshrining the right of all peoples to self-determination as a fundamental human right, thus reaffirming earlier UNGA resolutions from 1950 and 1952 in this regard.



Outside of the UN itself, but also positive, were the instruments and work of specialist bodies such as the International Labour Organisation (ILO). This included the ILO's work on indigenous workers, first in a colonial context and later also in independent countries. The UN Educational, Scientific and Cultural Organisation's Convention against Discrimination in Education was also important, adopted by the General Conference on 14 December 1960, and in force since 22 May 1962.

In this respect, it should be noted, as background, that in 1948 the Bolivian delegation presented a proposal to create a sub-commission responsible for the social problems of indigenous peoples on the American continent. This initiative was reviewed, amended and reviewed again and then turned into a proposal to conduct a study into the issue, to be undertaken with the advice, cooperation and assistance of the UN specialist bodies. This study never got off the ground. It did, however, illustrate that there was some interest in the issue at that time on the part of some countries.

### **The need for specific indigenous peoples' rights**

Indigenous peoples have inhabited my country, Guatemala, since time immemorial and these peoples were determined to maintain and protect their different identity, their own culture, customs, traditions and institutions, as well as their lands and territories, which had been the object of attempted usurpation and dispossession. They were, furthermore, calling for respect. As I was working in the area of human rights, it occurred to me that perhaps what was needed was work on recognition and respect for indigenous rights from an angle that was closer to their desires and aspirations. I felt it was particularly important that indigenous peoples' specific collective way of viewing the cosmos and themselves, their different world view, should be respected, in particular in relation to respect for Mother Earth and nature, which is of vital importance to them. I therefore devoted myself to this issue, in the confidence that success was possible, while fulfilling my obligations as a civil servant within the UN General Secretariat.

From 1977 onwards, in pursuit of an ideal that I considered to be a realistic one, we were able to rely increasingly on the enthusiastic, devoted, brilliant and effective struggle of indigenous peoples and their members, as well as on the international indigenous movement that was forming and growing around this task. The aim was clear: to achieve, insofar as possible, daily progress towards obtaining recognition of indigenous peoples as historic and living peoples, along with their human rights and fundamental freedoms, with particular emphasis on their collective, historic and specific characteristic rights which have, throughout history, always contributed to the well-being and integral development of hu-

manity as a whole, in an atmosphere of understanding and solidarity between all, with respect for differences.

The need for specific indigenous peoples' rights became particularly apparent to me when I learnt that ILO two texts, one a convention and the other a recommendation on indigenous peoples and others, referred to indigenous peoples as "populations". The terms and content of these instruments were not favourable to indigenous peoples as they referred to "integration" and "protection", evoking different and, in practice, contradictory ideas to those being advocated by indigenous peoples, at least those in my country and others that I knew of. I knew that in daily life (at least where I came from), integration was more akin to ideas and practices of assimilation and disappearance. I thought that protection would, in all probability, imply a continuation of the colonialist or neo-colonialist tutelage of the nation states in which these peoples lived, as they remained settled on their ancestral territories, now within the jurisdiction of those independent states. These ideas were contradictory to what we knew full well indigenous peoples were fundamentally seeking.

I thought that it might be possible to act from within the UN, with other like-minded people, to change these directions and guide them instead towards concepts of equal rights and self-determination of peoples on the basis of respect for differences (instead of "integration") and strict compliance with human rights legislation in their regard. I hoped to provide indigenous peoples' land ownership and possession with security and stability and to offer support to indigenous peoples' own authorities and regulations, as well as to the age-old forms of organisation and integrated development models they had so successfully applied (instead of "protection").

I decided that it was first necessary to bring the issue of indigenous rights to the attention of the UN's human rights bodies and organs with the aim of giving direction to the instruments that might be adopted and to the actions that could be taken on the issue within the UN itself, offering goals that were more congruent with the aspirations and hopes of the indigenous peoples. To bring these efforts to fruition, I saw the need to work in areas where action was possible and that more clarity and precision would be achieved.

## **Indigenous peoples' participation in international processes**

Indigenous representation was lacking both in the UN's conference rooms and its studies, and indigenous friends and acquaintances that I discussed the issue with at the time showed no interest in the work of the UN's human rights bodies and organs, nor in the studies being prepared. They saw this as a complicated matter and felt they had enough problems on their hands with the actions being taken by their governments domestically. My indigenous colleagues were not eager to

endure the lack of recognition and denial of their rights and freedoms that would certainly be dealt them by governments acting together at the international level. In support of their position, they posited the fact that the UN was an inter-governmental organisation whose member states were failing to recognise the fundamental rights of indigenous peoples, and who were committing different abuses against them. I argued that there were certainly at least a few UN member states that might be interested in helping to address violations of indigenous peoples' human rights and fundamental freedoms, and of their rights as historic peoples, enduring aspects of their past subjection to foreign domination on their own ancestral territories. I told my indigenous friends that, in my opinion, the only way of knowing how member states would react to their presentation of information to the UN was by participating in the sessions of the UN bodies and organs and outlining some of their main problems.

My indigenous friends stated that they had no way of participating in UN sessions as they were not accredited, and would be ejected if they turned up. I suggested that this problem could initially be overcome by participating as non-governmental organisations (NGOS), for which they could seek official UN consultative status. Of course I knew full well that indigenous peoples were not NGOs per se but I suggested that it was perhaps a way of making their voice and information, their points of view, complaints and suggestions heard within UN bodies and organs, until such time as they could obtain recognition in another form more akin to their true nature as indigenous peoples. I added that while indigenous organisations were obtaining this consultative status as NGOs, they could perhaps convince some friendly NGOs to give them a few minutes of their time in oral interventions and a few paragraphs in the written documents they were presenting, enriching their presentations by adding information on indigenous peoples. Some time later, when my indigenous colleagues had agreed to look into this option, I spoke with representatives of various NGOs. The Anti-slavery Society and the International Commission of Jurists quickly stated their willingness to give indigenous peoples a little time and space as requested. In addition, the increasing "internationalisation" of what were basically national indigenous peoples' organisations soon acquired consultative status from the NGO Committee in New York.

Equally, at the same time, the lack of UN commitment to indigenous issues was apparent within the Secretariat. When I requested authorisation to travel to Georgetown, Guyana, in response to an invitation to a meeting being organised by the National Indian Brotherhood of Canada, to initiate the process of their conversion into the World Council of Indigenous Peoples, the Division refused to allow me to attend. They stated that the process was by no means a clear one, and that it was not known what results would be obtained nor whether there would be complaints against UN member states, in what terms, and that it was not ap-

propriate for members of the General Secretariat to participate in this kind of meeting, even as observers (the capacity in which I had been invited).

Indirect ways of speeding up the process to secure indigenous peoples' access to the UN did, however, begin to be considered. It was concluded that one way of clearly guaranteeing an indigenous presence in the UN's conference rooms and documentation was to ensure their representatives' involvement in meetings at which their participation was explicitly anticipated and to which they could present documents prepared by themselves on issues that they considered of importance. In these sessions, I stated my certain belief that they would be directly listened to as they would be using their own voices to express what was in their hearts and minds, without the distortion of any intermediary.

In 1974, with the UN Human Rights Division having moved from New York to Geneva, in Switzerland, I was in contact with the Special Committee for non-governmental organisations on human rights and its Subcommittee on Decolonisation and against Racism, Racial Discrimination and Apartheid, and also with NGOs operating in Geneva, in the Palace of Nations and who were organising conferences on issues within their remit. I spoke to people regarding the possibility of organising a conference of NGOs on indigenous peoples' rights, and violation of them, in particular discrimination against them. The Subcommittee was enthusiastic about the idea, which they considered to be in line with the Subcommittee's aims and intentions. Among others, representatives of the World Council of Churches, and of the International Indian Treaty Council, in Geneva at that time, were involved in these talks.

It was decided to organise a conference along the lines of the ones already being held to address the issue of discrimination of indigenous peoples in the Western hemisphere, and NGOs with affiliate indigenous organisations were invited to attend, along with any that were in solidarity with indigenous peoples and who could send authentic indigenous representatives to the conference. It was agreed that these NGOs would be asked to send indigenous representatives with the hope of bringing together around 50 or 60 such participants. This conference, the International Conference of NGOs on Discrimination against the Indigenous Populations in the Americas, was held in the Palace of Nations, headquarters of the offices of the UN in Geneva, Switzerland, from 20 to 23 September 1977, with the participation of indigenous representatives (numbering more than double those expected). Reports were adopted from the different working groups established and from the conference itself, outlining the suggestions and proposals of the participants. Another meeting of the same kind followed later, the Conference of NGOs on Indigenous Peoples and Land, which was held from 14 to 17 September 1981, also at the Palace of Nations. A number of seminars on issues important to indigenous people also took place.

In 1981, a Meeting of Experts on Ethnocide and Ethno-development in Latin America was held from 6 to 13 December in La Catalina, Santa Bárbara de Here-

dia, Costa Rica, organised by UNESCO and the Latin American Faculty of Social Sciences (FLACSO). On 11 December 1981, the meeting adopted the text known as the San José Declaration by acclamation. These conferences and seminars invariably insisted on the creation of a working group on indigenous populations, something for which I had been advocating since December 1974.

### **Preparation of a specific study on indigenous peoples**

The Sub-Commission considered the study on racial discrimination at its 23rd session (1970). During the discussion, various members of the Sub-Commission supported the recommendation that the UN should conduct additional studies into the issue of the treatment of indigenous populations. Mr. Santa Cruz presented a draft resolution in which one of the four proposals called on the Commission to recommend that the Economic and Social Council (ECOSOC) authorise a study on minorities, including the issue of discrimination against 'indigenous populations'. As substantive officer assigned to the service of the Sub-Commission for the session and in my position as responsible for this within the General Secretariat, I was invited by Mr Santa Cruz to be involved. I stated that I was happy that the idea of conducting a study into the rights of indigenous peoples, their enforcement problems and all the measures necessary for their consolidation and for overcoming the obstacles to their effectiveness had been accepted and supported. I disagreed, however, with the idea of linking it, as was suggested in the discussions, to another study dealing with minorities. I stated that although there were similarities between indigenous peoples and minorities, there were also significant differences. Among the arguments that I then put forward, and given that a purely numerical notion of "minority" prevailed in the UN environment, I cited the cases of Bolivia and Guatemala, indicating that the indigenous peoples of both countries formed a clear majority, representing more than 50% of the population, according to official data.

The draft resolution having been sent from the Sub-Commission to the Commission on Human Rights, it was considered at the Commission's 27th session in Geneva in 1971. It noted opposing points of view, as some were in favour of a separate study into discrimination of indigenous populations while others insisted that just one study should be undertaken, to include both the protection of minorities and the elimination of discrimination against indigenous populations together.

One person who had been a member of the Commission in the 1940s when it was drafting the Universal Declaration of Human Rights was present at this period of Commission on Human Rights sessions and - in part for this very reason - enjoyed a reverential respect from other Commission members. I managed to get him to agree to make a short declaration referring to the fact that, according to official statistics, in Bolivia and Guatemala, the country from which I came and

which I represented in the Commission, indigenous peoples were in a vast majority of around 70% of the population and that this fact was reflected in the UN Population Yearbook, of which he left a copy with the Commission so that they could see that not all indigenous populations (peoples) were “minority groups” as some in the Commission had been stating. This had a great effect on the Commission members, in particular on those inclined to conduct only one study, including experts on minorities.

On 21 May 1971, ECOSOC unanimously approved Resolution 589 authorising the Sub-Commission to conduct a general and complete study into the problem of discrimination against indigenous populations and to suggest the necessary national and international measures by which to eliminate this. In its Resolution 8 (XXIV) of 18 August 1971, the Sub-Commission decided that the study would be placed under the responsibility of one of its members, appointing José Ricardo Martínez Cobo as Special Rapporteur, and requested a preliminary report on the matter to be presented to its 1972 session. The study was entitled “*study of the problem of discrimination against indigenous populations.*” (the Cobo Indigenous Populations Report).<sup>5</sup> The preliminary report was presented as anticipated and the Sub-Commission approved it without amendment.

José Ricardo Martínez Cobo decided to leave the job of preparing the Cobo Indigenous Populations Report to me. The final Cobo Indigenous Populations Report was presented to the Sub-Commission at different sessions, the various chapters having been put together in three documents that were considered at its sessions in 1982, 1983 and 1984. The Sub-Commission approved Resolution 1984/35 of 30 August 1984 by which it described the study as a “highly valuable contribution to the clarification of basic legal, social and cultural problems relating to indigenous populations”. On the recommendation of the Sub-Commission and the Commission on Human Rights, in its Decision 1985/137 of 30 May 1985, the ECOSOC called on the Secretary-General to publish the complete report in consolidated form and to disseminate it widely, and decided to print the report’s conclusions, proposals and recommendations.

When determining the sources of information to be used for the Cobo Indigenous Populations Report, it was suggested that wider information coming from scientific and academic bodies should be drawn on. From initial investigations into these and other sources, it was established that there were around 40 countries in which what we would regard as indigenous peoples were living and it was decided that, if possible, the study should include information on each and every one of them. In the end, only 37 countries were included. In addition, however, and this was an innovation in this kind of thematic study, it was proposed that, provided the Sub-Commission approved it and the respective governments agreed to receive them, visits would be made to some of the countries covered by the study. Visits were conducted to 11 countries.



It was also decided, with the approval of the Sub-Commission, to adopt the same practice as used in the above-mentioned earlier studies into discrimination conducted by the Sub-Commission, namely that of preparing summaries of the information available for each country, in the study. The process of meeting, selecting, classifying and ordering the materials and drafting these summaries, scrupulously following existing standards in this regard and covering each and every one of the issues included in the outline plan, was extremely laborious and complex given the difficult - and sometimes virtually impossible - access to existing data.

A particular issue that arose during the preparation of the Cobo Indigenous Populations Report was that of the classification of indigenous as peoples or populations. They had to be called populations instead of the more appropriate term peoples, which I had been using as a definite preference. The use of the word populations was required by the UN for a number of years, although I was always ready and waiting for the time when the more appropriate term peoples could be used, through a decision to change from within the UN.

The term "populations" had been previously used in publications and meetings of the International Labour Organisation and in the different conventions and recommendations adopted by that body ("poblaciones" in Spanish). The Study on Racial Discrimination, which was prepared under the responsibility of Hernán Santa Cruz, from Chile, contained a Chapter IX dealing with "Measures adopted in relation to the protection of Indigenous Peoples". In drafting this Chapter IX, I had deliberately used the word "peoples" ("pueblos"). However, Chapter XIII of the Study on Racial Discrimination - "Conclusions and proposals" - included a Section B "Problems of the Autochthonous Populations", to link it to Chapter IX, paragraph 1094 referred to "aboriginal populations" and the words "indigenous populations" were utilised throughout Section B, including three times in Paragraph 1102, which set out the proposal for the specific study on discrimination against "indigenous populations". Populations was confirmed by the Special Rapporteur Santa Cruz - thus worded by him - for its inclusion in the final report on the Study on Racial Discrimination. With this, the term indigenous populations became part of the UN terminology, contrary to my endeavours to use the term indigenous peoples in Chapter IX of the Study. From then on, many UN member states with indigenous peoples living on territory under their jurisdiction only accepted the term indigenous populations, which had to be used in the Cobo Indigenous Populations Study, being the term authorised by the ECOSOC.

A great deal more could be said with regard to the content of the Cobo Indigenous Populations Study but this is neither the time nor the place. I must say that, in general, I was free to determine the content and order of the information obtained. The only exception was relating to indigenous peoples' own legal systems and the exercise of jurisdictional powers by their communities and community

authorities, which I was asked not to include in the chapter on justice administration, or rather only in minimal terms, as this had to be limited to state actions in this regard, in particular that of the judicial authorities. A good number of the issues included in the study are still topical and have lost no relevance in terms of their approach, treatment or written development, even though 30 to 40 years have now passed (1971 to 2009).

## **The Working Group on Indigenous Populations**

The human rights bodies of the UN were paying little attention to establishing a mechanism to focus on indigenous peoples' issues, even over the period when the Cobo Indigenous Populations Report's different chapters were being presented each year to the Sub-Commission. Indigenous issues only received about 20 to 40 minutes of attention a year, when the Sub-Commission received the different reports we prepared. In essence, the information consisted of different substantive chapters of the Report and the visits made by the Special Rapporteur and I to the 11 countries to meet with indigenous peoples and obtain direct, first-hand information for the study.

When the Working Group on Slavery was created in 1974 I realised that the basic mechanism that I was seeking to create could be a working group on indigenous peoples. Towards the end of 1974, a Symposium on the Future of Traditional Societies was held at Cambridge University, United Kingdom, to which I was invited by the organisers, the Anti-Slavery Society. It was held from 16 to 20 December and I attended with the aim of gathering information for the Cobo Indigenous Populations Report given that, for all intents and purposes, they could be described as traditional societies. I explained that it would be useful for the UN to create a working group, under the Sub-Commission and made up of five members of that body, one from each of the established UN geo-political groups, selected by their corresponding geo-political group and appointed by the Chair of that body, to deal exclusively with issues affecting indigenous peoples. Information and proposals would be presented to this working group by indigenous peoples' genuine representatives, sent for this purpose by the indigenous communities and organisations. To enable this, the idea was to create a collateral voluntary contributions fund that would help defray the costs and expense of travelling to Geneva and spending at least a week there participating in the Working Group's session. Given the high travel expenses for such participation, such costs could not be covered by indigenous communities anywhere in the world. I repeated that these were personal ideas that had thus far not been formally proposed at the UN, although I intended to do so shortly. Having returned to my work in Geneva following the symposium, I presented two texts: 1. my report on my involvement in the meeting; and 2. as separate text, a file note on the ideas for



a working group and fund to facilitate indigenous peoples' participation. Initiatives subsequently arose in this regard on repeated occasions and in different fora.

The time finally came when the ECOSOC, in its Resolution 1982/34 of 7 May 1982, authorised the Sub-Commission to establish an annual Working Group on Indigenous Populations (WGIP) to meet for a maximum of five working days prior to the Sub-Commission's sessions with the aim of:

- a) .... examining events relating to the promotion and protection of the human rights and fundamental freedoms of indigenous populations,
- b) ... [paying] special attention to changes in standards relating to indigenous rights.<sup>6</sup>

In the interests of a broader participation in the new and recently created mechanism, during the initial sessions of the WGIP in 1982 and 1983 I sought ways of opening it up to the involvement of indigenous peoples - nations, peoples, communities - and also to organisations that were obviously indigenous. I was concerned about the restrictive effect of the simplistic, across-the-board application of the requirement for consultative status with the ECOSOC, which had been strictly demanded for participation in the sessions of UN organs and bodies for more or less 30 years. Non-ECOSOC accredited indigenous peoples' representatives found it impossible to participate alongside other representatives in a WGIP that had been created explicitly and specifically to listen to them and their communities, to gather their contributions and take them into due consideration when conducting its important work, something completely new in the UN with regard to indigenous peoples. Their information, along with the information provided by representatives of the nations, peoples and indigenous communities, would be of great importance in terms of enabling the WGIP to fulfil its tasks appropriately. I felt it absurd, and contradictory in the extreme, to create a working group to listen to indigenous organisations' representatives and then to demand that they have consultative status before they could participate in its sessions, which was the same as destroying with one hand what you had just finished building with the other.

Of course, it was important to make sure that those who attended the WGIP were actually the real and legitimate representatives of those peoples and communities and that they were attending to provide information on their problems and contribute to ways of resolving them, either solutions that they felt possible or advisable or those arising from the discussions in the WGIP. I stated that I was sure that they would come in good faith and share as the solemn emissaries of their peoples without resorting to the deviations, excesses or abuses that some sectors feared could happen, given that this would be an historic opportunity to tell the world what was happening to them. Ways of ensuring that the WGIP's

sessions were conducted in line with UN standards would be sought and most certainly found, without any kind of hitches, the WGIP always having the right to bring the behaviour of participants and the practices emerging in the sessions in line with the relevant regulations. These ideas were shared with different participants in the conference room where the WGIP's meetings were being held. A number of indigenous representatives in this situation decided to ask to speak at the sessions to see how the WGIP members would react and, if necessary, insist on their right to speak there. Meanwhile, at the same time, the same had been proposed individually to the WGIP members.

In their response to these conversations, three of the WGIP's members stated that they had no problem in allowing the representatives of indigenous organisations to talk at and participate in the WGIP sessions even if they did not hold consultative status, as they would provide important information to the WGIP, provided the other members of the WGIP also felt the same way, and they hoped that they would. When the WGIP members all came together to consider and decide on this issue of the participation of representatives from organisations without consultative status, they all repeated their respective positions. It was generally indicated that if they were allowed to participate, this would mean that the WGIP trusted those representatives to act in accordance with the UN's rules of procedure.

The then Chair of the WGIP, Asbjørn Eide (from Norway) in 1982 and 1983, proposed that they be allowed to speak with a proviso that the WGIP could take this permission away from them if they departed from the applicable procedures in the WGIP's sessions and that, if necessary, this would be done without hesitation. The other members of the WGIP agreed to this and supported the proposal without amendment. Having unanimously agreed to proceed in this way, at the next session of the WGIP the Chairperson announced this procedure, which was well received by the participants.

This broad openness on the part of the WGIP, which never had to be restricted, soon became a special - and perhaps its most important - feature, enabling the number of participants involved in the WGIP to become ever greater until it had reached, a decade later, around a thousand participants per session. This is highly unusual and extraordinary for a body at the level of a WGIP. It even leads us to confirm the relevance of it having been considered and named the point of entry for indigenous peoples to the UN and to a new kind of high-level dialogue between these peoples and the governments and international community and to the establishment of new methods of international cooperation. The WGIP performed these roles ideally due to appropriate goals, a clear and firm direction and the intervention of genuine indigenous representatives.

A number of governments also sent senior civil servants from their country's public administration, even from state ministries, to participate in the WGIP's sessions and they made formal statements on issues within their competence.

Due primarily to this openness, the number of participants grew year by year until it reached nearly 1,000 representatives, something extraordinary for a body at the level of a working group. To prepare itself to produce the concrete texts within its mandate, the WGIP was absorbing all information being provided to it in this regard. It was formally decided during its fourth session (1985) that production of a declaration on the rights of indigenous peoples would represent a first formal step in the process towards fulfilling the second aspect of its mandate. From the next session onwards, the WGIP devoted itself seriously to the task of formulating the draft Declaration.

The WGIP having made a fair amount of progress in developing a declaration, with many people making contributions to the concrete production of an international instrument on indigenous peoples' rights, three groups were established within the WGIP, headed by its members Erica Daes, Danilo Türk and Miguel Alfonso Martínez. Indigenous representatives participated fully and very actively as proponents and direct drafters in these groups.

In 1993, the International Year of Indigenous Peoples, the WGIP completed the elaboration of its draft declaration, prepared with the involvement of all those who had participated in its sessions and made contributions in many ways to the drafting process. This was presented to the Sub-Commission for its consideration. The following year, in its Resolution 45/1994, the Sub-Commission approved the text presented by the WGIP without a vote and passed it on to the Commission.<sup>7</sup> The Commission on Human Rights, by means of Resolution 1995/32, established an open-ended inter-sessional working group to examine the text adopted by the Sub-Commission (the WGDD).<sup>8</sup> Specific consultative status was established for indigenous representatives in the WGDD, thus becoming formally less open than the WGIP, although it must be noted that this status was not denied to any organisation that requested it.

After long and complicated consideration of the draft declaration in the WGDD, an amended version of the draft declaration was included in the last report of the WGDD, sent to the Commission on Human Rights, and was subsequently approved by the Human Rights Council via Resolution 2006/2 of 26 June 2006, with 30 votes in favour, 2 against and 12 abstentions.<sup>9</sup> However, on 18 November 2006, by a vote of 82 for, 67 against and 25 abstentions, the Third Committee of the UNGA adopted an amendment to the draft resolution proposing approval of the declaration, presented by the Group of African States. Because of this amendment, adoption of the declaration was postponed, primarily due to concerns regarding issues that were summarised thus by one author: "a) definition of indigenous peoples; b) self-determination; c) property rights to lands and natural resources; d) preservation of different political and economic institutions; and e) national and territorial integrity."<sup>10</sup> As is known, on 13 September 2007, the UNGA adopted the newly-modified text of the UN Declaration on the Rights

of Indigenous Peoples by a vote of 143 in favour, 4 against (Australia, Canada, USA and New Zealand), with 11 abstentions.<sup>11</sup>

## **Voluntary Fund for Indigenous Populations**

As already noted, the idea to establish a fund for indigenous peoples' participation in the UN was linked to the vital participation of genuine indigenous peoples' and communities' representatives to ensure the authenticity of the presentations on which, in principle, the actions of the WGIP, as well as of the UN organs and bodies, had to be based. At the end of the 1970s, having been authorized by the Human Rights Centre (as our offices were then known), because they involved the creation of a new UN body, I began to prepare the documents relating to the creation and organisation of the Fund, for which I drew on documentation relating to other similar funds in the UN. In their resolutions 1982/31 and 1983/23, the Sub-Commission and Commission on Human Rights respectively noted the first part of this initiative and the Commission on Human Rights called on the Sub-Commission to make "more concrete proposals on the possible establishment of a fund as noted above, including applicable criteria for the administration of this fund, and appropriate regulations to make it available to those who could be considered to meet the conditions for this". It called on the Secretary-General to make suggestions to the Sub-Commission on the way in which this fund could be administered. In the end, the Voluntary Contributions Fund for indigenous peoples was created by the UNGA in 1985 and has been in operation from 1988 to this very day, having supported hundreds of indigenous peoples' representatives to participate over the course of its 21 years of existence.

I promoted greater specialist indigenous knowledge in the UN in my role as Chair of the Board of Trustees of the UN Voluntary Fund, a position I held from 1988 to 1996, after retiring from the UN in 1983. Each session, more indigenous representatives were appointed to the Board of Trustees until, in 1996, I was not a candidate for re-election and an indigenous woman was appointed to replace me: Victoria Tauli Corpuz was chosen, and with this the composition of the Board of Trustees became 100% indigenous.

## **Conclusion**

I have gladly written these few lines for inclusion in a publication to celebrate the initial triumph of great importance in the UN, the crowning success of the collective efforts of thousands of people over many years, namely the approval of an international legal instrument exclusively dedicated to this issue, the UN Declaration on the Rights of Indigenous Peoples.

This marks an important stage in the struggle for respect, reaffirmation and promotion of the fundamental rights of millions of people, a struggle that began around 50 years ago, and in which the international indigenous movement - active in this process since the mid 1970s - has since 1978 been increasingly active and important through its effectiveness and efficiency, having taken on the predominant role it deserves in this.

As someone involved in this process, I found myself before a half closed door, one that did not wish to exclude anyone but which, however, prevented passage. I gave it a gentle nudge, and with some difficulty opened it a little. I will forever be thankful for that nudge because it opened up the possibility of thousands of people crossing that threshold, people representing the more than 300 million human beings whose rights were being violated and who needed to act to overcome this situation.

Once through the door, however, in the process of affirming their presence there, incorrect and manipulated terminology was initially used – such as indigenous populations – although the relevant terminological direction was never lost and, in the end, the use of the appropriate terms was recovered, preserved in hope yet always ready to reappear. The right to self-definition was claimed, combining subjective elements of self-identification and its complement, community acceptance. Insofar as was possible for a staff member of the General Secretariat within the procedures of a UN political body, I objected to discrediting indigenous peoples as historic peoples, which is what considering them as simple minorities would have meant. Lastly, the other door - ajar already and no more – was opened, enabling access to participation in the new specific mechanism, the establishment of which was achieved through repeated insistence on many occasions, over many years.

The international indigenous movement - now consolidated, albeit with some superficial cracks that it will be able to mend - will continue working, in all efficiency and suitability, in the UN and in the other existing fora, in order to guarantee future generations of indigenous peoples a dignified and significant future in which they will continue to contribute their bright lights and constructive directions to those generations and to humankind as a whole, for the good of all.... onwards and upwards! ○

## Notes

- 1 This text is an abbreviated version of a longer study on this issue to be published by the International Work Group of Indigenous Affairs.
- 2 The other 6 studies related, respectively, to discrimination in: political rights; freedom of religion and religious practice; the right of all people to leave any country, including their own and to return to their country; people born outside of wedlock; equality in justice administration; and the discussed racial discrimination.

- 3 I did not write the conclusions and recommendations in Chapter XIII that related to this chapter. The Special Rapporteur for this study was Hernán Santa Cruz, from Chile.
- 4 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, entered into force 4 January 1969; International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976; and International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976.
- 5 Martínez Cobo “Study of the Problem of Discrimination Against Indigenous Peoples” UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983).
- 6 UN Economic and Social Council “Resolution 1982/34: Study of the Problem of Discrimination Against Indigenous Populations” UN Doc E/RES/1982/34 (7 May 1982).
- 7 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities “Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples” UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 8 UN ECOSOC “Resolution 1995/32 Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214” (25 July 1995).
- 9 UN Human Rights Council “Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994” (29 June 2006).
- 10 **Mario Ibarra**. 2007. “Notas sobre algunos instrumentos, documentos y actividades internacionales para una discusión e implementación del derecho de libre determinación de los pueblos indígenas (essay).” (*Mayagráfica*, Guatemala), 84.
- 11 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).

# THE INDIGENOUS PEOPLES, THE WORKING GROUP ON INDIGENOUS POPULATIONS AND THE ADOPTION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES<sup>1</sup>

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Asbjørn Eide\*

The Working Group on Indigenous Populations (WGIP) was established by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission) at a time when international efforts to protect human rights had gained significant momentum, in 1982.

In the early formative years of international law, before it was separated from natural law and from theological thinking, issues relating to the treatment of indigenous peoples were addressed in the writings of Bartolomé de las Casas and Francisco de Vitoria.<sup>2</sup> Nonetheless, their humanist efforts were not terribly successful in positively improving the behaviour of European colonizers. Extreme brutality was common among *conquistadores* in the Americas, including extensive and deliberate killing of the people who had lived there previously. Injustice also characterized the process of European settlement in Australia and other places.

Concern for the rights of indigenous peoples disappeared from international law during the period of classic, positivist international law as it evolved from the end of the Napoleonic wars to the Second World War. It was the heyday of the nation-state system in Europe, extending to newly independent colonial states. National sovereignty was the basic organizing principle. International law was considered to derive solely from state consent and state practice and to deal exclusively with relations between sovereign states. Conditions inside states were the exclusive concern of the colonizing power. Consequently, the treatment of indigenous peoples was generally a matter of internal affairs, with no role envis-

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aged for the international community. Even treaties between colonial empires and indigenous peoples were subsequently considered to fall under domestic, rather than international, jurisdictions.<sup>3</sup>

Some elements of change in international law emerged at the end of World War I, though with little positive effect for indigenous peoples. The League of Nations established a system of international protection of minorities living in some of the new or reconstituted states of Central and Eastern Europe. Another partial development was the mandate system, as set out in Article 22 of the Covenant of the League of Nations.<sup>4</sup> With regard to colonies and territories taken from defeated colonial powers and transferred as mandates to those in the winning coalition, “there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant”. The mandated powers were required to provide to the Council of the League an annual report on their performance, and a permanent Commission was established to receive and examine these annual reports “and to advise the Council on all matters relating to the observance of the mandate”.

While the mandate system, and protection of minorities, suggested a path for possible modification of international law, they lost much of their significance in the 1930s due to the crisis of the international system caused by Japanese militarism in Asia, extreme nationalism in the heart of Europe and Stalinist Communism in the Soviet Union. Moreover, international law continued its failure to address indigenous peoples residing in existing sovereign states. Indigenous peoples had no status under international law, and no mechanism or procedure was established by which they could address the international community. The only exception was that the International Labour Organisation (the ILO), concerned with abolishing slave labour, had started to investigate the situation of these indigenous peoples, a process which was to culminate much later, after World War II, in the adoption of the first international convention relevant to them: ILO Convention 107 on Indigenous and Tribal Populations (ILO Convention 107).<sup>5</sup>

It was only with the adoption of the UN Charter that a significant change took place in international law. The inclusion of the promotion and protection of human rights as one of the purposes of the UN made it a legitimate concern in international relations to monitor and, if necessary, criticize the way in which governments treated their own inhabitants. It had little effect in the early years: in spite of the adoption of the Universal Declaration of Human Rights (UDHR) in 1948,<sup>6</sup> human rights promotion was severely hampered by the Cold War. In the 1970s, however, significant developments started to take place; the first treaty bodies were established and international human rights organizations were becoming increasingly active.



## The WGIP

The Sub-Commission's decision to establish the WGIP is taken as the starting point of this article for two reasons. To start with, it was the first time that indigenous issues were to become an exclusive agenda item of an international human rights body. Further, as the newly elected member of the Sub-Commission, I played a role in establishing the WGIP by introducing the draft resolution into the Sub-Commission and, in 1982, by being elected its first Chairperson. Other experts came to play a more important role in the later stages of the process.

It fell to me as Chairman to make one decision which turned out to have far greater consequences than I then realised. This related to participation in the WGIP. Many indigenous representatives wanted to participate but faced formal difficulties. All working groups of the Sub-Commission consist of only five members, who are members of the Sub-Commission itself and come from each of the five regions of the world as defined by the UN. However, working groups are permitted to have observers. According to standard rules at that time, representatives of governments and of specialized agencies and regional international organizations were entitled to participate as observers. Representatives of such Non-Governmental Organisations (NGOs) as had been given consultative status by the Economic and Social Council (ECOSOC) were also entitled to participate as observers. At that time, however, almost no indigenous organizations had consultative status with ECOSOC, meaning that it was difficult for indigenous peoples to participate. In my role as Chairman, I took the decision that, to fulfil the mandate of reviewing developments concerning indigenous populations and to work towards developing the corresponding standards, there was a need to have the best possible experts present, and the best experts were the indigenous representatives themselves. While this was a complete break with tradition and met with some objections, it was supported by the then director of the UN Centre for Human Rights, Theo van Boven from the Netherlands. The WGIP was thus opened up to indigenous representatives and, over the years, they joined in large numbers from all over the world. In hindsight, it is clear that this laid the ground for the emergence of a global indigenous movement which came to leave its imprint on much of the UN human rights work in the years to follow.

Human Rights Commission Resolution 1982/34 gave the WGIP the mandate to review developments concerning indigenous populations and to work towards the development of corresponding standards.<sup>7</sup> In 1985, the Sub-Commission requested that the WGIP draft a declaration on indigenous peoples for adoption by the UN General Assembly (UNGA), which it did, completing the draft in 1993.<sup>8</sup>

International human rights as established at the end of World War II were based on the principle that every person should be free and equal in dignity and

rights. Everyone was considered entitled to all human rights “without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (UDHR Art. 2).<sup>9</sup> The concern was to end all forms of exclusion and subordination, and to ensure integration for all in society on an egalitarian basis. The unit of responsibility for achieving this, as elaborated in the international covenants on human rights adopted in 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights,<sup>10</sup> was the state: every state party to those covenants should respect and ensure the equal enjoyment of those rights for every person within their territory. Any exclusion should be brought to an end; integration through prevention of discrimination was the main task to be pursued.

Such was the motivation for the ILO, which at an early stage started to investigate the discrimination and exploitation of persons of indigenous origin. A comprehensive study by the ILO in 1953 led to the adoption of ILO Convention 107. The focus of that Convention was to facilitate a better integration of indigenous persons in the labour market through the elimination of discrimination and through improved vocational training. It was recognized, however, that an underlying cause of the vulnerability of these peoples was their widespread deprivation of the land from which they had made their living in the past; the Convention therefore also called for an improvement in the recognition of land rights of the indigenous.

### **Shifting focus: from integration to self-determination**

For many years of its existence, the Sub-Commission focused mainly on the first part of its mandate, the prevention of discrimination. The dominant philosophy was to bring exclusion and marginalization to an end, and to promote integration and equality among all persons within national societies. The Sub-Commission carried out pioneering work in this area, including the drafting of the Convention on the Elimination of all Forms of Racial Discrimination. When it tried to deal with the second part of its mandate focusing on the protection of minorities, however, it was for a long time given the cold shoulder by the Commission on Human Rights and ECOSOC.

The climate changed in the 1970s, partly due to the adoption of the ICCPR in 1966, Article 27 of which provided: “In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language”.

The Sub-Commission decided to initiate a study into the rights of minorities on the basis of ICCPR Article 27, and entrusted it to its Italian member, Francesco Capotorti. In the process of the study he recommended, and the Sub-Commission agreed, that the situation of indigenous populations should be separated into a different study, entrusted to another member of the Sub-Commission, Mr Martínez Cobo. Over the course of nearly a decade, he and his collaborators carried out a comprehensive study into existing discrimination of indigenous populations. Much of the work was carried out by a staff member of the UN Center for Human Rights, Augusto Willemsen Díaz, a Guatemalan national (See Willemsen Díaz in this volume) (Cobo Indigenous Populations Report).

The initial plan was to focus on discrimination and the obstacles to full integration for indigenous persons in the wider society. As the Cobo Indigenous Populations Report progressed, it became increasingly clear that the focus had to be modified in response to demands made by indigenous organisations themselves. For centuries, indigenous peoples had had no presence in international bodies. This changed dramatically with the establishment of the WGIP. A wider presence of indigenous representatives was further facilitated by the UN Voluntary Fund for Indigenous Populations, established by the UNGA in 1985 to provide assistance to indigenous representatives to attend the WGIP (and, later, the Permanent Forum on Indigenous Issues). Over time, the Fund expanded and made it possible for poor indigenous communities, including from Africa, to attend. More than a hundred travel grants are now provided each year. The Fund has also facilitated the participation of women representatives from indigenous communities.

In the WGIP, the indigenous representatives were allowed not only to attend but also to speak, to prepare working papers and to make proposals. Their views were increasingly taken into account. The thrust of the discussions thus changed. Using the WGIP as a platform, the indigenous representatives managed also to be represented in many other deliberative bodies of the UN and were able to bring their concerns to the attention of other organizations such as the World Bank. It became a springboard for their attendance at the large summits organized during the 1990s – the Conference on Environment and Development (the Rio conference) in 1992, the World Conference on Human Rights in 1993, the Copenhagen World Summit on Social Development in 1995, the Fourth World Conference on Women in Beijing in 1996 and the International Conference against Racism in 2001. Through this participation, they managed to get the concerns of the indigenous peoples reflected in the declarations and programmes of action of several of those conferences, thereby also affecting the activities of many UN agencies.

For some of the most active among the indigenous representatives, the rights of persons belonging to minorities, as set out in Article 27 of the ICCPR, were insufficient. Increasingly they focused on Article 1, the right of peoples to self-

determination. It needs to be recalled that Article 1 had been introduced into the human rights instruments at a time of increasing struggle for - and growing acceptance of - decolonization. For indigenous leaders on the American continent, their situation was somewhat akin to a form of internal colonialism, and it was this situation they wanted to rectify by insisting on the right of peoples to self-determination. While human rights in the Universal Declaration of Human Rights concern the relationship between state authorities and the individuals who are subject to the exercise of their authority, the right to self-determination brought in an entirely different perspective: who should govern whom, and who should exercise authority and control over territory and natural resources? Indigenous activists challenged what they considered to be an integrationist perspective in international law and demanded a shift in focus towards self-determination and control over their own natural resources. For example, they rejected ILO Convention on Indigenous and Tribal Populations 107 as being assimilationist in nature. That Convention made it clear that its purpose was to achieve a progressive integration of persons from indigenous populations into the national society as a whole. In contrast, indigenous leaders demanded a space for their people to administer themselves collectively.

The change in the focus of international law dealing with indigenous peoples emerged step by step, with the WGIP at the centre of the developments. Parallel to the drafting of a declaration on the rights of indigenous peoples, a range of studies was carried out to deepen the understanding of the issues involved. The Chairperson of the WGIP for most of the period from 1984 was the member from Greece in the Sub-Commission, Erica Irene Daes (see Daes in this volume). She prepared some of the first drafts of the Declaration under discussion, based on the concerns expressed by the participants, and several studies were carried out by her. Some were also carried out by the subsequent Chairperson, Miguel Alfonso Martínez from Cuba.

In parallel, the ILO initiated a revision of its Convention No 107, based on the new perspective of greater autonomy for indigenous peoples, recognition of their collective control over land and natural resources, educational rights based on their own cultural orientation and needs, and labour protection and vocational training more geared to the assumption that they would serve their own society and find employment there, not only in the non-indigenous part of society. The outcome was ILO Convention 169 on Indigenous and Tribal Peoples, adopted in 1989 (ILO Convention 169).<sup>11</sup>

Support was growing for indigenous rights more generally. The World Conference on Human Rights in Vienna requested an early completion of the draft declaration on the rights of indigenous peoples and called for the proclamation of the Decade on Indigenous Peoples, which started in 1994.<sup>12</sup> Its main objective was to strengthen international cooperation for the solution of problems faced by indigenous peoples in areas such as human rights, the environment, develop-

ment, education and health. The theme for the Decade was “Indigenous people: partnership in action”.

The completion of the draft declaration by the WGIP in August 1993 was a major achievement, made possible through the perseverance and commitment of the long-standing Chair of the WGIP, Erica-Irene Daes, and the other Sub-Commission members, in close collaboration with the indigenous representatives. The draft was endorsed by the Sub-Commission and handed over to the Commission on Human Rights for endorsement and transmission to the UNGA. A working group was established within the Commission (the WGDD), which was to meet every year for more than a decade. Many governments were critical of some of the draft declaration’s contents, and negotiations turned out to be more difficult in the Commission (a political body) than in the Sub-Commission (composed of independent experts). The draft lingered on from 1994 to 2006 and was still not adopted when the Commission was abolished, though substantive work led by the Chairman of the WGDD had been done to smooth out the controversies. Then, in June 2006, the process took a new turn. The draft declaration was adopted in the very first session of the new Human Rights Council and transferred to the UNGA, where it came up against unexpected obstacles.

The Human Rights Council’s adoption of the declaration signalled a fundamental change, completing a process that had started in the 1970s. Nonetheless, while there is full agreement that coercive assimilation is no longer permissible, a significant gap remains between those who favour the integration of indigenous persons in their individual capacity, and those who support the demand for collective self-determination.

## **Decision-making in the UNGA**

The main supporters of the declaration were the Latin American and European countries. Nearly every Latin American and European state supported the draft declaration and therefore voted against the resolution to defer the UNGA’s consideration of it in the Third Committee of the UNGA on 28 November 2006. Opposition to the declaration came from two quite different quarters: from four countries outside Europe which, at some stage, had been British colonies and which now had an English-speaking majority (Australia, New Zealand, Canada, the United States), along with substantial numbers of indigenous peoples on their territories, and from African countries. The Russian Federation, which has indigenous peoples on its territory, though fewer in number, also opposed the draft declaration.

The somewhat unusual coalition of African states and non-European “Western” states where the majority are descended from European (though not Latin) settlers, had not emerged during the draft declaration’s adoption by the Human Rights Council in June 2006. On the contrary: African states were then either di-

rectly supportive or neutral. Among the sponsors presenting the resolution for the adoption of the declaration in the Human Rights Council were three African states (Benin, Congo and Zambia) and among the states voting in favour of its adoption were also Cameroon and South Africa, as well as Zambia. Not a single African state voted against the declaration in the Human Rights Council. Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia all abstained.<sup>13</sup>

The Human Rights Council adopted the Declaration by a vote of 30 for, 2 against and 12 abstentions. Only Canada and the Russian Federation voted against. The many states that were not at that time members of the Council also included Australia, New Zealand and the United States, where considerable numbers of indigenous peoples live. These three influential states protested against the adoption of the declaration by the Human Rights Council. Their protest and the underlying reasons were set out in a joint statement on 27 June to the Council. One passage in their statement deserves attention, as it read: “Our three countries have discussed the Chair’s text in detail in many capitals and in all regions. It has become very clear that others share our concerns.”<sup>14</sup> While their statement did not prevent the declaration from being adopted in the Human Rights Council in June, extensive lobbying was subsequently carried out by some or all of those three countries, joined by Canada, between the time of the adoption of the declaration in the Human Rights Council in June 2006 and its de facto rejection in the Third Committee of the UNGA in November of the same year.<sup>15</sup> The lobbying had its main impact on African countries, which in November voted en bloc for the deferral of the UNGA’s consideration of the declaration, including African states that had voted in favour of adopting the declaration in June in the Human Rights Council.

On 12 December 2006, a press conference was held at the UN headquarters, at the initiative of the Indigenous Peoples’ Caucus. Here, this body stated that it was “shocked and outraged” by the Third Committee, which had failed to adopt “the most important international instrument for the promotion and protection of the human rights of indigenous peoples”.<sup>16</sup> In the words of Mr Borrero, the Chair of the NGO Committee for the Decade of the World’s Indigenous Peoples,

*Africa had taken the lead in blocking the adoption of the Declaration – a strategy supported and encouraged by New Zealand, Canada, Australia and the United States. It was clear that such an action of politicizing human rights showed a clear disregard for the ongoing human rights abuses suffered by indigenous peoples. That betrayal and injustice severely impacted the 370 million indigenous people who were among the most marginalized groups in all regions of the world.*<sup>17</sup>

Mr Borrero said Africa’s vote in the Third Committee was a shock because, historically, Africa had been supportive of indigenous peoples. He stated that “[t] here had been reports of some governments putting pressure on other govern-

ments, and he believed it was a factor in this case".<sup>18</sup> He pointed out, however, that most African states had not been actively involved in negotiating the draft declaration, and that their positions would become clearer over time.

It would be simplistic, however, to blame Africa's shift in voting only on external factors. The African governments' dominant concerns during their relatively short history of independence have been to ensure some kind of nation-building in the aftermath of colonialism. Issues related to the protection of minorities or indigenous peoples have been viewed as divisive. Furthermore, African states have only very recently become aware that the term "indigenous peoples" may include some sections of their own populations. Africa and Asia were not included in the regions considered as having indigenous peoples in Martínez Cobo's earlier study. Identification criteria were broadened during the discussions in the WGIP in 1990, moving from groups that had been subjected to European colonialism to other groups where historical priority was not the only relevant factor. For example, ways of life connected to land use, and self-identification as indigenous, became relevant. This change in conception did not initially have an impact on the discourse within African states, however. The potential inclusion, under the term "indigenous peoples", of pastoralist groups in Africa such as the Maasai, who cannot assert any anteriority over their territories vis-à-vis other groups in countries where they live, is becoming an increasing concern for some African states. They have not yet examined the means by which to constitutionally accommodate the different ethnic groups in Africa, and need time to understand the implications of the declaration.

## The main controversial issues

The main criticism made by Australia, New Zealand and the United States in relation to the Human Rights Council's version of the declaration concerned the right to self-determination (Article 3) and the requirement for indigenous peoples' consent to certain decisions (Article 19). More generally, they claimed that the provisions on lands, territories and resources were particularly unworkable and unacceptable, "by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26).<sup>19</sup> Such provisions would be both arbitrary and impossible to implement".<sup>20</sup> The three states also claimed that other provisions in the declaration were potentially discriminatory. "The intent of the Working Group was not that collective rights prevail over the human rights of individuals, as could be misinterpreted in Article 34 of the text and elsewhere".<sup>21</sup>

Theoretically, the quest by some indigenous peoples to achieve international legal recognition of the Declaration could have been seen as an extension of the process of decolonization. The difference between the situation in the African



and Asian territories colonized but not extensively settled by Europeans, and the situation in the Americas, Australia and New Zealand where overpowering European settlement had taken place, is that decolonization gave back power to the “natives” in Africa and in the colonized parts of Asia. In contrast, in the Americas, Australia and New Zealand, the descendants of the European settlers had gained political power on decolonization, thereby politically submerging the indigenous population within the territory. The term “internal colonization” has been used in this regard. The balance of power within the territory between those who had come in and those who had been there previously was such that the indigenous peoples had no possibility of fully-fledged decolonization. This is probably why they chose the path of human rights rather than that of the language of decolonization, even if it meant stretching the human rights platform to include collective rights involving a degree of separation and self-determination.

One special case is that of Greenland, a territory in which the majority are descendants of the original Inuit inhabitants, with a minority consisting of Danish and other European settlers and their descendants. As a non-self-governing territory, Greenland clearly fell within the post-World War II UN decolonization ambit, but was taken out of that context on the basis of a “home rule” arrangement under Denmark. The decision to remove Greenland from the list of non-self-governing territories was made on somewhat shaky grounds,<sup>22</sup> and the issue of territorial self-determination for Greenland remains unsettled.

For most indigenous communities, outright secession is no longer a meaningful option and is not what they seek, and yet they have insisted on using the right to self-determination and have objected to a restricted understanding of the term. Erica-Irene Daes, who chaired the WGIP during the whole period of the drafting of the declaration, has explained why indigenous representatives have been so adamant about this.<sup>23</sup> Indigenous peoples feel a need to have a bargaining position from which a reciprocal trust can develop between the indigenous and others in society. Their past experiences have, in most cases, given them little confidence in the governments that rule over them. They have seen governments adopt positive measures, only to have subsequent governments retract and undermine the concessions previously made. Governments can change, so even can constitutions. This is why they insisted on an internationally recognized right to self-determination. This does not necessarily imply that they want to secede – forms of guaranteed autonomies may be sufficient for them – provided there is some international guarantee that it is respected.

## **Achieving the adoption of the Declaration**

On 13 September 2007, the UNGA finally adopted the Declaration, possibly following a successful negotiation between the supporting states, the indigenous



caucus and the African states (see Barume, this volume) that led to nine changes in the previous Human Rights Council's draft, most of them rather small and inconsequential but two of them of greater significance.

The provision on the right to self-determination in Article 3 remains unchanged but its significance and scope was significantly curtailed by a crucial addition to Article 46(1) stating that nothing in the Declaration may be: "construed as authorising or encouraging any action which would dismember or impair totally or in part the territorial integrity or political unity of any state". This language draws on the famous "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States",<sup>24</sup> repeated in the Vienna Declaration and Program of Action of 1993.<sup>25</sup> However, Article 46(1) of the Declaration is, in fact, more restrictive than the 1970 Resolution. It rules out any interpretation of the right to self-determination of indigenous peoples that might allow for secession. Demands for autonomy under the heading of self-determination under Articles 3 and 4 of the Declaration will have to respect the political unity of the state, the implication of which may be difficult to determine in the abstract.

The former 14th preambular paragraph has been deleted. This read: "Recognizing that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect". A change was also made to Article 30, which sought to prohibit military activities on the lands or territories of the indigenous peoples "unless justified by a significant threat to relevant public interests". The words "significant threat" were taken out, which means that military activities are now permissible under the Declaration when it is in a relevant public interest. A change of great importance, making it possible for the African states to support the Declaration, was the addition of a new preambular paragraph (now the final paragraph in the Preamble) with these words: "Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration."

In spite of these changes, the Declaration remains a very ambitious text, going very far in justifying indigenous peoples' claims to far-reaching autonomy, control over lands, veto over development projects which the indigenous consider undesirable, and far-reaching claims for restitution or compensation. It is indeed an historic document.

Against this backdrop, it is no surprise that the Declaration was not adopted unanimously. 143 states voted for, and 4 against. These were, not unexpectedly, Australia, Canada, New Zealand and the United States, all of them countries with sizeable numbers of indigenous peoples. Eleven states abstained, including the Russian Federation and three African states: Burundi, Kenya and Nigeria.

Practically all European and Latin American states voted in favour, except Colombia, which abstained.

## **On responsibility for human rights**

The Declaration's Article 1 provides that indigenous peoples have the right to full enjoyment, as a collective and as individuals, of all human rights found in international human rights law. Under the international conventions on human rights, each state has the responsibility to respect, protect and fulfil human rights for all persons on their territory and subject to their territory. The state is internationally responsible for human rights in all parts of its territory, including in the provinces, autonomies and the different entities such as the different units of federations, cantons or republics forming part of federations. The Human Rights Committee has, in its General Comment 31 (2004), spelled this principle out in some detail:

*The obligations of the Covenant in general and article 2 in particular are binding on every State Party as a whole. All branches of government (executive, legislative and judicial), and other public or governmental authorities, at whatever level – national, regional or local – are in a position to engage the responsibility of the State Party. In this respect, the Committee reminds States Parties with a federal structure of the terms of article 50, according to which the Covenant's provisions "shall extend to all parts of federal states without any limitations or exceptions."<sup>26</sup>*

Even if not expressly stated, the same overall state responsibility applies to the other human rights conventions. There is, of course, nothing to prevent states from delegating the authority to secure human rights to sub-state entities, including self-governing autonomies, but the final supervisory role will remain with the central government – the state cannot delegate away its ultimate responsibility. Generally speaking, it could be assumed that the human rights of indigenous individuals will be more rather than less protected in autonomies governed by the indigenous themselves. But circumstances may exist where compliance with human rights could become a problem. The cultural traditions of the indigenous peoples may sometimes conflict with human rights. The Declaration takes this into account: while indigenous peoples shall have the right to maintain, promote and develop their distinctive customs, spirituality, traditions, procedures and practices, these must be in accordance with international human rights standards.

## Conclusions: achievements and uncertainties

The focus of international law on preventing discrimination of indigenous peoples has changed. Indigenous peoples have gained increasing acceptance of their primary concern, the right to preserve their separate identity and culture. How far this acceptance goes, and its implications, remains a matter of considerable doubt. Rights related to cultural preservation are gradually being accepted. The preservation and development of their identity implies: a right to determine the content of their own education, in addition to the right to have access to the general education of the state in which they live; the right to have their own media and to have access to the wider, national media; and the right to retain their cultural heritage. Their right to restitution of the artifacts of their heritage, which have sometimes been taken from them, is still met with some hesitancy. The duty to respect and protect the material preconditions for indigenous culture has now been widely recognized in the practice of the treaty bodies and in the national legislation of a growing number of countries. And yet its scope remains controversial. It implies acceptance of claims for the recognition of their rights to the land and resources that they still occupy and use, which is clearly confirmed in ILO Convention 169 and the Declaration.

Rights concerning development remain a bone of contention. Indigenous peoples' quest for autonomy and lands seeks to ensure that no development project involving their lands, territories or resources will be undertaken in the future without their free, prior and informed consent. This implies a right to veto projects that they consider to be harmful, and this represents a challenge to the development policies of many states at a time when there is a growing demand on the part of external actors and the state to use natural resources found on indigenous peoples' territories, such as water resources for hydroelectric or other large-scale projects, mineral extraction including oil, logging activities and so on.

Rights to land and natural resources are also subject to serious controversy. Indigenous peoples are sometimes met with the claim that their rights have been extinguished because the property has been granted to other inhabitants. The Declaration goes far in providing for restitution in such cases or, where that is not possible, compensation. A number of governments have difficulties in accepting such far-reaching claims.

Some of the political preconditions for preserving and developing indigenous peoples' identity, such as autonomy or self-government, are increasingly being recognized. The degree of indigenous peoples' autonomy that states are willing to recognise depends on several factors, however. One is whether the territory contains important natural resources apart from land – if so, the issue of development projects and consent, as discussed above, comes into play. Another is whether there are also non-indigenous persons living on the territory, in which

case the central government is likely to maintain a degree of authority in the region. It raises the question of who should be responsible for the human rights of individuals within the territory, and how to avoid indigenous autonomy leading to the exclusion of non-indigenous persons. Ultimately, this adds up to the question of the scope and content of indigenous peoples' right to self-determination. This term took on tremendous symbolic significance during the negotiation of the Declaration but, in reality, the issue of self-determination can be broken down into a bundle of rights. Among the most important are the right to preserve cultural identity, to have collective authority over decisions related to the land and territory in which they live, and to determine the nature and scope of development activities within that territory. ○

## Notes

- 1 This is an abbreviated version of the author's "Rights of Indigenous Peoples – Achievements in International Law During the Last Quarter of a Century" (2006) XXXVIII Netherlands Yearbook of Int'l L 155–212.
- 2 See **Bartolomé de las Casas. 1987 (1530s)**. "The Devastation of the Indies" in Robert S Leiken and Barry Ruben (eds) *The Central American Crisis Reader: The Essential Guide to the Most Controversial Foreign Policy Issue Today*, (New York: Summit). On the discussion during the "Early Naturalist Frame", see **S James Anaya. 2004**. *Indigenous Peoples in International Law* (2nd ed. Oxford: Oxford University Press) 16–18. A comparable discussion of the place of indigenous peoples in international law during its different stages is also given in **Patrick Thornberry. 2002**. *Indigenous Peoples and Human Rights* (Manchester: Manchester University Press) 61–88.
- 3 On the disappearance of the issue of indigenous peoples from international law during the period of classical international law, see Anaya, *ibid*, 23–30.
- 4 Covenant of the League of Nations, Versailles, 28 June 1919, UKTS 4 (1919), 13 AJIL (1919) Supp 128, 361, entry into force 10 January 1920.
- 5 International Labour Organisation Convention Concerning Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No 107) ILC 40<sup>th</sup> Session 26 June 1957, entry into force 2 June 1959.
- 6 UNGA "Resolution 217 A (III): Universal Declaration of Human Rights" UN Doc A/810 (1948), 71.
- 7 UN ECOSOC "Resolution 1982/34: Working Group on Indigenous Populations" UN Doc E/RES/1982/34 (7 May 1982).
- 8 UN Sub-Commission on the Promotion of Human Rights and Protection of Minorities UN Doc E/CN4/Sub 2/1985/2, Ann II (1985).
- 9 Above n 6.
- 10 Respectively International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976 and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976.
- 11 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991.
- 12 UNGA World Conference on Human Rights "Vienna Declaration and Programme of Action" UN Doc A/CONF.157/22 (25 June 1993).
- 13 UN Human Rights Council "Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994" (29 June 2006).

- 14 UN Human Rights Council, Joint Statement by Australia, New Zealand and the United States of America "On the Chair's Text on the Declaration on the Rights of Indigenous Peoples" (June 2006).
- 15 UNGA Third Committee "Resolution on the draft Declaration on the Rights of Indigenous Peoples" Un Doc A/C.3/61/L.18/Rev.1 (28 November 2006).
- 16 UN Department of Public Information "Press Conference on the Declaration of Indigenous Peoples' Rights" (New York, 12 December 2006) <[http://www.un.org/News/briefings/docs/2006/061212\\_Indigenous.doc.htm](http://www.un.org/News/briefings/docs/2006/061212_Indigenous.doc.htm)>.
- 17 UN Department of Public Information "Press Conference on the Declaration of Indigenous Peoples' Rights" (New York, 12 December 2006) <[http://www.un.org/News/briefings/docs/2006/061212\\_Indigenous.doc.htm](http://www.un.org/News/briefings/docs/2006/061212_Indigenous.doc.htm)>.
- 18 UN Department of Public Information "Press Conference on the Declaration of Indigenous Peoples' Rights" (New York, 12 December 2006) <[http://www.un.org/News/briefings/docs/2006/061212\\_Indigenous.doc.htm](http://www.un.org/News/briefings/docs/2006/061212_Indigenous.doc.htm)>.
- 19 Permanent Mission of Australia to the United Nations Office at Geneva to the Office of the UN High Commissioner for Human Rights *Note verbale*, (2 August 2006) posted as UN Doc A/HRC/2/G/1 (24 August 2006).
- 20 Ibid.
- 21 Ibid.
- 22 **Gudmunder Alfredsson. 2004.** "Greenland under Chapter XI of the UN Charter" in S Skaale (ed) *The Right to National Self-determination* (Brill: Leiden) 49-93.
- 23 **Erica Irene Daes. 2000.** "The Spirit and the Letter of the Right to Self-determination: Reflections on the Making of the UN Draft Declaration" in P Aikio and M Scheinin (eds) *Operationalizing the Right of Indigenous Peoples to Self determination* (Turku: Institute for Human Rights, Åbo Akademi University).
- 24 UNGA "Resolution 2625: Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" UN Doc A/8028 (1971).
- 25 Above n 12.
- 26 Human Rights Committee "General Comment 31" UN Doc CCPR/C/21/Rev.1/Add.13 (2004), para 4.



# THE CONTRIBUTION OF THE WORKING GROUP ON INDIGENOUS POPULATIONS TO THE GENESIS AND EVOLUTION OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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Erica-Irene A Daes\*

## Introduction

In May 1982, the Economic and Social Council (ECOSOC) authorized the former Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) to establish the Working Group on Indigenous Populations (WGIP).<sup>1</sup> It was composed of five independent experts, members of the Sub-Commission, coming from the five UN regions (Africa, Asia, Eastern Europe, Latin America and Western Europe and Others Group (WEOG)). According to its mandate, the WGIP would review current developments affecting the rights of indigenous populations and draft standards related to the recognition, promotion and protection of the rights and freedoms of the world's indigenous peoples. For the first time, indigenous peoples had access to their own UN forum, which became a world forum for indigenous peoples' movements. It was the place where everyone met and coordinated their world-wide efforts: the five members of the WGIP, representatives of the world's indigenous peoples, government observers, members of non-governmental organizations (NGOs), academics and representatives of the Office of the High Commissioner for Human Rights (OHCHR) and its Secretariat. A free, liberal, democratic and constructive dialogue between all concerned took place, related in particular to issues outlined in its

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mandate, at every one of its meetings. Subsequently, the WGIP became the most open body in the UN system and a significant international forum. However, the WGIP did not have adjudicatory powers and was at the lowest level of the UN system. Its recommendations had to be submitted to the Sub-Commission, the former Commission on Human Rights and ECOSOC. However, the WGIP, as has been repeatedly stated, became a “community for action”.

## **Genesis of the declaration of the rights of indigenous peoples**

In September 1984, I was invited, in my capacity as the Chairperson-Rapporteur (Chairperson) of the WGIP, to represent the WGIP at the General Assembly of the World Council of Indigenous Peoples in Panama. I met with hundreds of indigenous peoples from different places around the globe, who demanded that the UN should formally recognize and protect their basic rights and fundamental freedoms. In particular, the Sami people, under the very able leadership of the late Sara from Kautokeino, insisted that a declaration, or even a convention, should be proposed for adoption by the UN. After long and painful consultations in which I actively participated, the following seventeen principles were adopted to constitute, among others, the basis of a declaration:

### **Declaration of Principles Adopted by the Fourth General Assembly of the World Council of Indigenous Peoples in Panama, September 1984:<sup>2</sup>**

- Principle 1: All indigenous peoples have the right to self-determination. By virtue of this right they may freely determine their political status and freely pursue their economic, social, religious and cultural development.
- Principle 2: All States within which an indigenous people lives shall recognize the population, territory and institutions of the indigenous people.
- Principle 3: The cultures of the indigenous peoples are part of the cultural heritage of mankind.
- Principle 4: The traditions and customs of indigenous people must be respected by the States, and recognized as a fundamental source of law.
- Principle 5: All indigenous peoples have the right to determine the person or group of persons who are included within the population.
- Principle 6: Each indigenous people has the right to determine the form, structure and authority of its institutions.



- Principle 7: The institutions of indigenous peoples and their decisions, like those of States, must be in conformity with internationally accepted human rights, both collective and individual.
- Principle 8: Indigenous peoples and their members are entitled to participate in the political life of the State.
- Principle 9: Indigenous people shall have exclusive rights to their traditional lands and its resources; where the lands and resources of the indigenous peoples have been taken away without their free and informed consent such lands and resources should be returned.
- Principle 10: The land rights of an indigenous people include surface and sub-surface rights, full rights to interior and coastal waters and rights to adequate and exclusive coastal economic zones within the limits of international law.
- Principle 11: All indigenous peoples may, for their own needs, freely use their natural wealth and resources in accordance with Principles 9 and 10.
- Principle 12: No action or course of conduct may be undertaken which, directly or indirectly, may result in the destruction of land, air, water, sea ice, wildlife, habitat or natural resources without the free and informed consent of the indigenous peoples affected.
- Principle 13: The original rights to their material culture, including archaeological sites, artefacts, designs, technology and works of art, lie with the indigenous people.
- Principle 14: The indigenous peoples have the right to receive education in their own language or to establish their own educational institutions. The languages of the indigenous peoples are to be respected by the States in all dealings between the indigenous people and the State on the basis of equality and non-discrimination.
- Principle 15: Indigenous peoples have the right, in accordance with their traditions, to move and conduct traditional activities and maintain friendship relations across international boundaries.
- Principle 16: The indigenous peoples and their authorities have the right to be previously consulted and to authorize the realization of all technological and scientific investigations to be conducted within their territories and to have full access to the results of the investigation.
- Principle 17: Treaties between indigenous nations or peoples and representatives of States freely entered into shall be given full effect under national and international law.

These principles constitute the minimum standards which States shall respect and implement.

## **Declaration of Principles Adopted by Indigenous Peoples at the WGIP in July 1985**

Another important drafting text - a Declaration of Principles - was submitted to the fourth session of the WGIP by the Indian Law Resource Center, the Four Directions Council, the National Aboriginal and Islander Legal Service, the National Indian Youth Council, the Inuit Circumpolar Conference and the International Indian Treaty Council.<sup>3</sup> This “Declaration of Principles,” stated:

Indigenous nations and peoples have, in common with all humanity, the right to life, and to freedom from oppression, discrimination, and aggression.

All 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.

No State shall assert any jurisdiction over an indigenous nation or people, or its territory, except in accordance with the freely expressed wishes of the nation or people concerned.

Indigenous nations and peoples are entitled to the permanent control and enjoyment of their aboriginal ancestral-historical territories. This includes surface and subsurface rights, inland and coastal waters, renewable and non-renewable resources, and the economies based on these resources.

Rights to share and use land, subject to the underlying and inalienable title of the indigenous nation or people, may be granted by their free and informed consent, as evidenced in a valid treaty or agreement.

Discovery, conquest, settlement on a theory of terra nullius and unilateral legislation are never legitimate bases for States to claim or retain the territories of indigenous nations or peoples.

In cases where lands taken in violation of these principles have already been settled, the indigenous nation or people concerned is entitled to immediate restitution, including compensation for the loss of use, without extinction of original title. Indigenous peoples’ desire to regain possession and control of sacred sites must always be respected.

No State shall participate financially or militarily in the involuntary displacement of indigenous populations, or in the subsequent economic exploitation or military use of their territory.

The laws and customs of indigenous nations and peoples must be recognized by States’ legislative, administrative and judicial institutions and, in case of conflicts with State laws, shall take precedence.

No State shall deny an indigenous nation, community, or people residing within its borders the right to participate in the life of the State in whatever manner and to whatever degree they may choose. This includes the right to participate in other forms of collective action and expression.

Indigenous nations and peoples continue to own and control their material culture, including archaeological, historical and sacred sites, artefacts, designs, knowledge, and works of art. They have the right to regain items of major cultural significance and, in all cases, to the return of the human remains of their ancestors for burial in accordance with their traditions.

Indigenous nations and peoples have the right to be educated and conduct business with States in their own languages, and to establish their own educational institutions.

No technical, scientific or social investigations, including archeological excavations, shall take place in relation to indigenous nations or peoples, or their lands, without their prior authorization, and their continuing ownership and control.

The religious practices of indigenous nations and peoples shall be fully respected and protected by laws of States and by international law. Indigenous nations and peoples shall always enjoy unrestricted access to, and enjoyment of, sacred sites in accordance with their own laws and customs, including the right of privacy.

Indigenous nations and peoples are subjects of international law.

Treaties and other agreements freely made with indigenous nations or peoples shall be recognized and applied in the same manner and according to the same international laws and principles of treaties and agreements entered into with other States.

Disputes regarding the jurisdiction, territories and institutions of an indigenous nation or people are a proper concern of international law, and must be resolved by mutual agreement or valid treaty.

Indigenous nations and peoples, may engage in self-defense against State actions in conflict with their right to self-determination.

Indigenous nations and peoples have the right freely to travel, and to maintain economic, social, cultural and religious relations with each other across State borders.

In addition to these rights, indigenous nations and peoples are entitled to the enjoyment of all the human rights and fundamental freedoms enumerated in the International Bill of Human Rights and other UN instruments. In no circumstances shall they be subjected to adverse discrimination.

## **General remarks concerning the elaboration of a draft declaration**

In my opening statement to the fourth session (1985) of the WGIP, and in my capacity as its Chairperson, I drew attention to the part of the mandate of the WGIP

relating to standard-setting activities in accordance with Resolutions 1982/34 of the ECOSOC, 1984/35 B of the Sub-Commission and 1985 /21 of the Commission, which emphasized this part of its mandate.<sup>4</sup> I stressed, *inter alia*, that a starting point for meeting some of the serious problems facing the indigenous peoples in the international and national context was the setting of appropriate standards directed at their needs and rights, and I underlined that this was not an easy task. It would be an enormous and complex one. Despite the difficulty and the complexity of the task, I was confident that international standards could be drafted.

Further, I recalled that no groups of people in contemporary society have been subjected to greater neglect and discrimination than indigenous people. Too often the indigenous peoples have been the first victims of gross and systematic violations of their human rights. It was on these kinds of challenges that the WGIP should also focus.

Finally, I pointed out that the two above mentioned sets of important drafts of principles for a declaration on indigenous rights should constitute the basis for drafting the new instrument because they succinctly reflected the needs, rights and aspirations of the world's indigenous peoples.

The other members of the WGIP expressed support for the emphasis I placed on the standard-setting activities of the WGIP and stated that the time had come to begin the elaboration of a draft instrument.<sup>5</sup> Similarly, the statements made by some of the government observers, by representatives of the indigenous peoples and their organizations, and of other NGOs, indicated general agreement with the drafting mandate and the need for, and expectation of, the preparation of new standards and norms on indigenous rights.

According to one member of the WGIP, while many international instruments were obviously related to the human rights of indigenous peoples, their special needs required new standards so as to provide fresh impetus and new emphasis in addressing and remedying the underlying problems facing indigenous peoples, including the frequent alienation between the indigenous populations and nations on one hand and the states on the other. The view that existing instruments did not adequately respond to the needs of indigenous peoples was endorsed by most speakers, including some government observers. The opinion was also expressed that the relevant provisions of the existing human rights instruments should be implemented for the protection of the rights of indigenous peoples.

Several representatives of the hundreds of indigenous peoples attending the WGIP, as observers, stressed the need for special indigenous standards. They pointed out, among other things, the inequalities and oppression suffered for centuries; ethnocidal practices, notwithstanding lofty statutes and policies; a lack of understanding and knowledge of indigenous peoples' cultures, reflected in accusations of backwardness and primitiveness; and forced assimilation and in-

tegration by majority populations, as reasons underlining the need for new standards concerning indigenous rights and freedoms.<sup>6</sup> The hope was expressed that precise new international standards would also bring into line national constitutional reforms, legislation and their prompt implementation. The more specific reason most often mentioned was deprivation of their territorial base and land rights, including all the surface and sub-surface resources which come with the land and which form so essential a base of the indigenous peoples' way of life.<sup>7</sup>

One member of the WGIP, Mr. Ivan Toševski, expressed words of caution for the road to a comprehensive declaration. It was in the same context as pointed out by some government observers, that the standards had to be drafted in such a way that they would cover all indigenous groups, a task said to be particularly difficult because of the factual diversities and different political demands involved. One set of solutions would not serve the needs of all aboriginal groups, even within the same country. Overly ambitious targets could also jeopardize the depth and seriousness of the analysis needed for the content and implications of the various substantive rights.

Toševski also expressed the view that he had some hesitation in using the term "indigenous peoples". He said that the term "peoples", as used in the UN Charter, related to all peoples, and new criteria establishing two different kinds of peoples should preferably not be introduced into international law. The political and legal use of the concept of "indigenusness" would only cause confusion. With a unified approach to the term "people", there was no need to specify special rights for indigenous peoples. Most indigenous peoples could be treated as minorities, and any attempted distinction between the two was nothing more than an artificial dilemma. He continued to state that the minority concept was a well-known quantitative concept in constitutional and international law. Taking into account the reality and historical political processes, it would be illusory to expect from the WGIP any recognition and definition in this regard. Likewise, according to the Toševski, the right to land was important for every human being and group, and emphasis on indigenous peoples' land rights was a misunderstanding as there was no specific need for ownership of land by cultural or ethnic identities. It was more important to clarify the functions of land in different societies. He concluded by saying the WGIP needed more time for further clarification of concepts before it could begin a drafting process of standards in this field.<sup>8</sup>

In this respect, another member of the WGIP pointed out that the UN had managed 40 years without a definition of the term "people" and that a definition of "indigenous peoples" was unnecessary, at least for the purposes of the present standard-setting activities, especially as there were ample international precedents of the usage of the latter term. The reality of the situation was also reflected by the presence in the conference room, in which the WGIP held its meetings, of a large number of persons who considered themselves to be indigenous and who

attached basic values to this identification. He stressed that the task of the WGIP should not be further complicated by definition of the beneficiaries; rather, the difficulties associated with defining the term “minority” should serve as a warning signal to the WGIP. Similarly, with regard to the right of peoples to self-determination, this right should not automatically be associated with independence.

Further, another member of the WGIP stated that the WGIP should draw inspiration from the influence that the Declaration on the Granting of Independence to Colonial Countries and Peoples had had on the decolonization process.<sup>9</sup> Thanks to this Declaration, millions of peoples all over the world now lived in freedom and independence. It was his belief that the recognition and restoration of basic rights to indigenous peoples would be hastened if an appropriate declaration could be drawn up by the WGIP with the co-operation of all the parties concerned, bearing in mind that any future set of principles could only be adopted with the support of governments.

Furthermore, Mrs. Gu Yijie, member of the WGIP, agreed that, historically speaking, the concept of indigenous populations was associated with colonialism and aggression by foreign nations and powers but she warned that there should be no confusion between indigenous populations, on the one hand, and ethnic minorities in certain countries and regions, on the other. Issues relating to multinational states with populations of different origin should be dealt with in other fora. Also, she said, to assure success in the WGIP’s work, indigenous peoples should be on an equal footing with all nationalities and individuals of all nations, but with clear protection of special rights.<sup>10</sup>

A great number of indigenous observers pointed out that the term “indigenous populations” in the title of the WGIP should be changed to “indigenous peoples”, which in their opinion accurately reflected the reality. They insisted that they represented peoples and nations and did not wish to be considered mere populations or minorities subject to outside definitions.

Some government observers pointed out that the standard had to be drafted in such a way that it would cover all indigenous groups, a task, as they said, that would be particularly difficult because of the factual diversities and different political demands involved.

Many speakers stated that the report prepared by the Special Rapporteur, Mr. José Martínez Cobo, entitled “Study on the Problem of Discrimination against Indigenous Populations”,<sup>11</sup> especially its chapter containing conclusions, recommendations and proposals,<sup>12</sup> should be taken into account in the process of formulating new standards.

The observer for the International Labour Office (ILO), Mr. Lee Swepston, after endorsing the efforts of the WGIP on the development standards, informed the WGIP that his organization was moving towards a revision of Convention No. 107 on Indigenous and Tribal Populations, 1957 (ILO Convention 107) and had initiated specific procedures and a timetable to this effect. In a written sub-

mission to the WGIP,<sup>13</sup> the ILO provided additional information on its work in this regard. Several speakers during the WGIP session warmly welcomed the measures taken by the ILO.

In this regard, one government observer stated that the WGIP should take due account of the ongoing work in relation to the revision of ILO Convention 107 and that the ILO's work should closely follow developments in that of the WGIP.

One individual expert advised that the WGIP should examine existing or possible national constitutional provisions in connection with its drafting work. It should be kept in mind that international standards on indigenous rights, for example, concerning autonomy, special parliamentary representation and voting regimes, could be incorporated into constitutional laws, which would supplement the international standards.

## **Substantive principles**

A member of the WGIP expressed the view that the drafting efforts had to be anchored in existing international instruments such as the Universal Declaration of Human Rights, the International Covenants on Human Rights, the International Convention on the Elimination of All Forms of Racial Discrimination,<sup>14</sup> and the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Indigenous populations and peoples had to be entitled to full enjoyment of these and other human rights. In addition, it had to be a cardinal principle of any standards that they provide for redress of disadvantage and abuse, suffered over the years, backed up by affirmative action at national level.

According to another member of the WGIP, the major principles to be covered, in addition to fundamental rights and civil rights laid down in other applicable instruments, included the right to life, physical freedom and security, the right to land and natural resources possessed by indigenous populations, the deprivation of which could in their case amount to deprivation of the right to life, and the right to appropriate political self-rule.<sup>15</sup>

With some variations, several government observers stated that the rights to land, religion, education and culture and respect for other aspects of their own life and for their own economic and political situation should be properly reflected in the new standards.<sup>16</sup>

In accordance with the Plan of Action of the WGIP for 1985, specific suggestions were made with regard to the cultural, linguistic, educational and religious rights of indigenous peoples. Indigenous representatives emphasized the urgency in maintaining and securing their cultural identity, heritage and traditions in the broadest sense, including their cultural and religious value systems. It was



stressed that education should be provided by and for themselves, in their own language and with their own curriculum. Some of them mentioned in this regard the need for intercultural education and ensuring that the larger national societies also learn about indigenous cultures. Further, the fullest regard for indigenous religious beliefs and religious sites was required when drafting the relevant articles in the new standards.

With regard to the principles concerning the education and culture of indigenous populations, one government observer raised the following basic issues:

How best to preserve and enhance indigenous cultures, languages, and religions within larger societies?

What are appropriate methods for ensuring that indigenous populations have control and influence over their own cultural and educational activities?

How can the values of indigenous populations be preserved within their own communities, and shared with the broader society?

What measures are appropriate to overcome the cultural losses experienced by many indigenous populations through history?<sup>17</sup>

The government observer who asked these important questions felt that a discussion of these issues might lead to significant progress towards a workable scheme for ensuring that the concerns at stake be respected.<sup>18</sup>

A number of suggestions forwarded by the representatives of indigenous peoples related in particular to the inalienable right of self-determination and to the rights to land, territories and natural resources. They underlined the fact that ancestral land and the territorial base are essential to all other rights of indigenous peoples and their future generations, including the right to life. Collective rights and peaceful possession of the surface and sub-surface of these lands, they argued, should be covered by the new standards, especially those connected to the indigenous way of life and activities relating to renewable resources, such as fishing, whaling, hunting, harvesting, gathering and trapping. They also stated that, without corresponding rights to adequate surface and ground waters, indigenous land rights would be rendered meaningless. They stressed further that the right to earth, land and natural resources was considered essential for indigenous peoples because of the many forms of dispossession they had suffered. The forms of loss become more extreme in modern times through transmigration and technological advances, reflected, *inter alia*, in increased pollution, dam constructions, mining operations, military activities and other environmental contamination. It was stressed that indigenous peoples had never had problems with conservation of the environment or the extinction of species, so protection groups were quite misdirected in their criticism of indigenous practices.

The right to self-determination was the main subject of many statements by indigenous representatives. While some spoke in this context of autonomy or self-government as necessary for their control over the land, as well as their economic, social and cultural systems, others spoke of the right in a broader sense,



prohibiting discovery, conquest, the concept of *terra nullius*, and occupation as means of depriving them of sovereignty. They also emphasized the need to respect treaties freely concluded between indigenous peoples and states, in accordance with the principle of *pacta sunt servanda*, which should be reiterated in the new standards.

Further, it was suggested that other principles and rights be included in a future set of standards, as set out in the abovementioned two draft declarations of principles proposed by a number of non-governmental indigenous organizations. The rights, which were also suggested from the floor, included: the right to peace, human dignity and justice; the right to life, physical integrity and security; the right to determine their own membership or citizenship; political rights; family rights; the right to move across state boundaries for the conduct of traditional activities; the right to humanitarian treatment of indigenous refugees; the right not to be subjected to relocation; and the right to prior authorization by indigenous populations of technological, scientific or social investigations.<sup>19</sup>

Furthermore, indigenous representatives, in the context of existing and forthcoming international standards affecting indigenous peoples, emphasized the need to establish remedies. The responsibility of states to respect populations, in accordance with the UN Charter, and to protect peoples against private and public encroachment therefore had to be established. They also referred to the right of indigenous peoples, as a last resort, to defend themselves against violations of their rights.

Some indigenous representatives spoke of the need to send international observers to national constitutional and political negotiations taking place between indigenous populations and governments in various parts of the world. Two indigenous NGOs, in their comments on one aspect of the proposed draft declaration concerning the resolution of disputes between states and indigenous populations, recommended that the WGIP elaborate further on the duty of indigenous communities and member states to engage in good-faith dispute resolution with respect to their differences.<sup>20</sup> Such disputes should be resolved by agreement between the parties. If good-faith negotiations failed, the two parties might wish to continue their negotiations with the assistance of a mediator, or the parties might wish to make efforts to establish a process for having the matters decided by an impartial third party. They also recommended that the international community be entitled to monitor the progress of dispute resolution and to encourage all parties to pursue such efforts in good faith. The WGIP, in fulfilling its mandate, should be able to hear information about the negotiations and monitor their progress.<sup>21</sup>

The observer for Canada expressed concern over proposals relating to the right of self-determination and the status of indigenous populations as subjects of international law, as spelled out in the draft declarations of principles submitted by a number of indigenous NGOs.<sup>22</sup> He pointed out, among other things, that

indigenous populations, as was the case in his own country, might well wish to organize their own life autonomously and to have their own institutions. The proposed text, however, went much further than this and included the right to determine their political status and citizenship. Indeed, reference to the right of self-determination would imply the right of secession, which governments would not be in a position to accept. He also questioned the assertion that indigenous peoples and nations were subjects of international law. International law was created by states, through agreements or practice, and there were no indications that states recognized indigenous peoples and nations as subjects of international law. In his view, therefore, it would be incorrect to include in the declaration something that was not, in fact, supported in international law.<sup>23</sup>

## **Type of instrument**

There was more or less general agreement from all sides that the WGIP should in the first instance produce a declaration, to be eventually adopted by the UN General Assembly (UNGA). The possibility of a convention was also mentioned but there seemed to be general agreement, on this point, that this kind of instrument would emerge further down the road, possibly by drawing inspiration from the declaration.

After considering the abovementioned comments, information and data submitted mainly by governments and indigenous organizations and, in particular, the draft declarations of principles presented by a number of indigenous NGOs,<sup>24</sup> I formally proposed to the WGIP that it should, within the framework of its standard-setting mandate produce, as a first formal step, a draft declaration on indigenous rights, which could be adopted by the UNGA. I further explained that the WGIP, in addition to the abovementioned draft declarations, should also take due account of the international instruments already existing within the UN system, particularly the UN Charter and the International Bill of Human Rights. The WGIP agreed with my proposal and authorized me to prepare, as a first step, a draft containing some relevant important principles.

## **The first draft principles:**

In accordance with the decision of the WGIP, I elaborated and submitted to the WGIP the following Draft Principles:

1. The right to the full and effective enjoyment of the fundamental rights and freedoms universally recognized in existing international instruments,

particularly in the Charter of the UN and the International Bill of Human Rights.

2. The right to be free and equal to all other human beings in dignity and rights, and to be free from discrimination of any kind.
3. The collective right to exist and to be protected against genocide, as well as the individual right to life, physical integrity, liberty and security of person.
4. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sites for these purposes;
5. The right to all forms of education, including the right to have access to education in their own languages and to establish their own educational institutions;
6. The right to preserve their culture identity and traditions and to pursue their own cultural development;
7. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures.

These draft principles, with the relevant recommendations of the WGIP, were submitted to WGIP's parent body, the Sub-Commission, to the former Commission on Human Rights and to the ECOSOC. Consequently, the systematic and substantive work of drafting standards, related to the recognition and protection of the rights and freedoms of the world's indigenous peoples began in 1985.<sup>25</sup>

## **The drafting of standards**

In 1987, the WGIP, in order to further facilitate the process of drafting standards, recommended that I should be entrusted with the preparation of a working paper containing a full set of preambular paragraphs and principles for insertion into the Declaration. This recommendation was submitted to the Sub-Commission which, bearing in mind that the Commission on Human Rights, in Resolution 1987/34 of 10 March 1987, had urged the WGIP to intensify its efforts to continue the elaboration of international standards in this field, expressed its appreciation to the WGIP and especially to its Chairman/Rapporteur Mrs. Erica-Irene Daes for the progress made at its fifth session in carrying out its mandate, particularly in its standard-setting activities. It endorsed the recommendation that the WGIP make every effort to complete a draft declaration on indigenous rights as soon as possible.

At the opening of the fifth session of the WGIP in 1987, I recalled that at its 1985 session the WGIP had adopted the preliminary version of seven draft principles and had decided,<sup>26</sup> as a first step, to elaborate a draft declaration on indig-

enous rights. The emphasis on standard-setting was subsequently endorsed both by the Sub-Commission (Resolutions 1985/22) and the Commission on Human Rights (Resolutions 1986/27 and 1987/34).<sup>27</sup> Useful and constructive comments on the draft principles had been submitted by the Governments of Australia, Canada and Norway.<sup>28</sup> During the NGO-sponsored Workshop held in Geneva in September 1986, in which I and another member of the WGIP participated, three additional draft principles were elaborated in preliminary form.<sup>29</sup> I also drew attention to GA Resolution 41/120 of 4 December 1986, entitled “Setting International Standards in the Field of Human Rights”.<sup>30</sup> The guidelines and requirements established by that Resolution were quite relevant to the work of the WGIP. They included *inter alia*, consistency with human rights law, sufficient precision, and realistic and effective implementation machinery.<sup>31</sup>

At all meetings of this session, a constructive dialogue took place between all the participants and a number of important proposals related to the elaboration of a draft declaration were made. I will make an attempt to compile the most important points from these discussions.

Members of the WGIP, governmental and indigenous representatives and other observers underlined the importance of the standard-setting part of the WGIP’s mandate. Speakers reiterated the opinion, expressed also during previous sessions, that there was a clear need for additional international standards for the protection of indigenous populations. It was also emphasized that the draft declaration should be elaborated in such a manner that it would be applicable in all parts of the world and that it cover the needs of all the diverse indigenous groups.

A government representative pointed out that the Declaration to be drafted should include collective rights; in that respect he considered the relevance of the Declaration on the Right to Development and found that it was of paramount importance and that it should therefore be taken into account by the WGIP in its future work.<sup>32</sup> The view was further expressed that the following two elements should be met in a declaration of principles: a) the principles should be applicable to all states in which there are indigenous populations; and b) they should be acceptable to governments and thus be of a realistic nature.

Mr. Danilo Turk, a member of the WGIP, provided an overview of his thoughts on standard-setting relating to indigenous rights. He pointed out that this was a complex task which would require a great deal of conceptual clarification and “confidence-building” prior to the adoption of standards by the political bodies of the UN. In that connection, he identified three areas to be addressed: a) the position of group rights in the context of UN human rights activities; b) issues relating to autonomy; and c) the possible relevance of new concepts, such as the right to development of indigenous populations.

With regard to the concept of group rights, he stated that the rights of minorities, historically the first kind of group to be provided with human rights protec-

tion, had so far been addressed at the UN through “the individualistic approach”, whereby the focus had been on the protection of individual members belonging to minorities rather than on the minorities as groups. The rights of peoples and the debates on self-determination had been largely concentrated on decolonization and other political issues, such as foreign occupation. In his view, the following group rights could be envisaged:

- the right to maintain and develop group characteristics and identity;
- the right to be protected against attempts to destroy the group identity, including propaganda directed against the group;
- the right to equality with other groups as regards respect for and development of their specific characteristics;
- the duty of the territorial state to grant the groups – within the resources available – the necessary assistance for maintenance of their identity and their development;
- the right to have their specific character reflected in the legal system and in the political institutions of their country, including cultural autonomy as well as administrative autonomy, wherever feasible; and
- along with these general and common rights each category of groups and each group would be entitled to more specific rights. For instance, the land rights of indigenous peoples constitute a specific category of rights necessary for the development of this category of groups.

He emphasized that none of the group rights could be construed in such a way as to justify any violation of the universally recognized human rights of individuals or to impair the territorial integrity of those sovereign states that were conducting themselves in compliance with the principles of international law concerning friendly relations and co-operation among states in accordance with the Charter of the UN.<sup>33</sup>

The indigenous preparatory meeting, held in Geneva from 27 to 31 July 1987, considered again the Declaration of Principles which had been prepared and submitted to the WGIP by a similar preparatory meeting held in 1985.<sup>34</sup> In presenting the results of the 1987 Preparatory Meeting, a representative of the indigenous peoples pointed out that indigenous participants had that year added two new principles to the above-mentioned Declaration of Principles and made new minor amendments and corrections to the 1985 draft. The two new principles covered the right to be free from military conscription and rights relating to health, social services and housing. The aforesaid Declaration obtained consensus among the participants of the 1987 Preparatory Meeting, including indigenous leaders and representatives who had not been present at the 1985 session. The speaker further requested that the WGIP take into account and comment upon the 22 principles contained in the above-mentioned Declaration as amended.<sup>35</sup>

Looking to the future standard-setting activities of the WGIP, all participants agreed that efforts to this end should be enhanced. Upon the specific recommendation of several indigenous observers and one government representative, it was agreed by members of the WGIP that I should be entrusted with the preparation of a full draft text prior to the WGIP's sixth session in 1988.

In accordance with this mandate, I elaborated the first draft declaration, entitled "Draft Universal Declaration on Indigenous Rights". It was tabled in August 1988. It was composed of twelve preambular paragraphs and six main parts.

As I stated, the first important issue for indigenous peoples is survival. Article 3 of the draft specifically dealt with this issue. It provided "the collective right to exist and to be protected against genocide, as well as the individual rights to life, physical integrity, liberty and security of person."

A second issue is equality. Indigenous peoples have frequently been denied legal equality with other members of the state. Article 1 of the draft provides that "indigenous peoples are entitled to universally recognized rights and freedoms, implicitly asserting a right to equality."

A third issue is cultural survival. It was considered that equality rights alone would not protect indigenous peoples against assimilationist state policies. Articles 4 and 11 dealt with cultural rights, including an affirmative obligation on the part of States under Article 7 to ensure that indigenous collectivities receive state support for the maintenance of their identity.

A fourth issue is economic rights. The most fundamental aspect of the economic issue is the right of ownership of traditional lands and natural resources, a matter of continuing dispute between States and indigenous peoples in many parts of the globe. In this respect, Article 12 provided for: "The right of ownership and possession of the lands which they have traditionally occupied. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement."

Issues about indigenous peoples' rights in a sector of commercial fishing have been advanced in the United States, Canada and New Zealand. The *Kitok* decision of the Human Rights Committee recognized the legitimacy of the special rights of the Sami people to the reindeer-breeding industry in Sami land (northern Scandinavia).<sup>36</sup> Article 18 recognized these rights to traditional economic activities and its 2<sup>nd</sup> and 3<sup>rd</sup> paragraphs expressly provided that "in no case may an indigenous people be deprived of its means of subsistence." It also provided for the right to just and fair compensation, if they have been so deprived.

A fifth issue was political rights. This issue was debated and views were expressed by a great number of participants, in particular by representatives of the observer governments, concerning terminology. Among the questions raised were the following: are the indigenous groups "populations" or "peoples"? If they are "peoples", do they have the right of self-determination in international law? In this respect, Canada and Sweden specifically made submissions to the

Human Rights Committee asserting, among other things, that Indian and Sami collectivities were not “peoples” with a right of self-determination under Article 1 of the Covenant on Civil and Political Rights.<sup>37</sup>

There was a consensus among members of the WGIP that the term “peoples” was the more appropriate term. Also, the other members of the WGIP supported my opinion that indigenous peoples did not wish to have or to exercise a right of secession. Self-determination for indigenous peoples is assumed, among other meanings, to require a degree of autonomy involving cultural, economic and political rights within the structures of recognized states.<sup>38</sup> This draft declaration dealt with two self-determination issues. It recognized a right of political participation in the institutions of the state in Articles 21 and 22. Articles 23, 24, and 25 provided for indigenous autonomy within the state. Thus, Article 23 guaranteed indigenous peoples: “the collective right to autonomy in matters relating to their own internal affairs, including education, information, culture, religion, health housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing those autonomous functions”.

This draft declaration also addressed the basic issues related to the recognition and protection of the rights and freedoms of the world’s indigenous peoples. For the first time in the UN’s history, substantive discussion of these important issues was launched in its fora, with hundreds of indigenous representatives recognized as active participants.

At the opening and closure of the meetings of the sixth session, I appealed to all participants, in particular to representatives of the observer governments and indigenous peoples, to submit comments and suggestions related in particular to the text of the draft declaration, in writing. In response to these invitations, a number of suggestions and constructive comments were received, made by governments, indigenous nations and organizations, as well as by NGOs, academics and other persons. I took these suggestions and comments into consideration when elaborating a revised draft declaration, entitled “Draft Universal Declaration on the Rights of Indigenous Peoples”.<sup>39</sup> I presented this new revised draft declaration to the eleventh session of the WGIP.

At the first meeting of the eleventh session of the WGIP in 1993, I indicated that standard-setting activities would be a major task of the session and invited all the participants to work together closely and constructively with the main objective of accelerating the drafting of the declaration. I also clarified that the abovementioned revised draft declaration on the rights of indigenous peoples, included, *inter alia*, the draft proposals from the three informal drafting groups established during the eighth session of the WGIP, as well as suggestions made by governments, indigenous organizations, other international organizations and interested parties.



Prior to the discussion on the specific provisions of the aforesaid draft declaration, a number of general statements were made on the draft declaration as a whole. Thus, the observer from New Zealand stated that the WGIP was now in a position to make substantial progress and emphasized a number of general points regarding the draft declaration. In particular, he underscored the need for the draft declaration to be sufficiently precise for it to be easily understood and effectively implemented.

The observer from the Government of Brazil pointed out that his government approached the drafting of the declaration in a positive manner. He mentioned Commission on Human Rights Resolution 1990/62, which stressed that international standards must be developed on the basis of the diverse realities of indigenous peoples in all parts of the world. He drew attention to the positive aspects of the existing draft, including the protection of the cultural identity and economic structures of indigenous communities but cautioned against the adoption of texts which were ambiguous or politically unacceptable to governments.

A representative of the Ainu people expressed her people's appreciation to the international community for its attempts to abolish oppression of indigenous peoples. The representative of the ILO reiterated the need for a new international instrument in this field that would be compatible with those already in existence. He, however, indicated that since the WGIP was drafting a declaration, it would be in a position to produce a text that would not only take into account accepted international standards but also reflect the aspirations of indigenous peoples.

Mr. Ted Moses, Chief of the Grand Council of the Crees of Quebec, also made a general statement on standard-setting. He suggested, *inter alia*, that the present drafting process should take into account the results of the above-mentioned important drafting groups set up at the eighth session of the WGIP in 1988, as well as the results of the "Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States".<sup>40</sup> He also stated that the inalienable rights of indigenous peoples could not be negotiated or bargained away. He reminded the WGIP that the representative of the ILO felt that a consideration of political rights was beyond its mandate and more appropriate for consideration by ECOSOC. He therefore urged the WGIP to take these rights into account in preparing the draft declaration.

The representative of the International Organization of Indigenous Resource Development also expressed the desire for a declaration which would explicitly recognize indigenous people as "peoples", providing practical remedies for ongoing problems without compromising existing rights.

The representative of the Indian Council of South America stated that the draft declaration should be universal in its scope and that states participating in the work of the WGIP should use their political skills to assist in finding universally accepted provisions.



Another suggestion was made by the representative of the Mohawk nation. He stressed that early treaties between indigenous peoples and Europeans were based on agreements among equals and that this notion should be incorporated in the draft declaration.

A number of observers of governments, indigenous peoples and others at the WGIP emphasized the need for the draft declaration to be both consistent with itself, especially regarding terminology and substance, and consistent with existing international human rights instruments.

Subsequently, I submitted the above mentioned draft declaration for its first reading<sup>41</sup> and requested that the WGIP proceed by considering the paragraphs of the draft declaration one by one. This exercise was extremely difficult, taking into consideration the great number of participants, over seven hundred, and their different legal backgrounds and cultures.

During the discussion of certain provisions of the above mentioned revised draft declaration, some important issues were raised. Several indigenous representatives stressed that the draft declaration should reflect the unqualified right of indigenous peoples to self-determination. Some government observers, however, indicated that it might be necessary to qualify the application of this right in order to make the text acceptable to governments, who would have to implement it. Other government observers expressed strong opposition to the inclusion of a reference to self-determination.

It was also stated by certain indigenous representatives that indigenous peoples were entitled to recovery, restoration, restitution and/or adequate compensation of and for lands and resources that have been taken without their consent, and that this right should be adequately expressed in the draft declaration.

The question of control over the occupation and/or use of their lands and resources was highlighted as being of special concern to indigenous peoples. Indigenous peoples particularly sought to exercise control over the use of their lands and resources. In this connection, the traditional role of indigenous peoples as custodians of the environment was brought to the attention of the WGIP.

Amendments were also submitted by WGIP members Alfonso Martinez and the late Hatano.<sup>42</sup>

I invited the WGIP to commence the second reading of the draft Declaration. On the basis of the discussion of the draft Declaration held during the previous meetings, I elaborated a new draft which I presented at the 5<sup>th</sup> meeting during its eleventh session on 21 July 1993. At this meeting it was agreed to use the word "articles" rather than "paragraphs" in future in the draft Declaration. The new revised draft, on which a further reading of the draft declaration was based, is contained in UN Document E/CN.4/Sub.2/AC.4/1993/CRP.4.

The UN Goodwill Ambassador, Ms. Rigoberta Mench Tum, addressed the meeting. She stated, *inter alia*, that the draft declaration would have to be an instrument which facilitated the struggle of all indigenous peoples. At that point,

the drafting procedure had shown considerable progress but, before the declaration could be enshrined within the framework of international instruments, gaps needed to be filled. It would be paramount to reach consensus on the issue of self-determination. Furthermore, the right to ownership of land by indigenous peoples could not become a peripheral issue. Unfettered enjoyment of those rights went to the very essence of the cultures and societies of indigenous peoples and must be entrenched in the document. There were many promising developments. She underlined the fact that the discussions had displayed the perseverance and unity of indigenous peoples as well as the goodwill of a number of states. It was essential that the draft not be viewed as a threat to governments or a source of friction but as a mechanism that would eliminate conflict in the future.<sup>43</sup>

During the prolonged and often contentious debate about specific provisions of the above-mentioned revised draft declaration, many important and complex issues relating to “collective rights” and, in particular, individual versus group rights in international human rights development were raised.

In this regard, the observer for the United States of America stated: “The draft Declaration is largely a list of collective rights to which indigenous peoples are entitled.” She expressed concern about the fact that those references went far beyond the limited collective rights recognized in international law or the practice of the states. The draft Declaration did not define “indigenous peoples”. Hence, there were no criteria for determining what groups of persons could assert the proposed new collective rights. She expressed concern that in some circumstances the articulation of group rights could lead to the submergence of the rights of individuals.<sup>44</sup> Many other governmental observers stressed that the approach to the question of “collective rights” in the revised draft Declaration was “fundamentally inconsistent with existing international human rights instruments...”<sup>45</sup> This interpretation was opposed by virtually all of the indigenous representatives, who supported an extension of the traditional Western understanding of human rights, i.e. rights of individuals to be free from oppression by the state, to a broader recognition of the rights of peoples to exist as collectives and to be secure in their collective integrity from intrusions by the state or other threatening forces.

The observer for the Government of Chile expressed the readiness of his government to participate in the elaboration of a consensus document.

Another issue which was frequently addressed by government observers was the need to make the draft declaration as flexible as possible. The observer for Japan pointed out that a flexible text was needed so as to take into account the different historical and social contexts in which indigenous peoples lived as well as the different administrative systems of the countries concerned. The observer of Norway stressed that such flexibility had to be followed by strong protection of the rights of indigenous peoples.

The observers for some other governments reiterated that the draft Declaration in its present form did not contain a definition of “indigenous peoples”. In particular the representative of Japan expressed the concern that this might give rise to subjective interpretations as to which groups were entitled to the rights contained in the Declaration. In this respect, I replied that for the purposes of the draft Declaration, the working definition of “indigenous peoples” contained in the study by Martínez Cobo should be applied.<sup>46</sup> Further, several representatives of indigenous peoples commented on the need to use the term “peoples” in the plural, both in the draft Declaration and in other documents, because the singular form was perceived by indigenous peoples as discriminatory, denying them rights available to other peoples.

Following a request for clarification of the terms “cultural genocide” and “ethnocide”, I explained that cultural genocide referred to the destruction of the physical aspects of a culture, while “ethnocide” referred to the elimination of an entire “ethnos”.

The majority of the government observers expressed reservations on the issue of self-determination. The observer of Canada emphasized again at this session that his country supported the principle that indigenous people qualified for the right of self-determination in international law on the same basis as non-indigenous people. In all other cases, self-determination of indigenous people had to be granted within the framework of existing nation states. The notion of self-determination as used in the draft declaration implied the right of indigenous people to unilaterally determine their political, economic and social status within the existing state, while it was not clear how the concepts of self-determination, self-government and autonomy, which were addressed in Articles 3 and 29 of the draft, interrelated and what the range of powers of indigenous governments would be and how they would relate to the jurisdiction of existing states.<sup>47</sup>

The observer for Finland stated that his country was in favour of the use of the concept of self-determination in the draft declaration. The observer for Denmark also stated that the exercise of the right of self-determination was a precondition for any full realization of human rights for indigenous peoples. His country supported the formulation in the draft declaration that indigenous peoples had the right to autonomy and self-government in matters relating to their internal and local affairs. The enjoyment of the right to autonomy and self-government constituted the minimum standard for the survival and the well-being of the world’s indigenous peoples.

The observer for the Russian Federation said that when discussing the issue of self-determination it had to be borne in mind that indigenous peoples live in very different regions of the world and that they might require totally different aspects of self-government. She felt that paragraph 29 did not cover all aspects that fell under the notion of self-determination and self-government and suggested that the Declaration should contain only the general principle.

Further, the observer of Brazil pointed out that some of the concepts proposed in the draft had difficulty in being accepted by many governments, in particular those relating to self-determination as defined by existing international law, the extent of the rights of property over indigenous lands, demilitarization of indigenous lands, and the impossibility of removal of indigenous populations from their lands.

Moreover, the observer for New Zealand stated that a distinction could be made between the right of self-determination as it currently existed in international law, a right which had developed essentially in the post-Second World War era and which carried with it a right of secession, and a proposed modern interpretation of self-determination within the bounds of a nation state, covering a wide range of situations but relating essentially to the right of a people to participate in the political, economic and cultural affairs of a state on terms which meet their aspirations and which enable them to take control of their own lives. He suggested seeking language on self-determination which committed governments to work with indigenous peoples in a process of empowerment within the state in which they lived.

The prevailing opinion of the indigenous peoples was expressed by Mr. Moana Jackson, who reported on the conclusions reached in the informal meeting held by the representatives of indigenous peoples. They were worried about attempts to limit the concept of self-determination to the conduct of internal affairs. He stated that the right to self-determination, contrary to what the observer for New Zealand had said, was not primarily a post-Second World War concept but had existed since time immemorial and was not dependent exclusively on international law for its understanding. Indigenous peoples claimed for themselves a right to a subjective definition of the right to self-determination.

In addition to the above-mentioned statement, a number of representatives of indigenous peoples expressed the view that the right to self-determination was the pillar on which all the other provisions of the draft declaration rested and the concept on which its integrity depended. It was argued that there seemed to be consensus that the right to self-determination should be considered as a rule of *jus cogens* implying that this right was of such a profound nature that no state could derogate from it. Many representatives of indigenous peoples also emphasized that the Declaration had to express the right of self-determination without any limitations or qualifications.

The observer for the Nordic Sami Council proposed that the issue of self-determination, in accordance with its importance, should be dealt with in the first operative paragraph or article and that the exact wording of Article 1 of the two International Covenants on Human Rights should be used. The observer of the Haudenosaunee Nation, delivering a joint statement on behalf of the indigenous representatives of Australia, made similar proposals.

In this regard, Ms. Lowitjia O'Donogue, Chairperson of the Aboriginal and Torres Strait Islander Commission, recalled my visit to Australia and mentioned that at a meeting, I had suggested that a distinction be made between "external" self-determination, available to peoples who had liberated themselves from imposed alien rule, and "internal" self-determination, by which collective groups of indigenous peoples sought to preserve and develop their cultural and territorial identity within the political order of the state in which they live. Ms. O'Donogue stressed the fact that "self-determination", to Australia's indigenous peoples, meant seeking increasing autonomy in terms of self-management and self-government but was not understood as a mandate for secession. A need to stress the territorial integrity of states in the draft Declaration could therefore not be perceived.<sup>48</sup>

The observer for the American Indian Movement of Colorado expressed the view that the right to self-determination could not be limited to those peoples who had already established their states. He emphasized that accepting a concept of self-determination which encompassed not merely self-government but the right to freely choose a political status would not automatically lead to the dismemberment of states. Conflict and disruption were not caused by demands for the right to self-determination, as some governments had suggested, but by the fact that peoples were forced to assimilate into states that did not respect their distinctive identities.

A number of scholars also expressed their views on the concept of self-determination. Professor Maivan Lam stated that indigenous peoples had the same right as all other peoples to self-determination and that many international jurists today held the view that the right of self-determination had achieved the status of *jus cogens* and was therefore not subject to changes by states. Moreover, she drew attention to the fact that the International Court of Justice had, in the Western Sahara case, expressed the view that the right to self-determination belonged to peoples, not to states.<sup>49</sup>

Professor Thornberry emphasized that the international law on self-determination was not static. Although a powerful case could be made that self-determination formed part of *jus cogens*, the precise form of self-determination was subject to historical change. He pointed out that the concept of self-determination as it was shaped by the WGIP was itself part of the change.

Professor Jim Anaya argued that the right of self-determination was a long-standing idea. He referred to two aspects of self-determination: one constitutive, the other ongoing. The first was linked to the rights of peoples to determine their political status, the second concerned the rights of groups of individuals to make meaningful choices in matters of concern to them on an ongoing basis. He added that secession was not usually desirable and could in many cases prove to be detrimental to the interests of indigenous peoples.<sup>50</sup>

Another issue which was frequently addressed and reiterated during the debate was the use of the term “indigenous peoples”.

Government observers expressed their concern that the use of the term “peoples” would have implications for international law because of its link with the right of self-determination. The observer for Canada proposed that the draft Declaration should contain a provision specifying that the term “peoples” had no consequences for the right of self-determination under international law. If such a clarification were not made, it would mean that there was a right to secede; even if secession were not chosen, it would still imply the right of indigenous peoples to enact laws concerning their political, economic, social and cultural status without regard to, or application of, the laws of the surrounding state.

Further, the observer for Brazil noted that the use of the term “peoples” instead of “people” was not consistent with that of other UN documents, including Chapter 26 of Agenda 21.<sup>51</sup>

Many representatives of indigenous peoples stressed that the term “people” had primarily historical implications for them. Mr. Ted Moses, the Chief of the Grand Council of the Crees, for example, pointed out that they had defined themselves as peoples since time immemorial. Others emphasized that only the use of the term “peoples” would reflect the notion of collectivity on which indigenous life was based. The term “indigenous people” or “populations” signified only a group of individuals and therefore denied them their collective identity.<sup>52</sup>

On the question of land rights, the observer for Canada stated that the draft declaration drew no distinction between “lands” and “territories”, nor was it clear whether they were intended to mean only those lands and territories where indigenous people had or could establish legal titles to all lands and territories which they claimed. The provision in Article 24 of the draft declaration,<sup>53</sup> that indigenous people “have the right to own, control and use their lands and territories”, in combination with the statement in Article 23 that lands and territories are those that have been traditionally owned or otherwise occupied or used, gave those articles a far-reaching effect. Article 25, establishing a principle of restitution of land, was also problematic for Canada, which has devised a system of negotiated settlements (comprehensive land claims agreements) with indigenous people. He reiterated the Canadian recommendation that a “reasonable limits” clause should be introduced in the Declaration in order to enable more governments to support it.

The observer for Sweden pointed out that, while the land rights of indigenous populations were generally discussed in terms of ownership and possession, he felt that the importance of “*usufruct*” should be stressed as an alternative concept because it is a strongly-protected legal right to use land. The Swedish Supreme Court had recognized the right of “*usufruct*” as a customary right of the Sami population in one large land area.

The observer for the Dene Nation also emphasized that the declaration had to include a clear right of indigenous peoples to own their lands and resources. Similarly, the observer for the Nordic Sami Council stressed that the draft declaration should clearly guarantee the ownership of traditional lands by indigenous peoples and recognize their hunting and fishing rights and that other concepts such as mere “*usufruct*”, as suggested by the above mentioned Swedish delegate, were not able to meet the concerns of all indigenous peoples.

Mr. Moana Jackson, who reported on the conclusions reached at the informal meeting held by indigenous representatives, proposed *inter alia*, that Articles 3 and 29 of the draft declaration should be amended.<sup>54</sup> He further argued that the issue of self-determination should be dealt with in a new Article 1 and be worded along the lines of the two International Covenants on Human Rights.

Finally, my colleagues, the other four members of the WGIP, and I acceded to the requests of the representatives of indigenous peoples and adopted unanimously as Article 3 of the draft Declaration the following text, which incorporates common Article 1 of the two International Covenants on Human Rights, without any change or qualification: “Indigenous peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development”. This decision of the WGIP was greeted with a standing ovation from indigenous participants and a conciliatory response from many of the governments.

It should be mentioned that my colleagues, members of the WGIP, and I made every effort and completed the elaboration of the draft Declaration on the rights of indigenous peoples at our eleventh session in 1993. After careful consideration of the last comments and amendments, the draft Declaration was given a second reading and all delegations participated actively in the discussions.

Subsequently, the WGIP agreed on a final text entitled “Draft Declaration as Agreed upon by the Members of the Working Group at its Eleventh Session” and decided to submit it to the Sub-Commission at its forty-fifth session.<sup>55</sup> In that respect, the WGIP recommended to the Sub-Commission:<sup>56</sup>

*To consider the draft declaration as contained in the annex of the present report of its eleventh session Doc. E/CN.4/Sub.2/1993 /29, at its forty-sixth session in 1994, in order to ensure that the members of the Sub-Commission have sufficient time to study the text;*

*To request the Secretary-General to send the draft declaration to the editorial and translation services of the UN as soon as possible;*

*To request the Secretary General to circulate the text to indigenous peoples, governments and intergovernmental organizations, making special reference to the fact that no further discussion of the text would take place in the Working Group;*



*To recommend that the Commission on Human Rights and the Economic and Social Council take special measures so that indigenous peoples be enabled to participate fully and effectively, without regard to their consultative status, in the consideration of the draft declaration by the Sub-Commission and other higher UN bodies, as they have thus far contributed to the work of the Working Group; and*

*To submit the draft declaration to the Commission on Human Rights for consideration at its fifty-first session in 1995.*

At the level of the Sub-Commission, and before the closing of the relevant debate on the draft declaration, I submitted the following relevant amendments to the Sub-Commission's Resolution.<sup>57</sup>

Insert the following text as a new subparagraph(a):

*The draft declaration shall be entitled "UN Declaration on the Rights of Indigenous Peoples;*

Renumber the subparagraphs.

Replace existing subparagraph (d) by the following:

*To adopt the draft UN Declaration after due consideration, at its forty-sixth session in 1994, and to submit it to the Commission on Human Rights with the recommendation that the Commission consider and adopt it at its fifty-first session, in 1995;*

Add the following new paragraph, as operative paragraph 4:

*To recommend to the Commission on Human Rights and to the Economic and Social Council to take special measures to enable indigenous peoples to participate fully and effectively, without regard to consultative status, in the consideration of the draft UN Declaration, as they have contributed to the work of the Working Group.*

The Sub-Commission adopted unanimously the above-mentioned amendments and in particular the new title of the draft declaration, as I proposed it, which was "UN Declaration on the Rights of Indigenous Peoples".

Finally, the Sub-Commission, after an attentive consideration of the above mentioned revised draft Declaration,<sup>58</sup> decided unanimously to submit it to the Commission on Human Rights,<sup>59</sup> for consideration and adoption by the UNGA within the International Decade of the World's Indigenous People.

## **Conclusions**

The UN Declaration on the Rights of Indigenous Peoples (the Declaration) constitutes the most important development concerning the recognition and protec-



tion of the basic rights and fundamental freedoms of the world's indigenous peoples. It is the product of many years of work by many people including, in particular, many hundreds of indigenous people from all parts of the world. Its text reflects an extraordinary liberal, transparent and democratic procedure before the WGIP that encouraged broad and unified indigenous input. The members of the WGIP and I made every effort to incorporate indigenous peoples' primary aspirations in the final text. It should be noted that no other UN human rights instrument has ever been elaborated with so much direct involvement and active participation on the part of its intended beneficiaries. The text as it was drafted by myself and approved by the WGIP also focused on issues of special concern to indigenous peoples in the exercise of their rights to equality, self-determination, lands and natural resources and collective identity. In broad terms, it deals with aspects of strengthening the distinctiveness of indigenous societies within the institutional frameworks of existing states. The preparatory work and the debates on the draft declaration have contributed highly to the perseverance and the unity of indigenous peoples. Also, the preparatory work as it is presented in the preceding paragraphs constitutes a useful tool for analysis and interpretation of many provisions of the final text of the Declaration adopted by the UNGA. Further, it will be used effectively for peaceful negotiations and reconciliation between states and indigenous peoples. The WGIP has greatly contributed, with its systematic, responsible and important work, to establishing the foundations on which the final text of the proclaimed Declaration is built.<sup>60</sup> ○

## Notes

- 1 UN ECOSOC "Resolution 1982/34: Working Group on Indigenous Populations" UN Doc E/RES/1982/34 (7 May 1982).
- 2 UN Working Group on Indigenous Populations "Report of the Working Group on Indigenous Populations on its fourth session: Chairman/Rapporteur: Mrs. Erica-Irene A. Daes" UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985), Annex III, 1 and 2.
- 3 Ibid.
- 4 Ibid, 14.
- 5 Ibid, para 58.
- 6 Ibid, para 61.
- 7 Ibid, para 61.
- 8 Ibid, para 63.
- 9 UNGA "Resolution 1514 (XV): Declaration on the Granting of Independence to Colonial Countries and Peoples" UN Doc A/RES/1514/XV (14 December 1960).
- 10 Above n 2, para 66.
- 11 Martinez Cobo "Study of the Problem of Discrimination Against Indigenous Peoples" UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983).
- 12 Ibid.
- 13 "Submission of the ILO to the WGIP" UN Doc E/CN.4 /Sub.2/AC.4 /1985 /WP2/add. 1 (1984).
- 14 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, entered into force 4 January 1969.

- 15 Above n 2, para 72.
- 16 Ibid, para 74.
- 17 Ibid, para 76.
- 18 Ibid, para 76.
- 19 Ibid, para 80.
- 20 See UN doc. E/CN.4/Sub. 2/ AC.4/1985/WP.4 and Annex IV (1984).
- 21 Above n 2, para 82.
- 22 Ibid.
- 23 Ibid, para 83.
- 24 Ibid.
- 25 Ibid, Annex II, Annex III and IV.
- 26 Ibid, Annex II.
- 27 Sub-Commission on the Prevention of Discrimination and Protection of Minorities “Resolution 1985/22: Working Group on Indigenous Populations” UN Doc E/CN.4/Sub.2/1985/22 (29 August 1985); the Commission on Human Rights “Resolution 1986/27: Working Group on Indigenous Populations” UN Doc E/CN.4/Res/1986/27 (11 March 1986); Commission on Human Rights “Resolution 1987/34: Working Group on Indigenous Populations” UN Doc E/CN.4/Res/1987/34 (10 March 1987).
- 28 UN Working Group on Indigenous Populations UN doc. E/CN.4/Sub.2/1987/WP.1/Add. 1 (Annex 2, 3 and 4).
- 29 UN Working Group on Indigenous Populations UN doc. E/CN. 4 /Sub.2/1987/WP.4 /Add. 1, Annex 1.
- 30 UNGA “Resolution 41/120: Setting International Standard in the Field of Human Rights” UN Doc A/RES/41/120 (4 December 1986).
- 31 Ibid.
- 32 UNGA “Resolution 41/128: Declaration on the Right to Development” UN Doc A/Res/41/128 (4 December 1986).
- 33 UNGA “Resolution 2625: Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations” UN Doc A/8028 (1971).
- 34 Above n 2, Annex IV.
- 35 Working Group on Indigenous Populations “Report on its Fifth Session” UN doc. E/CN.4./Sub.2/1987 22 (1997), Annex V.
- 36 *Kitok v. Sweden*, Communication No. 197/1985, Report of the Human Rights Committee, 43rd session UN GAOR Supp. (No. 40) UN Doc. A/43/40, Annex 7 (G) 1988, Views adopted 27 July 1988.
- 37 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976.
- 38 **Erica-Irene A Daes. 2008.** “An Overview of the History of Indigenous Peoples’ Self-determination and the UN” 21(1) Cambridge Rev Int’l Affairs 7.
- 39 Sub-Commission “Resolution 1991/30: “Draft Universal Declaration on the Rights of Indigenous Peoples” UN Doc E/CN.4/Sub.2/1991/36; E/CN.4/Sub.2/1991/65 (1991) 66-69.
- 40 “Report on the UN Seminar on the Effects of Racism and Racial Discrimination on the Social and Economic Relations between Indigenous Peoples and States” UN Doc. E/CN.4/1989 (1989), Annex II. See also **Erica-Irene A Daes. 1989.** “On the Relations between Indigenous Peoples and States” in *Without Prejudice, The EAFORD International Review of Racial Discrimination* Special Issue, 2(2) Indigenous Peoples and the Law, 2(2), 41.
- 41 Working Group on Indigenous Populations “Report of the Ninth Session” UN Doc E/CN.4/ Sub.2/1991/40/Rev.1, (1991) 30-37.
- 42 Working Group on Indigenous Populations “Report of the Eleventh Session” UN Doc E/CN.4/ sub2/1993/29 (1993) 61-63.
- 43 Statement by Rigoberta Menchu Tum in *ibid*, 15
- 44 *Ibid*, para 68
- 45 *Ibid*.

- 46 Above n 11.
- 47 Above n 45.
- 48 Ibid, para 9.
- 49 *Western Sahara* case, Advisory Opinion ICJ 12 (16 October 1975).
- 50 A Summary of the interventions made by these 3 scholars is contained in above n 45, 19.
- 51 Editor's Note: Agenda 21 is a comprehensive plan of action for the UN, states and groups to take to protect the environment. It was agreed at the 1992 UN Conference on Environment and Development in Rio de Janeiro, Brazil: Rio Declaration on Environment and Development (1992) 33 ILM 874.
- 52 Above n 45, 20.
- 53 Contained in Working Group on Indigenous Peoples UN Doc E/CN.4/Sub.2/AC.4/1993/CRP.4 (1993).
- 54 As contained in Working Group on Indigenous Populations UN Doc E/CN.4/Sub.2/1993 /26 (1993).
- 55 Above n 45, 50- 60. Ms. Attah stressed the need for the draft declaration to be adopted by the Sub-Commission in 1993, because that was the wish of the indigenous peoples.
- 56 These recommendations represent a compromise achieved after long consultations between the members of the WGIP. The individual opinions and the amendments to the report of three of its members (Mr Alfonso Martinez, Mr. Boutkevitch and Mr. Hatano) are contained in above n 45, Annex II.
- 57 E/CN.4/Sub.2/1993/L.47, contained in Doc. E/CN.4/Sub.2/1993 /L.54
- 58 Above n 45.
- 59 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities "Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples" UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 60 UN General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).

# NEGOTIATING THE DECLARATION

**PART TWO**

# THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: SOME KEY ISSUES AND EVENTS IN THE PROCESS

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John B Henriksen\*

The UN High Commissioner for Human Rights, Louise Arbour, hailed the General Assembly's adoption of the Declaration on the Rights of Indigenous Peoples (the Declaration) as "a triumph for justice and human dignity".<sup>1</sup> It is indeed not difficult to concur with the views of the High Commissioner when looking back at the extremely difficult process by which the Declaration was developed.

This article provides a brief personal retrospective glimpse at the long process leading to the adoption of the Declaration, focusing on what happened at the level of the UN Commission on Human Rights. The author of this article was involved in the negotiation process for almost two decades in various capacities: as an indigenous representative; a governmental representative; and as a staff member of the Office of the UN High Commissioner for Human Rights.<sup>2</sup>

In 1993, the Working Group on Indigenous Populations (the WGIP) agreed on a draft declaration on the rights of indigenous peoples, which it had been working on since 1985. In 1994, the parent body of the WGIP, the Sub-Commission on Prevention of Discrimination and Protection of Minorities (the Sub-Commission), endorsed the proposed text and submitted it to the Commission on Human Rights (the Sub-Commission Text).<sup>3</sup> In 1995, the Commission on Human Rights followed up by establishing a working group (WGDD) to consider the Sub-Commission Text,<sup>4</sup> and recommend how the General Assembly (UNGA) should deal with this matter.

The Commission on Human Rights established special procedures for participation in the WGDD on the part of indigenous peoples' organizations to ensure that those that did not have consultative status with the Economic and Social Council could participate in the process.<sup>5</sup> These special accreditation procedures ensured broad indigenous peoples' participation. However, indigenous organi-

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zations from certain countries were still prevented from participating as the special indigenous participant status could not be granted if the government concerned had any objections with regard to granting such status to an applicant from the relevant country.

The nature of the negotiation process differed remarkably from other comparative human rights standard-setting processes. The participation and influence of the beneficiaries of the instrument was significant and unprecedented. During the first session of the WGDD (1996), the issue of indigenous peoples' status in the negotiations was a major issue. Despite strong objections from certain states, an informal understanding was reached stipulating that changes in the Sub-Commission text required broad acceptance from indigenous peoples' representatives. This unprecedented informal procedural agreement between indigenous peoples and member states established the foundations for the negotiation process. It ensured greater transparency in the negotiations and encouraged governments to discuss and explain proposed changes in the plenary of the WGDD.

Indigenous peoples were also successful in gaining significant substantive influence in the negotiations as a result of a combination of factors, such as having a strong case to advocate, a relatively high degree of unity within the indigenous caucus, many visionary indigenous leaders, international human rights law expertise, and a gradual development of experience in multilateral diplomacy. Consequently, indigenous peoples were able to match the substantive expertise and negotiation skills of governmental delegations and, in many instances, the indigenous delegates also surpassed governmental delegations in this regard.

At the opening of the first session of the WGDD, a joint indigenous caucus statement called for the immediate adoption of the declaration as submitted by the Sub-Commission, without change, amendment or deletion, as a statement of minimum standards for the rights of indigenous peoples.<sup>6</sup> This later became known as the "no-change position". However, only three governments indicated a willingness to accept the text from the Sub-Commission without changes.<sup>7</sup> It soon became evident that there was no majority in the WGDD in favor of adopting the text as proposed by the Sub-Commission. It was, however, agreed that the Sub-Commission text should serve as a basis for future negotiations.

The concept of "indigenous peoples" was a significant hurdle for many governments to overcome in the early stages of the negotiations. African and Asian governments generally held the view that a definition of the term "indigenous peoples" should be included in the text in order to identify the beneficiaries. It was clear that some of these states were more interested in obtaining a definition which would exclude indigenous peoples in their own countries from becoming beneficiaries of the Declaration. It was frequently stated by African and Asian states that they did not have any indigenous peoples in their countries and that everyone there was indigenous. The debate surrounding the concept of "indige-

nous peoples” was re-energized by the conclusions of the Sub-Commission’s Special Rapporteur on treaties, agreements and other constructive arrangements between States and Indigenous populations. Professor Miguel Alfonso Martínez, in his final treaty-study report stated that the situation of groups in African and Asian States claiming to be indigenous should be analyzed in UN forums other than those concerned with the problems of indigenous peoples.<sup>8</sup> The conclusions of the Special Rapporteur encouraged African and Asian governments to continue to raise the issue of definition. It also created a very tense situation between African and Asian members of the indigenous caucus and caucus members from the American continent, as the latter group had strongly supported the final report of the Special Rapporteur. Eventually, African and Asian governments dropped their insistence on a definition, and no such definition was included in the Declaration as adopted by the UNGA.

In addition to this specific problem related to Africa and Asia, the concept of “indigenous peoples” was also problematic for many governments due to the fact that international law acknowledges that “all peoples” have the right to self-determination.<sup>9</sup> In an attempt to avoid identifying indigenous peoples as “peoples”, various other terms were introduced to describe the beneficiaries, including “indigenous populations”, “indigenous people”, “persons belonging to indigenous populations”. In other words, some states wanted either to replace the term “peoples” or to explicitly clarify that the use of the term “peoples” in the text should not be construed as having any applications as regards the collective rights which may be attached to the term under international law. Indigenous peoples strongly opposed all such attempts. The text, as adopted by the UNGA, uses the term “indigenous peoples” without defining the concept, nor does it contain any reservations as far the legal implications of the term are concerned.

It is beyond any doubt that the concept of collective rights, in particular the right to self-determination and collective land and natural resource rights, represented the greatest challenges to the process. Some states, including France, Sweden and the UK, were strongly against recognizing collective human rights. Indigenous peoples argued in favor of acknowledging collective rights as indispensable to their continued existence as distinct peoples. The principal concern which certain states had with regard to collective rights was eventually solved through a specific paragraph in the preamble to the Declaration, which recognizes and reaffirms that *indigenous individuals* are entitled to all human rights recognized in international law, and that *indigenous peoples* possess collective rights which are indispensable for their existence, well-being and integral development as peoples.

Many governments viewed collective indigenous rights, in particular the right to self-determination, as challenging existing national political and legal structures. Hence, they advocated *status quo* solutions. Some governments also frequently argued that acknowledgement of an indigenous peoples’ right to self-

determination would constitute a serious threat to the stability and sovereignty of states. This was also the position expressed by the representative of Sweden in a closed informal meeting of Western governments.<sup>10</sup> It was said that the government concerned could not accept the draft provision on the right to self-determination because it could lead to claims for independence from the Sami people. However, fourteen years later, the Swedish government acknowledged that indigenous peoples have the right to self-determination, including under common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>11</sup> In its periodic report (2006) to the UN Committee on Economic, Social and Cultural Rights, the Government of Sweden stated that indigenous peoples have the right to self-determination insofar as they constitute peoples within the meaning of common Article 1 of the ICCPR and the ICESCR.<sup>12</sup> This demonstrates the extent of change and of influence that took place in the position of some governments during the 20-year negotiation process.

The Declaration identifies indigenous peoples as self-determining peoples without any qualifications, and reaffirms that indigenous peoples are entitled to the general right to self-determination. This is significant because, initially, a number of governments, in particular the United States of America, fiercely attempted to formulate a restrictive *sui generis* right to self-determination for indigenous peoples.

Another major problem in the negotiations were the constant attempts from many states to domesticate indigenous peoples' rights by seeking to make them strictly subject to national legislation. Indigenous peoples expressed strong opposition against all such attempts; it was argued that this would undermine the entire purpose of the Declaration, as well as the international human rights system. Eventually, only one reference to domestic legislation was made in the operative part of the Declaration: Article 46 states that the exercise of the rights set forth in the Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations.

The negotiations were heavily influenced by a mutual mistrust between governments and indigenous peoples. Some governments expressed concerns about possible hidden agendas in informal settings. At the same time, many indigenous representatives expressed similar mistrust towards governments, and were wary of indigenous organizations that engaged in bilateral dialogue with governments. In one instance, in 1998, during the fourth session of the WGDD, a representative of a European government, regarded as being very progressive in the field of human rights, informally expressed great frustration because the governmental delegations of Denmark and Norway had indigenous individuals in their delegations. In his view, an indigenous presence in closed governmental meetings made it impossible to have open discussions between governments.



The previously mentioned “no-change” position of the indigenous caucus helped to cement the Sub-Commission Text as the basis for negotiations. However, towards the end of the 1990s, some indigenous organizations started to question the sustainability of this position. It was obvious that the Sub-Commission Text could be improved, strengthened and clarified. Moreover, there were clear signs that a continuation of this position could jeopardize the entire process, as certain governments had started to question the usefulness of extending the mandate of the WGDD due to the stalemate, in particular caused by Australia and the USA.

In 2000, the Inuit Circumpolar Conference and the Saami Council delivered a joint statement in the WGDD, indicating a willingness to consider changes in the Sub-Commission Text, if such amendments strengthened or clarified the text and were in conformity with international legal standards. This created severe problems within the indigenous caucus, and the two organizations were branded as deserters by many other indigenous organizations. However, other indigenous organizations gradually joined this position when they, too, realized that to hold on to the strict no-change position was infeasible. The “no-change” group in the caucus began to lose ground. In the meantime, the governments of Guatemala and Mexico adopted a no-change position of their own. This effectively blocked any progress in the negotiations because there were now “no-change” groups in both camps.

Consequently, at the turn of the century, after four years of negotiations, only two of 45 draft articles had been adopted by the WGDD: one on the right to nationality for indigenous individuals (Article 6); and the other on gender equality (Article 44). Both provisions simply reaffirmed existing individual human rights.

In 2004, the Nordic governments, together with New Zealand and Switzerland, submitted a comprehensive package of proposed changes to the Sub-Commissions text (CRP1).<sup>13</sup> This proposal was based on the Sub-Commission Text, and aimed at identifying possible consensus. It attempted to keep intact as much as possible of the Sub-Commission Text. The vast majority of the proposed changes were included in the text adopted by the UNGA in September 2007. However, provisions concerning indigenous peoples’ rights to lands, territories and nature resources are significantly stronger in the final text than proposed in CRP1.

This joint proposal created a certain momentum in the process, as it was welcomed by most states and a number of indigenous representatives as a constructive attempt to overcome existing differences. Many indigenous organizations strongly opposed the proposed changes, and continued to advocate the adoption of the Sub-Commission Text. Some of these indigenous representatives informally expressed the view that they would prefer not to have a declaration at all rather than having a text which differed from the Sub-Commission Text. At the following session, the Tebtebba Foundation, the Saami Council and the Sami Par-

liamentary Council submitted their own comprehensive proposal aimed at further narrowing the gaps. Substantive progress was blocked, however, by indigenous and governmental delegations holding to their no-change positions. The Peruvian chairman of the WGDD was effectively sidelined as consensus facilitator due to the fact that two influential states from his region were sticking to their no-change positions.

The stalemate resulted in a division of the global indigenous caucus into seven regional caucuses. This allowed indigenous organizations that had abandoned their previous no-change position to engage in constructive discussions about proposed amendments.

On the governmental side, a similar watershed event took place. At the 10<sup>th</sup> session of the WGDD (2004), the delegation of Norway, in response to continued opposition from the delegations of Guatemala and Mexico to adopt articles with minor amendments, proposed through the Chairman of the WGDD that Guatemala and Mexico take over Norway's responsibilities to facilitate consensus on these provisions. Guatemala and Mexico both accepted this responsibility, albeit somewhat reluctantly. This changed the overall dynamic of the process as, in their new role as facilitators of consensus, the two delegations were no longer in a position to maintain their no-change position. As a consequence, the Chair of the WGDD also became proactive in seeking consensus. Guatemala and Mexico continued their successful facilitation throughout the process, and played a crucial role in the final negotiations at the UNGA, in particular in securing African support for the text.

This process is probably the most difficult and complex human rights standard-setting activity the UN has ever embarked on, and it will most likely remain so for a very long time. The Declaration, although far from being perfect, represents the world community's commitment towards redressing the historic injustices faced by indigenous peoples. The next battle for the world's indigenous peoples will be to secure full and effective implementation of these universal minimum standards for indigenous peoples' rights. ○

## Notes

- 1 UN High Commission for Human Rights, Press Release, Geneva (13 September 2007).
- 2 The author participated in the negotiation process in various capacities: (1) from 1991-1995, as an indigenous representative in the UN Working Group on Indigenous Populations, representing the Saami Council and the Sami Parliament respectively; (2) from 1996-1999, as staff member of the Office of the UN High Commissioner for Human Rights assigned to serve the UN Commission on Human Rights' Working Group on the Draft UN Declaration on the Rights of Indigenous Peoples; (3) from 1999-2001, as an indigenous representative, representing the Saami Council; (4) from 2002-2004, as an adviser in the Royal Ministry of Foreign Affairs of Norway; and (5) in 2007, as an adviser to the Saami Council during the final negotiations on the Declaration in the UN General Assembly.

- 3 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities “Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples” UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 4 The working group was officially named “the working group established in accordance with Commission on Human Rights resolution 1995/32” because the UN Commission on Human Rights could not reach an agreement on how the beneficiaries of the instrument should be identified, as “indigenous peoples” or “indigenous people”. Hence, the title of the new working group did not make any reference to the beneficiaries of the draft declaration. This matter was closely related to the question of whether indigenous peoples were entitled to the right to self-determination.
- 5 At the time, less than 20 indigenous organizations were in consultative status with ECOSOC and the majority of these organizations were from the Western hemisphere. Without the special accreditation procedure, indigenous peoples from other parts of the world would have been prevented from participating in the process.
- 6 “Report of the working group established in accordance with Commission on Human Rights resolution 1995/32” UN Doc E/CN.4/1997/102 (10 December 1996).
- 7 Bolivia, Fiji and Denmark.
- 8 Special Rapporteur Miguel Alfonso Martinez “Studies on treaties, agreements and other constructive arrangements between States and indigenous populations” UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999), para 90.
- 9 Common Article 1 of the International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976 and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976.
- 10 Working Group on Indigenous Populations, informal meeting, 1992.
- 11 Above n 9.
- 12 “Fifth periodic report by the Government of Sweden on the implementation of the International Covenant on Economic, Social and Cultural Rights” UN Doc E/C.12/SWE/5 (6 September 2006), para 7.
- 13 New Zealand later resumed close cooperation with its long-time partners in this process, Australia, Canada and USA. These four were the only states that voted against the adoption of the Declaration in the UN General Assembly on 13 September 2007.



## INTERNATIONAL INDIAN TREATY COUNCIL REPORT FROM THE BATTLE FIELD - THE STRUGGLE FOR THE DECLARATION

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**Andrea Carmen\***

Juan Leon Alvarado, a long-time Mayan Quiche activist, former International Indian Treaty Council (IITC) staff member and now Guatemalan Ambassador to Norway, Jean Luc Von Arx, a good friend from Geneva and I were climbing the mountainsides of France on a weekend during negotiations on the then draft declaration on the rights of indigenous peoples in September 2004. It was a beautiful day with a warm sun, a cool breeze and a brilliant blue sky. Lake Geneva appeared tiny; a long thin mirror of the sky many miles away and far below. Although we could see the buildings of the surrounding city, they were too small and far away to make them out clearly. Our physical and spiritual distance from the UN's Palais des Nations was immense, and very welcome at that moment.

During the previous week in Geneva, those of us still fighting for adoption of the text approved by the Working Group of Indigenous Populations and the Sub-Commission for the Prevention of Discrimination and Protection of Minorities (the Sub-Commission Text) in 1994 had been having a tough time.<sup>1</sup> Many states were attempting to weaken the rights in the Sub-Commission Text and create a second-class set of rights for indigenous peoples. Some states had made it clear that a text that included the term "indigenous peoples", which was in most of the articles, would not be adopted intact. We were told that the most essential provisions, including self-determination and rights to traditionally-owned and used lands and resources, would not be accepted by most states, and that we were living in a dream world.

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Our dedication to defending the Sub-Commission Text went beyond our support for its contents as the “minimum standard” we could not and would not go below. In our view, maintaining a unified “no changes” position was also the best strategy for blocking unacceptable changes, and had been the key to our success in doing so over the years. In addition, for many of us, the Sub-Commission Text represented the words, spirit, thoughts and instructions of many of the elders and traditional leaders who had begun the work on the declaration back in the early 1970s but who were no longer with us in this world.

IITC’s position was complicated, or simple, whichever way you want to see it, because our many affiliates from the Americas and the Pacific continuously mandated us to defend the Sub-Commission Text against changes. It was not until the final year of negotiations that we were authorised to accept changes, and then only where they would strengthen or clarify the Text or refine wording that could gain state support without undermining rights. However, in September 2004, we were not there yet.

On that Sunday in September 2004, Juan Leon, Jean Luc and I were grappling with the realisation that the indigenous caucus, the group of indigenous peoples from around the world involved in the declaration negotiations process, was no longer united around the “no changes” position. Some delegations felt we should consider some of the state proposals and enter into active negotiations to develop new wording. A few had actually joined states in making proposals for changes on the floor. Still, at that point, most indigenous delegations and even a few states, such as Guatemala, continued to defend the Sub-Commission Text in most if not all provisions, and no indigenous delegation said they were prepared to compromise on the most essential provisions such as self-determination. However, in our view, it was a risky strategy to accept changes: where it would lead was anyone’s guess. We at IITC felt that we were fighting for our survival, and we knew that our grandchildren would have to live with whatever was in the final version once it was adopted as the international standard recognizing our rights.

The most extreme proposed amendments from states included doing away with terms like “peoples” and “self determination” thereby creating new and limiting terms such as “internal self-determination” or “self-empowerment” just for indigenous peoples! Many other state proposals at first sight appeared innocuous, just a word or two here and there, but they would still have the effect of watering down or weakening vital rights. These included proposals to substitute “obtain” with “seek” regarding free, prior and informed consent and “shall” with “should” regarding state obligations to uphold the rights in the Declaration. None of the changes proposed by states at that point did anything to strengthen the original wording, in our view, and often appeared to be part of a deliberate strategy to break the indigenous caucus’ no-changes position.

Some very hard questions were facing all the indigenous delegations involved in this process, including IITC: if the Sub-Commission Text had been accepted as

the “minimum standard”, how could we consider any text that was even more of a minimum? How much change were we willing to accept collectively as a caucus or as delegations to achieve the requisite state support for eventual adoption by the Human Rights Council and the General Assembly (UNGA)? At what point in the process would we decide that no Declaration was preferable to a weakened one, and could the indigenous caucus agree on when that would be? If the Sub-Commission Text began to change with the agreement of indigenous peoples, was it possible to propose even stronger wording in some provisions? If so, how would we be able to defend it against unacceptable changes to the core provisions, such as land rights and self-determination, which were the focus of state opposition? Was it possible to negotiate text without negotiating rights, which are inalienable and therefore non-negotiable? At what point in Geneva or New York would indigenous peoples, as non-state participants, be excluded from decision-making on the final text? Could we maintain a collective position in the caucus to defend core rights and could we even agree on what those were? As one indigenous delegate had said that week, all the strategies before us entailed tremendous risks. The stakes for our peoples now and in the future were so high, and we had dedicated so many years of our lives to this process. I could hear my grandchildren’s voices in my heart, once they were able to read some mythical finished product of the Declaration many years in the future, saying “Grandma, I can’t believe that you agreed to THIS!!!” The tension within the indigenous caucus, and in the UN negotiations, was hard to take at times.

With the benefit of hindsight it has become clear that the long-held indigenous caucus no-change position was essential to the final outcome of the Declaration, even if it also appeared that little progress was made in declaration negotiations between 1995 and 2004.

Yet that sunny Sunday in September 2004, we could not have predicted how the Declaration would turn out. We were struggling to remain optimistic, positive, determined, to keep our spirits up, enjoy the day and clear our minds for what was to come in the next week and after. We were catching our breath for the next phases of the negotiations, which would start up again in just a few hours back in the belly of the UN far below.

The walk started out easily enough, across green sloping meadows and under lush green trees. It soon became more steep and rugged and we had to edge along or, in my case, crawl along on my hands and knees, on narrow rocky paths along the sides of cliffs with steep drops of hundreds of feet just to our right. Finally after several hours we reached what Jean Luc had announced was our intended destination: a large cave opening in the cliff side called “the hole” in French. With smooth rock tables and huge boulders inside, it seemed that it had been used by the ancient peoples of that land for ceremonies and gatherings. We could see the late afternoon sun and blue sky far above through what had once been a “blow hole” where the waves of an ocean, long since retreated, used to

crash in through the cave opening and then shoot up through the hole in the roof of the cave a hundred feet or more above where we now stood. A small painted wooden sign mounted on the cave wall told us that, 140 million years before, this cave had been at sea level. We noticed small fossil sea creatures embedded in the rock of the wall. 140 million years! I felt very new, tiny and small, pressed up against the reality of that huge expanse of time.

Juan Leon and I both stood very still, and pressed our faces against the cool, smooth cave wall. I said, "Juan, you know that in 140 million years, it won't matter what this Article or that one says in the Declaration. All that will matter is that we fought for our peoples." Juan said to me, "*Si, es cierto*" (yes that's true). We looked at each other in silence, cheeks held against the rock, feeling our valiant ancestors who had fought the battles they had to fight irrespective of whether they were certain they would win, lose or survive to fight another day, and had kept their hearts strong no matter what the odds. We smiled at each other and really meant it, took a few slow deep breaths in and out, knowing then what was true, what passed away and what lasted for ever and was never lost. We were ready, really ready then, for the steep climb up and out of that amazing hole. We were ready to go back into the UN the next day and do what we had to do, the best we could. We knew that somehow it would be OK in the end.

It is not that we had not been encouraged by significant victories up until then, which had helped us immeasurably to hold on to the Sub-Commission Text or, at least, the essential rights it affirmed. We had, against all odds and through unyielding and vocal determination, held the Chair of the Working Group on the Declaration (the WGDD) negotiations since 1997, Luis Enrique Chávez of Peru, to keeping the Sub-Commission Text as the "basis of discussion". This prevented certain states, and groups of states, from promoting their new and often seriously flawed drafts on an equal footing with the Sub-Commission Text. This also ensured that the Sub-Commission Text remained the official Text that was presented, referenced, quoted, used and applied in many situations and contexts, including in UN bodies and expert seminars over the years of the negotiations. This position was maintained through to the very last WGDD session in Geneva and meant that changes were minimized. For example, the wording of all changes were compared to the Text and intent of the Sub-Commission Text. The indigenous participants, as well as the Chairman, maintained the position that proposed word changes had to remain as close as possible to the Sub-Commission Text, and any potential changes had to be presented and justified in terms of how they improved or clarified the original. Many proposed changes, when assessed in this light, did not stand up to scrutiny and were abandoned and the original language, or very close to it, was what was finally used.

In 1996, most of the indigenous delegates "walked out" of the negotiations in protest at being relegated to the position of "observers" in the debate over our own survival, rights and dignity. As a result of the walk-out, for which we re-



ceived considerable international and UN attention, we achieved a groundbreaking and confidence-building victory, ensuring that indigenous peoples would be equal participants in reaching consensus on the Text. It also made it clear that the negotiation process would not garner any legitimacy without the participation of indigenous peoples. We made history in UN standard-setting: for the first time the so-called “beneficiaries” of rights were playing an active and equal role in their development.

Together, indigenous peoples’ active participation and the use of the Sub-Commission Text as the basis for negotiations ensured that the rights in the declaration as finally adopted by the Human Rights Council still constituted an acceptable minimum standard, from the point of view of most indigenous peoples. Indeed, some articles were actually strengthened in the final stages of the debates. Examples include new language on border rights in what became Article 36 (very important to my own Yaqui Nation and others divided between international borders of states like the US and Mexico), repatriation of cultural items including human remains, and the vital provisions for the recognition of treaty rights.

A surprising ally for us in this process (sorry, Luis, but it was a surprise, albeit a very welcome one!) was the Chairman of the WGDD. Of course, we had moments of frustration over the years with various aspects of his approach, especially when we saw he would not press states to accept the Text of Sub-Commission articles when only one or two objected (what does consensus mean in a UN process? A constant subject of debate). However, Luis Chávez’ reports to the Commission on Human Rights consistently compared proposed changes to the Sub-Commission Text. He was always willing to engage with indigenous participants at any point in the process and to allow for their significant input. Most importantly, the final “compromise Chairman’s text” presented for a vote of the Human Rights Council in June 2006 (when it became clear that consensus was not possible on certain core provisions such as land rights), retained an allegiance, not totally but in large part, to the spirit and letter of the Sub-Commission Text as well as to the indigenous peoples’ proposals.

Moreover, despite some tense and fragmented moments in the indigenous caucus, it held together with an overall process, internal protocol and sense of principle, despite differences in objectives, approaches and strategies. Most of us continued to participate, listen to one another and find consensus wherever we could. And, it is not that we did not have times of fun together. We went dancing, ate together (remember the long meals and meetings at the old Manora restaurant?), told stories, prayed together, took weekend trips to see the Matterhorn, stayed up all night drafting joint statements, laughed and told jokes to get us through the stressful moments. One year we organized a betting pool, collecting 2 Swiss Francs per bet from caucus members, to guess Chair Luis Chávez’ real age (the late great Bob Epstein won the 244 franc “pot” but I won’t divulge how

we were able to get the correct answer from the Chairman himself, which was “40 in August” at the time!). Through this very tough, unique and historic experience, over the years, we developed deep bonds of friendship, solidarity and mutual respect that have continued to grow, like warrior soldiers fighting side-by-side in the trenches of a war.

During those two weeks in September 2004, some of us agreed that we were missing a broader awareness and activism about the declaration among the indigenous peoples of the world, especially at the “grass roots” level. Many community members never made it to Geneva but were vitally affected nonetheless. We took the view that the active engagement of indigenous peoples on the “home front” could help break down the resistance of states, if only we could find a way to involve them in what was going on. So a four-day hunger strike and spiritual fast was organized by six indigenous representatives, with wide support from indigenous organizations around the world, when the declaration negotiations resumed for a third week in November/December 2004. The resulting publicity helped to mobilize the attention of the world community and, in particular, indigenous peoples around the world, and to build support for defending our rights despite the concerned attempts by some states to undermine them.

A statement declaring the hunger strike and spiritual fast on 29 November 2004 was presented at the WGDD by Saul Vicente Vasquez (Zapotec from Oaxaca, Mexico) on behalf of the hunger strikers, after a traditional drum and prayer song had been offered by a Lakota elder:

*We will not allow our rights to be negotiated, compromised or diminished in this UN process, which was initiated more than 20 years ago by Indigenous Peoples. The United Nations itself says that human rights are inherent and inalienable, and must be applied to all Peoples without discrimination.”<sup>2</sup>*

Chairman Chávez allowed us to remain sitting on our white blanket in the back of the room despite requests from both the US and the Russian Federation to have us physically removed as “protesters”. The Russian Federation also objected to the Lakota prayer song!

Over 700 emails and faxes came in from around the world that week declaring their support for the hunger strike, the declaration, and the rights and principles it upholds. These messages were passed on to the states to demonstrate that the work on the declaration was part of a growing international movement and a shared commitment that reached far beyond the few dozen indigenous delegates who persisted in finding their way back to Geneva year after year. Later, the Chair and several states told me and others that this was a turning point for them, and that it had helped open their eyes as well, as it underscored our level of commitment to our rights and the vital importance of the declaration to indig-

enous peoples around the world. The responses of the “grass roots” peoples invigorated us as well.

Maybe this did help to turn the tide. There were certainly many other factors involved as well. For whatever reason, by 2005, things had begun to move in a better way, and a growing number of states seemed ready to accept that any changes would have to be small and could not undermine the rights already contained in the Sub-Commission Text or international law. The caucus agreed that while changes to the Sub-Commission Text seemed to many to be inevitable at that point, we would stand together and hold the line for key provisions including free, prior and informed consent, traditional land and resource rights, self-determination and the unqualified use of the term “peoples”.

New and unexpected relationships of political solidarity and personal friendship emerged, not just among indigenous peoples but also with some of the state representatives who seemed newly prepared to fight for us and defend the rights in the declaration, if need be in direct opposition to some of the other states. Although many of the old familiar battle lines remained to the bitter end, new alliances were forged and have lasted to this day, in some cases realigning the “state vs. indigenous” paradigm that had characterized the struggle for the Declaration for so many years.

The indigenous caucus remained strong and, in the main, unified even after the declaration was adopted by the Human Rights Council and moved to the UNGA in New York. Our cohesiveness could have been seriously undermined by a changed political scenario and a greatly diminished voice in the process during these final set of negotiations among the states, which precipitated the vote in the UNGA. We were consulted about a final set of nine changes that had been negotiated among a group of states, with the concession that, if these could be incorporated, then further amendments would not be considered. We all consulted quickly with our regional lists; we were presented with the proposed changes one week to the day before the scheduled vote was to take place in New York. The vast majority of indigenous peoples from around the world who responded expressed that although they did not like two of the nine proposed amendments in particular (some others were fairly neutral and two appeared to actually strengthen the Text), they were not “deal breakers” and the rights we needed to have affirmed and recognized were still intact. Those who had objections would thus not call for opposition to its adoption. It would go ahead as scheduled.

On 13 September 2007, I was able, as the North American regional co-coordinator, together with Grand Chief Edward John from Canada, on the Global Steering Committee for the Indigenous Caucus, to join the indigenous representatives invited to sit on the floor of the UN UNGA to watch the UNGA’s huge electronic voting screen as the 143 green “yes” votes (one more “yes” vote was added later making a total of 144), the 4 red “no” votes (everyone knows who they were by

now) and only 11 abstentions (I was one of many who expected a few more of those) came up. What a moment! We were finally, in the eyes of the UN, full members of the human family with the legal rights essential for our survival, dignity and well-being fully recognized (if not yet fully upheld)!

But what was it that we had finally gained after all those years of struggle and negotiations over the wording? In the end we were able to join forces with many states and indigenous peoples around the world to maintain the key provisions we had started out to defend 30 years before, to make a real difference to indigenous peoples trying to uphold their rights in their own communities. It is not surprising that many of these most vital provisions were also the most hard fought and, in some cases, among those where consensus was ultimately not possible. They include:

- **Peoples with an “s” throughout the document**, which ensures that the rights recognized under international standards and laws for all peoples are also recognized and applied without qualification or exception to indigenous peoples, such as self-determination, development and means of subsistence.
- **Equal rights and non-discrimination**, which can be used to challenge all forms of cultural, environmental, social, judicial, education and legal forms of discrimination.
- The Declaration is the first international standard focusing primarily on the recognition of **collective rights** rather than individual human rights, responding to our ongoing insistence over many years that as indigenous peoples our rights and identity, which are based on our relationships to our lands, cultural and ceremonial practices, ways of life, subsistence economies, languages and political systems, are exercised and carried out collectively, as peoples.
- **Self-determination**, which is an essential and non-negotiable provision that functions as the basis of all the other rights in the Declaration.
- **Rights to the lands, territories and natural resources “which they have traditionally owned, occupied or otherwise used or acquired”**.<sup>3</sup> Recognition of this vital right in these words provides a tool for the struggles of countless indigenous peoples around the world whose traditional lands and resources are not legally recognised by the states in which they live, or for whom these rights are being denied.
- **Free, prior and informed consent** expressed as both a right of indigenous peoples and an obligation of states in many of the Declaration’s provisions, including, notably, in regard to the adoption by states of legislative or administrative measures, and as a prerequisite for the development, use or exploitation of indigenous peoples’ lands and natural resources.

- **Right to subsistence and development**, which includes the protection of indigenous peoples' traditional institutions, economic activities and subsistence ways of life.
- **The international standing of treaties** entered into by indigenous peoples and states and the full recognition of treaty rights as having an international character, interest and responsibility for the first time.
- The Declaration provides a framework for establishing **just and equitable processes for redress, restitution and conflict resolution**, with the full participation of the indigenous peoples concerned, including the minimum criteria for negotiations and settlement processes involving indigenous peoples' lands, territories and resources, including those which were traditionally owned or otherwise occupied or used and which were confiscated, taken, occupied, used or damaged without their free, prior and informed consent.<sup>4</sup>
- The Declaration also recognises rights required for the practice of **traditional cultures and ways of life, protection of sacred sites, control of educational systems, preservation of indigenous languages, defense of the environment and productive capacity of our lands, prevention of forced relocation**, and many other rights essential for our survival, as well as a number of specific obligations by states to ensure and facilitate the exercise and implementation of these rights.

### **Implementing the Declaration: pesticides use in Yaqui communities in Sonora, Mexico**

Indigenous peoples have been able to use the Declaration to good effect since its adoption. For example, Yaqui indigenous peoples in Mexico have utilized the Declaration in their fight against the use of pesticides, which have had a devastating effect on their communities. Based on Article 29 of the Declaration, which affirms that: "[s]tates shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent", the Yaqui authorities passed a Declaration requiring states to respect their right to free, prior and informed consent before using pesticides and chemicals on their lands.

In Rio Yaqui, Sonora, Mexico, Yaqui indigenous communities had experienced over 50 years of the so-called "green revolution" which sought to boost agricultural production in "developing countries" through the use of modern agricultural methods such as the heavy use of toxic pesticides and chemical fertilizers, as well as the introduction of new, hybrid seeds. The right to free, prior and informed consent on the part of the affected communities was not considered as a

factor, nor is it understood or practised in the implementation of this program to this day.

Seeing the Declaration used in this way makes the many years of struggle and time away from home and families well worth it. I think we can be satisfied, hold up our heads and look into the eyes of our community members, our leaders and elders, our children and grandchildren, knowing we did the best we could for them. We were part of creating something they can use.

Maybe in the far distant future, the spiritual echoes of this historic struggle, and the many personal stories of love and sacrifice that went along with it, will still be felt and told in some place or another. There is no doubt that our ancestors stood with us and gave us strength throughout the process, especially when the negotiations were difficult. We learned that, in a cave on a mountainside far above Geneva, in the halls of the UN, and in a traditional Guardia (meeting place) in Vicam Sonora, Mexico, we saw our leaders take a stand using the words we fought for. What we all helped to create in the Declaration is much more than words on paper, however dry or beautiful they may be. We helped to create a tool that can be used now by our peoples in their struggles, to safeguard the health of their children, protect the waters and lands that feed their families, uphold their treaty rights, and safeguard the sacred places where prayers are offered to the Creator for the coming generations.

The Declaration will live up to its full potential only when it is combined with the resistance and commitment of indigenous communities who decide to assert it. The text may not be all we wanted it to be, but it is far, far stronger than it seemed it would be at some of the darker moments we lived through, working for its adoption. It is a new floor but it is not the ceiling. The work will continue as new generations come into the international arena and see new possibilities there to defend and assert our inherent rights as indigenous peoples.

Meanwhile, in the here and now, the Declaration is alive with the hopes that it can be used to ensure that our rights to live in our own ways, with health, dignity, peace and justice, will be respected at long last. This will happen if our peoples and nations know it, take it to heart, stand behind it, assert it and use it. This is the responsibility of us all. For all our relations. ○

## Notes

- 1 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities “Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples” UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 2 **Saul Vicente Vasquez** “Statement to the UN Working Group established in accordance with Commission on Human rights resolution 1995/32” (29 November 2004),
- 3 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007), Article 26.
- 4 *Ibid*, Articles 27, 28 and 40.

## THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES BREAKING THE *IMPASSE*: THE MIDDLE GROUND

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Luis Enrique Chávez\*

The aim of this chapter is to provide a record of the negotiations that took place in the Human Rights Commission's open-ended inter-sessional Working Group on the Draft Declaration (WGDD) that culminated in the Draft Declaration on the Rights of Indigenous Peoples adopted by the Human Rights Council in June 2006 (the HRC Draft Declaration).

More specifically, it is my task to explain how a 24-year-old *impasse* in negotiations was overcome. For this, it is first necessary to define the *impasse*, or *impasses*, to be more precise, as there were far more than one facing the WGDD, in terms of both what were apparently procedural issues – such as the creation of the working group itself, its composition and working methods – and more substantive aspects of the HRC Draft Declaration.

### The establishment of the WGDD

The first *impasse* was probably the one that arose immediately following the adoption of the so-called Sub-Commission Draft Declaration on the Rights of Indigenous Peoples in 1994,<sup>1</sup> by what was then the Sub-Commission on the Prevention and Discrimination of Minorities (the Sub-Commission). This Draft (the Sub-Commission Text) was itself the result of a long elaboration process on the part of one of this body's subsidiary organs, the Working Group on Indigenous Populations (WGIP).

In accordance with then procedure, the Sub-Commission sent the Sub-Commission Text to the Commission on Human Rights for its consideration and approval in 1994. The Sub-Commission Text formed the object of somewhat heated debate at the Commission on Human Rights 51st session in 1995 given the oppos-

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ing positions that were immediately stated with the Sub-Commission Text. In fact, while the indigenous peoples' representatives, participating in the Commission as observers, stated their unanimous support for the Sub-Commission Text and called for its rapid approval without amendment, the member states held different and contrasting opinions. Some said they were able to approve the Sub-Commission Text. Others indicated that they generally supported the sentiment of the Sub-Commission Text but that some issues needed clarification or improvement. Yet others had significant doubts regarding the substance of the Sub-Commission Text, either its key provisions, such as self-determination or those relating to lands and territories, or the very concept of "indigenous", which many felt was not applicable in their territories.

It thus became clear that there was no consensus for an immediate approval of the Sub-Commission Text and that, given the positions stated, a mechanism would need to be created through which these positions could be reconciled. Following Commission on Human Rights practice, the text would need to be considered, like other standard-setting projects, in an open-ended inter-sessional working group where these differences could be ironed out on the understanding that - once this process was complete - the Commission on Human Rights would be in a position to approve the declaration.

But this was no ordinary text, and its *sui generis* nature became clear very early on. The task of establishing a working group thus encountered a number of significant obstacles. The first related to its mandate, given that the indigenous representatives were stating that the task at hand was to accept the Sub-Commission Text without amendment while some states were indicating that they would require at least some improvements (a euphemism encompassing differing levels of disagreement with the Sub-Commission Text) and others wanted an alternative text altogether. The second difficulty related to the involvement of indigenous peoples' representatives in the working group because, although *open-ended*, this had thus far only been taken to include interested governments and, as observers, non-governmental organisations with ECOSOC consultative status, thus excluding a significant number of indigenous peoples' representatives who wished to participate. The third and fundamental difficulty related to the name of the working group, as many states were unable to accept the word "peoples" when linked to the adjective "indigenous".

It was the negotiation skills of the countries sponsoring the creation of the WGDD, headed by Canada, that enabled this initial *impasse* to be overcome. It was agreed that the WGDD would be created without any specific name, and that its mandate would be "to elaborate a draft declaration", without specifying the actual title of this declaration, "considering the (...) draft United Nations declaration on the rights of indigenous peoples" approved by the Sub-Commission. By referring only indirectly to the words "peoples" and "indigenous", this imaginative formula was acceptable to everyone because, although both terms were



in the resolution, they were only referring to a non-binding document. Those who had expressed the greatest difficulties with the initiative could thus be included in the consensus.

The expectations of the indigenous representatives also had to be met, however, as they had been directly involved in elaborating the Sub-Commission Text for years and naturally wanted to retain the same level of participation in the new working group. It was thus agreed that the rules of participation would be amended to allow as many indigenous peoples' representatives as possible to be involved in the working group without first having to obtain ECOSOC consultative status.<sup>2</sup>

On 3 March 1995, Resolution 1995/32 of the Commission on Human Rights was thus adopted under the cryptic title of "Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214". Consequently, given its lack of a specific name for the reasons stated above, until it ceased functioning in 2006 the WGDD was officially known by the no less cryptic formal name of "Working Group established in accordance with Resolution 1995/32 of the Commission on Human Rights".

## **The early days**

The WGDD's first session was scheduled for the end of November 1995, by which time it had to have a Chairperson-Rapporteur who would lead the debates. This selection process was therefore the first test of how decisions were going to be taken within the Group and consequently a great deal of attention was focused on this and it was the object of much consultation. The indigenous peoples, now admitted as full players in the process, soon made known that they would not accept a Chairperson from a state opposed to the declaration, or a state where indigenous peoples were facing particularly difficult situations. These states, in turn, stated that the chair could not go to the representative of a government that had expressed an overly-favourable opinion of the Sub-Commission Text.

The search was thus considerably restricted, and it was clear from the outset that the Chairperson would have to come from a Latin American state given that, despite having some differences (and not necessarily minor ones) on the matter, the states of that region had shown themselves to be generally favourable to the existence of a declaration based on the Sub-Commission Text while not ruling out the possibility of making improvements to the text, thus opening up a space for consensus. The perception that indigenous peoples enjoyed greater protection in Latin America than in other regions,<sup>3</sup> and that they had achieved a high degree of political dialogue with their respective governments<sup>4</sup> was also important, particularly for the indigenous representatives.

Following a variety of delicate consultations, agreement was finally reached to appoint the Permanent Representative of Peru in Geneva, Ambassador José Urrutia, as Chairperson-Rapporteur of the WGDD. In addition to a long diplomatic career representing a Latin American country, Ambassador Urrutia also enjoyed well-earned respect from his colleagues in Geneva and was perceived to be a prudent man, with ample common sense and also a consensus builder, all of which were important qualities for the task at hand, and qualities that some other candidates might not necessarily possess.

Under Urrutia's chairmanship, the first session was devoted to a general debate aimed at achieving a clearer understanding of the participants' already well-known differences regarding content, such as the sphere of application of the declaration and the very definition of "indigenous peoples". There also seemed to be agreement on many of the principles contained in the Sub-Commission Text but, unfortunately, there was no possible space in which to debate the concrete "improvements" that some countries wanted. This was because the indigenous peoples' strategy, from the outset, consisted of not accepting any amendments to the Sub-Commission Text, as they felt this contained minimum standards that could not be modified without endangering minimum rights. A second great *impasse* thus arose because whilst it was clear that essential changes needed to be made to the Sub-Commission Text if a consensus was to be reached amongst states, indigenous representatives continued to insist that a consensus could only be built around the Sub-Commission Text, with no changes.

In the long term it was realised that some changes would have to be introduced without, however, these changes being rejected by the indigenous peoples as this would detract from the declaration's legitimacy, regardless of any consensus that might be reached amongst the state representatives. In the short term, however, a move in this direction would only be achieved through a combination of prudence and imagination. At the second session of the WGDD in October 1996, the Chairperson-Rapporteur therefore suggested an initial measure, rather bold under the circumstances, that consisted of "reclustering" the articles of the Sub-Commission Text by substantive issues to facilitate the discussion. To get an idea of how delicate this proposal was, suffice to say that this only became possible once the Chairperson-Rapporteur had given assurances that "this exercise should not be considered as a negotiation" and that "no changes would thus be made to the draft declaration" at that session.<sup>5</sup>

This initial step, however, proved very useful because, along with the reclustering, the discussion of articles was put into order by degree of difficulty. A proposal was therefore made to talk first about articles relating to issues of culture and tradition, leaving aside the issue of self-determination for the moment. This methodological proposal was to guide the work of the group to the end.

The next year, at the third session, the WGDD took another essential step towards commencing negotiations, managing to get some state delegations to

present concrete proposals for language regarding Articles 15, 16, 17 and 18, without this leading to the withdrawal of the indigenous representatives from the room, as had occurred the previous year, following a rumour that a state delegation was planning to propose amendments to the Sub-Commission Text. Just as important, or possibly even more so, was the inclusion of these proposals as an annex to the WGDD report,<sup>6</sup> as this meant that the *rolling text*, reflecting proposed amendments, so characteristic of all negotiation processes had been commenced. This was clearly understood by many of the indigenous representatives, who were firmly, but unsuccessfully, opposed to this inclusion.

At the same time, this session ended on a positive note, Articles 43 and 5 of the Sub-Commission Text being adopted without amendment, as the indigenous representatives desired. Many people were of the opinion that articles needed to be adopted in order to demonstrate that progress was being made, and so this action breathed new life into the process. This was only possible, however, because these two articles were the only ones in the Sub-Commission Text that did not contain the word “peoples”. We would therefore have to wait until the end of the process in 2006 for the remaining articles to be approved, this time en bloc.

A new step was taken at the fourth session, and this time a definitive one, towards real negotiations, as the state delegations began to hold informal consultations amongst themselves to narrow their positions, thus giving rise to a *de facto* attempted drafting, at least amongst the states. The various proposals related to Articles 15, 16, 17 and 18 from the previous year thus became unified texts, hence consolidating the rolling text.<sup>7</sup> For such progress to be made, however, the Chairperson-Rapporteur again had to give assurances that these unified texts were not a Chairman’s document or a Secretariat document, and “that the working group was not engaged in a drafting or negotiating exercise”.<sup>8</sup>

## The negotiations

At the end of the fourth session, Ambassador José Urrutia announced that he would be unable to continue as Chairperson-Rapporteur, and I was honoured to succeed him. Under his direction, great progress had been made in building the trust of the indigenous representatives, although it has to be recognised that this trust was based primarily on an understanding that we were not in a negotiation process and that the Sub-Commission Text was therefore not being amended. The challenge from now on would be to guide the work towards negotiations without, however, it being perceived as such.

This apparent contradiction was finally overcome through a combination of different factors. The nature of things had, in fact, created a division between the state delegations, on the one hand, and the indigenous representatives, on the other. This was the consequence of initial approaches whereby one group of par-

ticipants – the states – wanted changes to the Sub-Commission Text or, at least, were willing to consider them, while the other – the indigenous representatives – insisted that they could not accept any.

This consequently put the indigenous representatives in a position of passive resistance consistent with their refusal to negotiate and bolstered by a lack of state proposals reflecting true joint preferences. The indigenous representatives thus restricted themselves to expressing a willingness to study state proposals but only insofar as they reflected a shared position on the part of all states, which did not seem to be forthcoming. In view of this, it seemed clear that progress would first and foremost require state delegations to come to an agreement amongst themselves, and so the next necessary course of action was for them to narrow their differences. The work from the fifth session onwards was organised with this aim in mind.<sup>9</sup>

Indigenous representatives resisted these efforts from the start, however, because they correctly sensed that once a consensus had been achieved amongst state delegates, it would be difficult for them to avoid the Sub-Commission Text being amended, not so much because of the strength of the possible state proposals but rather because of the visible difficulties the indigenous caucus was having in producing alternative proposals.

To tone down this resistance and maintain the necessary trust with which to move forward, the indigenous delegations had to be given some assurances. The first consisted of reminding them that any consensus that was reached would necessarily require their involvement. The second was that any possible changes to the Sub-Commission Text would have to meet three conditions: be essential; and hence minimal; and improve the text.

On this premise, clear progress began to be made from the fifth session onwards in terms of ironing out the differences between the state delegations' positions. And, each year, the rolling text contained in the annexes to the report included new articles and fewer differences each time. As can be seen from these reports, the differences were being narrowed to such a point that, in many cases, a state consensus was being reached around language that was identical, or at least very similar, to the original draft.

The report of the tenth session, in 2004, clearly reflected this situation.<sup>10</sup> It also reflected a degree of progress that enabled me, as Chairperson-Rapporteur, for the first time to make proposals that, in my opinion, could form a basis for consensus around those articles still outstanding. These Chairman's proposals, as they were called, had a number of aims. On the one hand they sought to facilitate the reaching of an agreement at the next session, which it was thought might be the last (as in fact it was, although not for the reasons we had imagined).<sup>11</sup> Moreover, by systematically presenting the progress that had been achieved, I wanted to provide a tool that would favour a renewal of the WGDD's mandate, something which - at this point in the process - did not seem an easy task. And finally,

the proposals were intended to send a message of confidence to the indigenous representatives, in the sense that if a consensus were not achieved, my intervention would be in favour of wording that was as close as possible to that of the Sub-Commission Text.

### **The final *impasses***

The eleventh session, in 2005, began under great pressure to reach an agreement on all outstanding issues. Given the good results of the previous year, work was organised in the same way as before, namely dividing the discussion into two broad areas: on the one hand, the most sensitive issues, such as self-determination and lands, territories and resources; on the other, the remaining articles, on which enormous progress had now been made. With the Norwegian delegation facilitating, we managed to end the session with 16 preambular paragraphs ready for adoption, and 21 articles.<sup>12</sup> In contrast, the articles that did not form part of this facilitation process now represented the final *impasses*. Let's take a look at how they were resolved.

Given the lack of agreement on certain fundamental articles, at the end of the session, I informed the WGDD that I would present a revised version of my proposals from the previous year.<sup>13</sup> The task, fortunately, was quite clearly demarcated, not only because it was limited to certain articles but, above all, because the discussion of those articles had progressed to such a point that there were few clear options left. Thus, for example, it was not difficult to opt for paragraph 6 to the Preamble in its original form, or for paragraphs 13 and 15a as they arose from the consultations.

The greatest difficulties lay in the operative part, starting with the issue of the right to self-determination, as stated in Article 3 of the Sub-Commission Text. It was common knowledge that this had been a key issue from the start and that consensus would not be possible without this right being qualified in some way. On the other hand, it was also clear from the start that Article 3 could not be subject to any amendment. Consequently, my proposal consisted of maintaining Article 3 in its original wording whilst adding in an Article 3a based on the text from the consultations, opting for the least-limiting alternatives.

In all other respects, this Article 3 had to be read in conjunction with Article 45, which was of general application to the whole draft, and established the criteria by which the Declaration's provisions should be interpreted. The understanding was that this Article 45 had to address the concerns of those delegations that were calling for express assurance that indigenous peoples' exercise of the right to self-determination would not come into conflict with the principle of respect for the territorial integrity of states. I have to admit that, by this time, few indigenous representatives were still firmly opposed to this clarification. How-

ever, I chose not to expressly incorporate this reference to territorial integrity, in view of the final negotiations that clearly still had to take place either in the WGDD, in the Human Rights Council or, as was finally the case, in the General Assembly (the UNGA). It seemed to me that some countries would be so taken up with efforts to include this reference in the draft that other issues of greater concrete value would be left untouched, such as the chapter on lands and territories. The way events panned out in fact confirmed my assessment of this.

Another issue that was clearly sensitive from start was the scope of the declaration's application, in other words, how "indigenous" was to be defined. Article 8 of the Sub-Commission Text thus envisaged self-identification as the means by which to determine who was or was not indigenous. This criterion met with serious resistance from many states, however. Curiously, a debate that started off as an impassioned one became watered down over time, to the point where - in the final sessions - nobody even raised the issue, thereby sending a clear message: attempts to find a definition were succumbing to the complexity of the issue,<sup>14</sup> and precedent indicated that a declaration of this kind was possible without a definition.<sup>15</sup> The natural solution was therefore to remove this definitional article from the draft.

The Chairman's proposals also removed Article 11, on situations of armed conflict, from the draft text. This article was, in fact, insufficiently discussed so we were still far from reaching a consensus. It was not clear that the declaration would lose anything essential without it, given that international humanitarian law is in itself applicable to indigenous peoples affected by armed conflict.

Nor was any consensus reached on the issue of redress. Of the alternatives proposed for Article 12, I therefore opted to recognise the state's obligation of redress, rather than an obligation to provide mechanisms for it, as various delegations had been suggesting, insofar as the right recognised had to be redress and not merely access to mechanisms, which would not necessarily guarantee any result. The same approach was taken with Article 21.

Given its possible implications then, Article 20 (Article 19 in the Declaration as adopted by the UNGA) contained another of the most sensitive issues: the need for free, prior and informed consent of indigenous peoples before taking any decisions affecting them. Put simply, it was a question of establishing whether the declaration could recognise a right of veto in relation to state action or not. My assessment was that the WGDD could not accept this, neither for practical reasons nor reasons of principle. In practical terms, the state could not renounce either its powers or its responsibility when taking decisions on issues of public order. And, in principle, the declaration could not recognise indigenous peoples preferential or greater rights than those granted to other members of society, as would be the case with a right of veto. The Chairman's proposals therefore established only an obligation regarding the means (consultation and cooperation in

good faith with a view to obtaining consent) but not, in any way, an obligation regarding the result, which would mean having to obtain that consent.

Proposals for the remaining articles on land, territories and resources also drew on this same logic of finding a balance between practice and principle. Article 25 therefore did not include a right to the material relationship between indigenous peoples and their lands but focused only on the spiritual aspect. Article 26 was reordered so that a right “to lands, territories and resources” was first established before going on to describe the content of this right in terms of possession, use and control of the lands. As regards the mechanisms that the state should establish for recognising these rights, I opted for a more flexible alternative, namely one whereby such mechanisms should respect indigenous traditions without necessarily having to adapt to them. Article 26a specified the scope of this idea, recognising the right of indigenous peoples to participate in this process.

For Article 27 (Article 28 on the Declaration as adopted by the UNGA), the Chairman’s proposals focused on the collective dimension of the right to restitution. For this, as with Articles 12 and 21 (Articles 11 and 20 respectively in the Declaration as adopted by the UNGA) on redress, the proposal recognised first and foremost that the right is one to restitution and not simply to access mechanisms for restitution. In a pragmatic way this proposal put restitution into perspective as the main form of redress. The second paragraph of the article was consistent with this approach, having added other methods of redress, such as financial compensation, to the original text.

The Chairman’s proposals included the most direct and realistic formula for Article 28 (Article 29 of the Declaration as adopted by the UNGA). On the one hand, it fully recognised the right to conservation but not to restoration of the environment, given the unviability of this. It also established the state’s responsibilities directly (*shall*), and not in conditional terms, as had already been agreed for the rest of the article. In relation to the state obligation to consult with indigenous peoples before undertaking military activities on their lands in Article 28a (Article 30 of the Declaration as adopted by the UNGA), I omitted the reference to respect for human rights, it being understood that this omission would in no way affect the states’ obligations in this regard. In Article 29 (Article 31 of the Declaration as adopted by the UNGA) I deleted the reference to indigenous peoples’ “collective” intellectual property, which, in this context, did not seem essential. Instead, I included a reference to their right to “control” their intellectual property, traditional knowledge and traditional cultural expressions. Article 29 did not include the concept of special measures, which could be considered as covered in the expression “effective measures”, which was included. Finally, for natural consistency, I used similar language in Article 30 to that of Article 20 on prior and informed consent.



The other outstanding articles presented no great difficulties and the alternatives retained were those which, in the light of the opinions expressed in the consultations, had the greatest possibility of obtaining a consensus, as in the case of Article 36 (Article 37 of the Declaration as adopted by the UNGA) on treaties, in which the proposal presented by the facilitators was maintained. In Article 39 (Article 40 of the Declaration as adopted by the UNGA) the expression “other parties”, rather than third parties, seemed more viable in connection with conflict resolution, at the same time using language similar to that of Article 26 (Article 27 of the Declaration as adopted by the UNGA) with regard to indigenous traditions to be taken into consideration when resolving these conflicts.

## Postscript

In the way that has been described, we therefore ended up with an integral document that had a significant number of articles already agreed and others close to consensus, for which I formulated some proposals to present to the Human Rights Council. The aim of these revised Chairman’s proposals was to enable a comprehensive and integral interpretation of an alternative to the Sub-Commission Text, and which would include the necessary balance for achieving a consensus or, at least, for making it acceptable to the majority. This is why it was announced as a compromise text.<sup>16</sup>

As we now know, this compromise was in the end not adopted by consensus in the WGDD, which never met again, nor in the newly-created Human Rights Council, for which reason it had to go to a vote. What were, up until then, the Chairman’s proposals were thus approved following a vote in the Human Rights Council, thereby becoming the HRC Draft Declaration. This vote, although not desirable, was neither unforeseen nor damaging. In the end, the vote had a positive effect by preserving the achievements of 11 years of work whilst at the same time replacing the Sub-Commission Text, once and for all, with something more viable.

This viability could be seen in the last stage of the process, which took place during the 61st session of the UNGA in 2007. As had been anticipated, there was a final negotiation, which meant incorporating some small amendments into the HRC Draft Declaration, essentially - and as anticipated - a reference to the territorial integrity of states. It was thus again put to the vote, being adopted by the UNGA with only four votes against.

We can always wonder whether these *impasses* could have been overcome with a consensual text. Although I do not rule it out, I sincerely do not believe that they could, at least not in the short term, given the nature of the difficulties some delegations had. In any case, it is no longer of any importance. A unique opportunity to obtain a declaration presented itself and we were able to make the



most of it. I am convinced that, in time, this Declaration will take its place as one of the universal human rights instruments, the major example of which, the Universal Declaration of Human Rights, let us not forget, was also adopted by means of a vote. ○

## Notes

- 1 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities "Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples" UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 2 UN ECOSOC "Establishment of a Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214" Resolution 1995/32 (25 July 1995), authorised the participation of interested indigenous organisations on the basis of rules 75 and 76 of the rules of procedure of the functional commissions of ECOSOC.
- 3 Most of the states that have ratified ILO Convention 169 were, and still are, in Latin America.
- 4 Mexico and Guatemala are good examples in this respect.
- 5 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214, Report UN Doc E/CN.4/1997/102 (1997), para 18.
- 6 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214, Report UN Doc E/CN.4/1998/106, Annex I (1998).
- 7 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214, Report UN Doc E/CN.4/1999/82, Annex I (1999).
- 8 See *Ibid*, para 80.
- 9 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214, Report UN Doc E/CN.4/2000/84 (2000) para 24.
- 10 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214, Report UN Doc E/CN.4/2005/89/Add.2 (2005).
- 11 The working group was created with the mandate to elaborate a draft declaration during the first international decade of the world's indigenous people, which ended in 2005. This objective was not achieved, for which reason the working group's mandate had to be extended for one further year. In 2006, however, despite some issues still not having been resolved, a second extension was not possible given that the Commission on Human Rights no longer existed and had been replaced by the Human Rights Council.
- 12 See UN Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 Report, UN Doc E/CN.4/2006/79 (2006), para 25.
- 13 *Ibid*. para 28.
- 14 Cf: Martinez Cobo "Study of the Problem of Discrimination Against Indigenous Peoples" UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983).
- 15 The Declaration on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities has no definition of the subjects of the rights therein recognised.
- 16 Above n 13, para 30.



# THE HUMAN RIGHTS COUNCIL'S ADOPTION OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES<sup>1</sup>

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Luis Alfonso de Alba\*

## Introduction

At its first session, on 29 June 2006, the Human Rights Council adopted the UN declaration on the rights of indigenous peoples (the HRC Text) by 30 votes to 2 with 12 abstentions.<sup>2</sup> More than a year later, after long and complex negotiations including amendments, the Declaration was adopted by the UN General Assembly (UNGA) by 143 votes to 4, with 11 abstentions (the UN Declaration).<sup>3</sup>

The first session of the Human Rights Council was historic not only because it replaced the Commission on Human Rights, which had been in existence for almost six decades but, above all, because of the kind of decisions it took. They marked out the direction of the new Human Rights Council, which lies at the heart of the international human rights system.

With the adoption of the HRC Text, the Human Rights Council, which I had the honour to chair in its first year, took a very important step towards consolidating and positioning itself in preparation for the institutional reform required by UNGA Resolution 60/251 establishing the Human Rights Council and abolishing the Commission on Human Rights, a subsidiary body of the Economic and Social (ECOSOC) (170 states voted for, 4 states against (Israel, the Marshall Islands, Palau and the USA), with 3 abstentions (Belarus, Iran and Venezuela).<sup>4</sup> The Human Rights Council brought in a transformation in the international system for the protection and promotion of human rights

This chapter contributes to the analysis and promotion of the UN Indigenous Declaration by describing its adoption at a very specific moment in the history of the UN, during the transition from the Commission on Human Rights to the Hu-

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man Rights Council. I take September 2005 as my starting point, even though the declaration negotiations did, in fact, commence almost 20 years earlier. There are a number of reasons for this approach. Firstly, the second Summit of Heads of State and Government, held on 14 - 16 September 2005, approved the creation of the Human Rights Council responsible for: promoting universal respect for the protection of all human rights and fundamental freedoms; studying situations of serious and systematic human rights violations; and promoting effective coordination and the inclusion of human rights into the general activity of the UN system, amongst other things.<sup>5</sup> Secondly, the Heads of State and Government reaffirmed their commitment to present the final draft of a “UN Declaration on the Rights of Indigenous Peoples” for adoption as soon as possible.<sup>6</sup>

## Background

The responsibility for concluding the negotiations between indigenous peoples and states for the HRC Text fell to Luis Enrique Chávez, the Peruvian Chairperson of the Commission of Human Rights Working Group responsible for elaborating the declaration (the WGDD). In March 2006 Mr Chávez presented a compromise text to the 62nd session of the Commission on Human Rights, the chair of which was then held by Manuel Rodríguez Cuadros, also from Peru. Peru was also the state that was to present the draft resolution on the UN declaration on the rights of indigenous peoples to the Commission on Human Rights (and later the Human Rights Council). I highlight here the main stages from this point.

After the Working Group on Indigenous Populations (WGIP) had finalised a text on the draft declaration on the rights of indigenous peoples, approved by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission Text),<sup>7</sup> the Commission on Human Rights established the WGDD with the sole purpose of elaborating a draft declaration, considering the Sub-Commission Text, for its examination and approval by the UNGA during the International Decade of the World’s Indigenous People.<sup>8</sup> The ECOSOC ratified the Commission on Human Rights Resolution 1995/32 in 25 July 1995.<sup>9</sup> Over the course of its existence, the WGDD had two Chairperson-Rapporteurs, José Urrutia and Luis Enrique Chávez, both Peruvian.

A number of factors led to the completion of the WGDD negotiations, largely corresponding to temporal circumstances, including looming deadlines. As will be recalled, the completion of negotiations and approval of a declaration was a priority of the International Decade of the World’s Indigenous People, as established by the UNGA, which ended in 2004.

In 2004, during the 10th session of the WGDD, Australia, New Zealand, Norway and Switzerland, among others, presented a set of proposals that led to the withdrawal of support for the Sub-Commission Text unamended (including that

of the Chairperson of the WGDD himself). In addition, after 10 years of stagnation, Chairperson Chávez asked the Guatemalan and Mexican delegations, whom he identified as being the most reluctant to accept changes to the Sub-Commission Text and hence closest to the indigenous caucus, to negotiate a group of articles in the declaration. This combination of events, along with the trust that the indigenous peoples' representatives had in the Guatemalan and Mexican delegations, enabled the necessary flexibility to be found, both among the states and the caucus, to finally overcome the "impasse" in the adoption of various articles.

The involvement of Xóchitl Gálvez, the head of the Mexican National Commission for the Development of Indigenous Peoples (CDI), undoubtedly strengthened the capacity of the Mexican delegation to interact both with the state and indigenous delegations, particularly given that at the end of the 10th session the idea was fielded of an informal meeting at which fundamental issues relating to the declaration could be openly and frankly discussed. This was to lead to the Pátzcuaro workshop (Pátzcuaro Workshop), which drew its inspiration from the meeting of the Group of Friends for UN Reform hosted by the Mexican government in June 2005, to discuss reform of the UN's human rights institutions.<sup>10</sup>

Other factors also exerted pressure on the WGDD to adopt a declaration text expeditiously. For example, a split within the indigenous caucus became apparent at the April 2005 session of the Commission on Human Rights. On the one hand, some indigenous representatives sent a letter to the Chairperson of the Commission requesting that the Sub-Commission Text be adopted so as not to dilute the minimum standard of rights it represented. Were this not possible, these representatives requested a pause in the WGDD's negotiations to provide an opportunity for a reassessment of positions and restructuring of discussion, given the poor progress in the negotiations at that point, thus challenging WGDD Chairperson Chávez. Rumours spread in the corridors of the possibility of an indigenous co-Chair. On the other side, a significant proportion of indigenous representatives were questioning the merit of the postponement strategy as many indigenous groups had not been consulted on it, and there would be a serious risk, if the negotiation process were interrupted, that it might not be resumed.

Another far more decisive factor in the late 2004/early 2005 period was the negotiation, in the context of the 61st session of the Commission on Human Rights between 14 March – 22 April 2005, on the future of the WGDD.<sup>11</sup> The crucial issue in the corresponding resolution, sponsored by Canada, was whether an extension of the WGDD's mandate would be successful in concluding the declaration before the 62nd session of the Commission in 2006, or as soon as possible. Guatemala and Mexico supported an extension of the WGDD's mandate, requesting a further six weeks of meetings over two years with a programme of work, including deadlines for the adoption of articles and new and dynamic methodology, to achieve a speedy adoption of a declaration. This proposal mirrored that of the UN High Commissioner for Human Rights in her final report on

the first International Decade.<sup>12</sup> The United States and Australia expressed their wish that the WGDD complete the declaration before the 62nd session in early 2006.

As an alternative proposal, Mexico suggested reintroducing the Resolution by which the UNGA had established the Second International Decade on the World's Indigenous Peoples calling on the states to undertake their best efforts to successfully fulfil the WGDD's mandate and present for adoption, as soon as possible, a final version of the declaration.<sup>13</sup> Immediately afterwards, it was recommended that the WGDD meet for 10 days prior to the Commission on Human Rights's 62nd session, and the Chairperson-Rapporteur was invited to consult with the Office of the UN High Commissioner on Human Rights to convene additional meetings of the WGDD to facilitate the negotiations. Many delegations were able to accept this proposal, with the exception of the United States of America, which added that it would present an amendment with its proposal and that, should this not be accepted, it would call for a vote on the resolution as a whole and would abstain, which is in fact what happened.<sup>14</sup>

This is important because, with the declaration close to being adopted, the states that were requesting more time to complete the negotiations, both in the Human Rights Council and in the UNGA, were precisely those who had been placing more time restrictions on the WGDD and hence more pressure on the negotiation process in the Commission on Human Rights.

The negotiation process for the declaration had a very particular logic, not only because the issue was in itself complex, diverse and multi-faceted, relating to historic processes that went back far beyond recent colonisation, but also because it was conducted in cultural and legal settings that prevented a full understanding of the "otherness" of indigenous peoples. We also have to remember that the indigenous peoples' involvement in the context of the UN negotiations was *sui generis* given that states and indigenous peoples were placed virtually on an equal footing. A declaration (not legally binding but morally obligatory) that did not enjoy the approval of the indigenous representatives would be devoid of meaning. This aspect is key to understanding the outcome of the process.

Initially, there were not really any true negotiations in the WGDD given that the position of the indigenous peoples and of some states was to maintain the Sub-Commission Text intact, refusing to alter "even a comma" as if it were some kind of canon. In this regard, however, we must take into account the historical reasons that led indigenous peoples to doubt and mistrust the negotiations with states. However, if the objective had been *not* to have a declaration, then the "no change" position was undoubtedly the best path. It should be recalled that, in 10 years, only two articles had been adopted *ad referendum* by the WGDD: recognition of indigenous peoples as citizens of their countries; and the equality of men and women. This did not mean that substantive discussions had not taken place or that proposals aimed at achieving a consensus had not been suggested: on the

contrary, a large number of proposals were considered, some of which were taken up by the Chairperson-Rapporteur at the end of the negotiation process.

Meanwhile, it was at the 2005 World Summit that Heads of State and Government manifested their decisive political commitment to indigenous rights, as paragraph 127 of the Final Document clearly shows:

*We reaffirm our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them, and to present for adoption a final draft UN declaration on the rights of indigenous peoples as soon as possible.*<sup>15</sup>

Although the term “indigenous peoples” had already been used in other international instruments, such as ILO Convention No. 169 on Indigenous and Tribal Peoples of 1989 (ILO Convention 169) and the Durban Declaration and Programme of Action of 2001,<sup>16</sup> the use of the term “peoples” in the Sub-Commission Text attracted unprecedented political importance and general support because it was not qualified as in the aforementioned texts (potentially authorising Indigenous peoples’ self-determination). Indeed, I focused on the question of “peoples” during my involvement in the Pátzcuaro Workshop, which I will refer to further on, which cleared the way to resolving the outstanding issues in the declaration without further delay. These related primarily to Article 3, the central and core issue of the Declaration, as it recognises indigenous peoples as “peoples”, and thus their right to self-determination, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development.

These factors provided the basis for obtaining a general, although not complete, understanding amongst the WGDD members in 2004 and 2005, including its Chairperson Chavez, that time had run out for revising the declaration drafts. More negotiations, after 21 years, would add nothing significant and, on the contrary, would run the risk of losing support along the way. Obviously, this is still the subject of much controversy, and others may well believe that discussions on the Declaration’s content should have continued with the risk, in my opinion, of going on *ad infinitum* and achieving nothing.

It was in this context that the Pátzcuaro Workshop was held from 26 to 30 September 2005 under the auspices of the Mexican government and in coordination with the Office of the UN High Commissioner for Human Rights. This Workshop was to play a decisive role, particularly in the light of the way in which the 10th and penultimate session of the WGDD from 29 November to 3 December 2004 had come to an end, caused in part by: the opening up of the possibility of negotiating certain parts of the Sub-Commission Text; the lack of time for achieving greater agreement among the parties; a hunger strike on the part of some

civil society organisations dissatisfied with the results and working methods; and a great schism in the indigenous caucus with regard to the future of the document under consideration.

The Pátzcuaro Workshop was organised under the leadership of Xóchitl Gálvez to whom, as previously mentioned, credit must largely go for the success of this final stage of negotiations. The Workshop was designed neither as a negotiation to replace the WGIP nor as a parallel forum. Its main objective was to contribute informally to the discussions on fundamental issues in the draft declaration, namely: self-determination; lands, territories and resources; and the general provisions. Around 90 government representatives, specialists from the main indigenous regions of the world, non-governmental organisations (NGOs), along with different academics and then Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, attended. The Workshop facilitated a frank and sincere exchange of different opinions that led to a better understanding of the different positions taken by states and indigenous peoples and to ideas on how to narrow them to produce a strong and dynamic declaration on the rights of indigenous peoples.

Conducting this dialogue in an informal arena, outside the rigid format of the Geneva negotiations, gave the WGDD a breath of fresh air. The Pátzcuaro Workshop discussions led to a different approach to the issue. The state, indigenous and NGOs were able to express their doubts and concerns more freely and openly, along with their positions. At the end of the day, the participants realised that there was more agreement than disagreement amongst them and that, with effort, it would be possible to find the necessary solutions to reach a compromise.

## **Final negotiations in the WGDD**

The eleventh and last session of the WGDD was held in two meetings from 5 to 16 December 2005 and from 30 January to 3 February 2006 and, unlike in previous years, was imbued with a positive atmosphere, perhaps presaging the need to impose a “new culture” on human rights work. At this session, there were still intense debates on: the meaning of “self-determination” in the context of the autonomy exercised by indigenous peoples; on the scope of the meaning of “lands and territories” in the context of nation states and the agrarian and cultural dimensions of indigenous peoples; and on cross-cutting issues such as the rights of women, children, third parties, and particularly on the apparent dichotomy between collective rights and individual rights. However, the last two sessions of the WGDD were able to refine the wording of key articles (e.g. Preambular Paragraph 18a and Articles 1, 2, 26, 27, 31 and 45) to achieve consensus around a whole document that would, in the end, be approved by the Human Rights Council.



The biggest conflict arose between Mexico and New Zealand. New Zealand presented, along with Australia and the United States, a proposal to amend Article 3 on self-determination, an article that reproduces the provisions on self-determination in the international human rights covenants. However, in Pátzcuaro, it was clear that neither the indigenous caucus nor the states promoting the declaration would accept changes to this. Immediately after the proposal for Article 3 amendment was submitted to the session, Chairperson Chavez tried to defer its consideration of the matter on the basis that it had been circulated only in English. I found myself forced to indicate that we did not need a translation to express our absolute rejection of the proposal and that, if we did not all show a will to come together around the text via the path of consensus, the option always remained of submitting the declaration to a vote so that the majority could express its wish. This conflict forced us to redouble our efforts to maintain a constructive environment for the rest of the session, which strengthened Chairperson Chavez in his role as mediator.

I think the most important aspects of those weeks were: the tacit acceptance of the Chairperson's draft as a basic working document; a willingness on the part of both states and indigenous peoples to negotiate; and the preliminary adoption of more than 25 preambular paragraphs and 35 articles of the declaration, through an open and informal subsidiary WGDD working group headed in exemplary fashion by the Norwegian delegation (a country that had played a decisive role in previous sessions and which had helped to extricate the WGDD from its previous stagnation).

This was possible largely because the indigenous representatives considered the text presented by the Chairperson to be acceptable since it largely reiterated the Sub-Commission Text, and even improved on it. In this context, the Latin American indigenous caucus played a key role in achieving a flexible position and in favour of moving the negotiations forward within the indigenous caucus, using well-founded legal arguments.

The Chairperson of the WGDD had stated that he would revise his text of the declaration to include February's work. Based on that, a number of states and indigenous representatives believed that this result would be submitted to the next session of the Commission on Human Rights for action. An atmosphere aimed at completing the negotiations as quickly as possible was created.

Some difficult issues still remained, however. The collective nature of indigenous rights, for example, was an issue about which a number of delegations from the Western group had problems, particularly France and the United Kingdom. Another issue was that of self-identification when determining the "identity" of members of indigenous peoples. Australia, the United States, the Russian Federation and New Zealand repeated their intransigent position on self-determination, attempting to clearly limit it to internal autonomy. They also insisted on establishing explicit guarantees in the operative part regarding the territorial integ-

rity and political unity of states. The members of the Group of Latin American and Caribbean Countries (GRULAC), along with the European Union, were trying to address their own concerns through constructive proposals that would enable an agreement and thus progress to be made with the indigenous peoples' representatives.

At the end of the 11th session, the Chairperson of the WGDD decided to submit his proposal for a draft declaration (the WGDD Text) to the March 2006 62nd session of the Commission on Human Rights. This was aided by the fact that Peru, as noted, also held the Chair of the Commission on Human Rights, which enabled the most to be made of the WGDD's efforts.

### **From the Commission on Human Rights to the Human Rights Council**

In principle, the WGDD Text had to be considered by the Commission on Human Rights. However, there was some uncertainty resulting from the process of reform of the Commission, and a lack of clarity over the format of the March 2006 62nd session given the imminent establishment of the Human Rights Council.

Against the backdrop of the transition from Commission to HRC, there was a serious risk that Chairperson Chavez' text might not obtain sufficient support either from state or indigenous representatives. There was the possibility, for example, of the Commission on Human Rights embarking upon a highly complex process of amendments and sub-amendments to the WGDD Text or authorising an additional final session of the WGDD. However, everyone knew that the "rubber band" had been stretched to breaking point and now all it could do was spring back or snap. That, or the Commission could have "put the text on hold", freezing it for a few years, before re-commencing the negotiations once again. This last scenario could have signalled the end of the declaration.

The 62nd session of the Commission was to be its last. Just a few days before it was due to start, there was still no clarity on dates, format or agenda, nor with regard to what needed to be decided from 13 March 2006, when the work was to start, given that the negotiations to establish the HRC in New York had still not come to an end.

In New York, not only was there no clarity on the future of the Human Rights Council, there was also no clarity on how issues would be transferred from the Commission to the HRC without creating a human rights protection gap, or on the nature of this new body. In Geneva, the states were discussing the organisation of work for the 62nd session of the Commission on the basis of whether the Human Rights Council would be established, or not, although the discussions primarily revolved around the first eventuality. In general, there was a tendency towards favouring a short procedural session. The Asian and African Groups were in favour of this idea, without a session for special procedures and without

adopting the recently-negotiated draft *Convention for the Protection of All Persons from Enforced Disappearance* (draft Convention on Disappearances). The European Union was also leaning towards a procedural format but was in favour of adopting the Convention on Disappearances, along with the WGDD Text. Meanwhile, although accepting the idea of a short session, GRULAC insisted (with the support of the Chairperson of the Commission) on a substantive session that would enable both the draft Convention on Disappearances and the WGDD Text to be adopted. GRULAC also sought recognition of the almost 60 years of Commission contributions to standard setting, starting with the adoption of the Universal Declaration of Human Rights. When the time came, GRULAC was to deplore the fact that no action was taken on these the draft Convention on Disappearances and the WGDD Text.

One of the distinctive features of this final session was the lack of preparation of virtually all players involved in the Commission, given that everything depended on the negotiations in New York. In Geneva, states were aware that those negotiations could conclude on 15 March were the President of the UNGA to decide to submit his draft resolution establishing the Human Rights Council to a vote on that day. This is in fact what happened, given the United States of America's refusal to join the consensus. State delegations and NGOs were required to improvise and exercise great flexibility over this time.

Various scenarios were considered for what was to be the last session of the Commission on Human Rights. On the one hand, a favourable decision in the UNGA establishing the Human Rights Council would help to improve the parliamentary atmosphere in the Commission, which would change the Commission's traditional agenda. The holding of a two-week session instead of the six traditional weeks might have also been possible, with the transmission to the HRC of all non-urgent or finished business.

To assist the process, most of the Geneva NGOs were in favour of encouraging a positive atmosphere around the establishment of the Human Rights Council, leaving aside for the time being their – primarily national – priorities. However, complications in the UNGA with regard to the way in which the vote should take place, or a possible postponement of the decision, were significantly undermining the atmosphere in Geneva. In addition, it was to be expected that the issues around which there was traditionally polarisation would be present in the debate: the Middle East, along with religious intolerance and defamation, given the now-famous recently-published cartoons; Guantanamo; and the situation in Darfur, to name but a few.

As stated, the work of the 62nd session of the Commission on Human Rights was supposed to start on 13 March. That day, Ambassador Rodríguez Cuadros, Chair of the Commission, gave a brief intervention, as previously agreed. He indicated that the whole human rights system was in an exceptional situation given the negotiations around the establishment of the Human Rights Council in New

York even though, regardless of these negotiations, the Commission had responsibilities and mandates to fulfil. Then, in accordance with Article 48 of the ECOSOC Rules of Procedure, the President declared the meeting suspended and indicated that work would recommence on Monday 20 March. Intensive consultations immediately commenced regarding different agendas, formats and proposals for the duration of the 62nd session.

Finally, on 15 March 2006, by means of Resolution 60/251, the UNGA created the Human Rights Council, thus replacing the Commission on Human Rights.<sup>17</sup> That same day, intense activity took place on the part of NGOs and indigenous peoples' representatives involved in the adoption process of the WGDD Text. Via letters and press releases, they expressed their support for the adoption of the declaration at the 62nd session of the Commission on Human Rights and called on various states, including Mexico, to do all within their power to ensure that the text be urgently adopted by the Commission and thus transferred to ECOSOC and on to the UNGA.

This was all very encouraging and positive given that, initially, the indigenous peoples had expressed their reservations with the text proposed by Chairperson Chavez.<sup>18</sup> At that time, the WGDD Text was gaining significant support from indigenous peoples and was also beginning to acquire the support of the EU and GRULAC countries. But it was also known that Australia, New Zealand, the Russian Federation and the United States of America had serious problems with it. Canada was later to express its clear disagreement with the WGDD Text.

Nevertheless, the wheel was still turning in favour of the adoption of the declaration. That week, GRULAC repeated its position in favour of a substantive Commission that could closely examine the instruments produced by the working groups, and that it was ready to adopt the WGDD Text and the draft Convention on Disappearances. On the basis of this commitment, GRULAC, like the other regional groups, joined the proposal for a short 62nd session of the Commission. Although the Western Group did not have a common position, the European Union was now in favour of adopting the WGDD Text and the Convention on Disappearances.

In accordance with Resolution 60/251 establishing the Human Rights Council, the ECOSOC was required to adopt a resolution to provide for the continuation of the Commission's special procedures and working groups during the transition period, before the HRC could take any decisions. ECOSOC was in a position to request, by resolution, that the special procedures' reports be referred to the HRC.

The Commission's meetings were suspended until Monday 27 March 2006 to await the requisite ECOSOC decision. Meanwhile, state delegations and NGOs were expressing their increasing dissatisfaction - if not their open concern - with the confusing way in which events were taking place, as the days went on, given that Ambassador Rodríguez Cuadros, Chair of the Commission, could not get his

proposed agenda accepted, including consideration of the WGDD Text. Most of the delegations now considered it inevitable that the Commission's final meeting would be simply procedural, with statements made only by the Chairs of the 61st and 62nd Commission sessions and the High Commissioner.

Given the urgency of ECOSOC coming to a decision on the appropriate process for the consideration of reports of the Working Groups on the the Convention on Disappearances and the WGDD Text, some states sought to have ECOSOC resolve to itself consider those reports them. While this alternative, to have these two instruments adopted through ECOSOC, gained wide support from GRULAC and virtually all members of the European Union, its progress was hindered by opposition from other groups.

On 22 March 2006, ECOSOC finally approved Resolution 2006/2 (Implementing UNGA Resolution 60/251). While recalling Resolution 5(1) of 16 February 1946 creating the Commission, other resolutions relevant to the Commission's mandate and Resolution 60/251 of the UNGA establishing the Human Rights Council, it guaranteed only two things: to conclude the work of the Commission at its 62nd session, which had to be "short and procedural", submitting its final report to the HRC; and to abolish the Commission on 16 June 2006.

All the negotiations that had taken place up to the third week of March became even more complicated as a result of the lack of direction from the ECOSOC. Difficulties prevailed in reaching an agreement on the session's agenda, which ended in a modest programme for winding up the Commission that lasted no longer than 3 hours. In addition, there was an uncomfortable feeling amongst many given the lack of recognition given to the Commission for its 60 years of work, and its enormous contributions, including the Universal Declaration of Human Rights.

The 62nd session of the Commission came to an end on 27 March in an atmosphere of solemn protocol. In addition to concluding the work for that period, it formalised the end of the Commission. The wide attendance of governmental delegations, NGOs and press contrasted with the lack of action on substantive matters and the few interventions allowed, limited to the outgoing and incoming Chairs of the Commission, the High Commissioner for Human Rights, the five coordinators of the various UN politico-geographic regions and a very brief NGO statement.

GRULAC took the opportunity, as previously noted, of indicating its deep dissatisfaction and concern with the process that had led to a Commission session devoid of substance that took no action, with no apparent reason, either on the draft Convention on Disappearances or on the WGDD Text. GRULAC also dissociated itself from the Commission's Resolution bringing the Commission's work to a close, indicating that it would not request a vote on the Resolution on the understanding that the first meeting of the Human Rights Council would be substantive. GRULAC emphasised that adopting the Convention on Disappear-

ances and the WGDD Text at the Commission's final session would have sent a positive message and would have been a worthy culmination of the Commission's work. Thus the Commission came to a close, and the first session of the Human Rights Council drew near, amidst significant responsibilities and with high expectations.

Given the situation, it was important to take a proactive attitude in favour not only of the new Human Rights Council but also the Commission's achievements, one of which was drafting the WGDD Text. Some states were supporting the draft Convention on Disappearances, others the WGDD Text. In this way, a strategic alliance was established that, in the end, was effective: uniting forces around both instruments and supporting the approval of the both together at the first session of the Human Rights Council.

A press conference was held on 29 March 2006 on the WGDD Text and the Convention on Disappearances. The ambassadors of Argentina, Belgium, Chile, France and Spain participated, as well as myself, representing Mexico. Similarly, representatives of the International Committee of the Red Cross, Amnesty International, the International Commission of Jurists and the International Human Rights Federation participated, together with correspondents from various media organisations including Reuters, the BBC, EFE, Voice of America and La Jornada.

This press conference marked the beginning of a campaign to promote the adoption of a Convention on Disappearances and WGDD Text at the first session of the Human Rights Council and in the UNGA that same year, given the impossibility of this happening within the Commission or ECOSOC. The fundamental nature of the two instruments - promoting and protecting human rights - was highlighted. All regions were invited to join this important effort.

It was stated that the WGDD Text: would finally respond to indigenous peoples' historic demands; was the result of a very long negotiation process that had commenced in 1985 (in what was then the Sub-Commission and had been continued in the WGDD for 11 years); and achieved a balance between the states' and indigenous peoples' proposals. Moreover, the WGDD Text, it was said: recognised an historical legacy and established a series of measures to ensure the preservation, existence and development of indigenous peoples; required the elimination of the discrimination from which indigenous peoples were suffering; and provided solutions directed at correcting historic injustices in the context of establishing new relationships between states and indigenous peoples; and reaffirmed the rights of indigenous peoples on the basis of international law principles, including their particularly vulnerable situation and the right to self-determination.

Among the contributions of different states to the negotiation process, the Pátzcuaro Workshop in 2005 was mentioned, which helped resolve the issue of self-determination in the WGDD Text. The Spanish and French ambassadors



highlighted that the European Union supported the Human Rights Council's consideration of the Convention on Disappearances and WGDD Text at its first meeting, indicating that there was no further scope for re-negotiations of the texts at the HRC or the UNGA. It was made clear that the fate of the Convention and the declaration were interwoven, that the agreement amongst the EU and GRULAC states was to keep both instruments linked in a single package. It was this linking, among other things, that enabled the WGDD Text to be adopted at the Human Rights Council's first session.

The message could not have been clearer: the negotiation process leading to the WGDD Text had come to an end after 21 years, and it was now time to take action. The decision was in the hands of states and civil society organisations that, in the end, responded responsibly given the magnitude of the approaching historic event.

It is worth recalling the "other campaign" conducted by indigenous organisations and representatives at that time, in an unusual and unsurprising but also very effective way, to counter the actions by states opposed to the declaration. This took place by means of a meeting, which I attended, on Saturday 24 June 2006. The indigenous representatives accused the opposing states of attempting to delay or even freeze action on the WGDD Text by means of procedural motions that the opposing states themselves considered contrary to the development of human rights, the so-called "non-action motion". From that moment on, the request for more time to analyse the declaration, as well as to reach greater agreement between states and indigenous peoples, was described as a non-action motion rather than one of goodwill or good faith.

## **Approval of the HRC Text**

In April 2006, efforts were made to define some of the substantive agenda points of the first session of the Human Rights Council. However, the issue of who should hold the presidency was preventing progress from being made. GRULAC felt that it should hold the Human Rights Council's first presidency, given the circumstances under which the Commission's final session had taken place, lasting less than 3 hours, although other groups considered various options.

Peru launched a campaign around the world in favour of Ambassador Rodríguez Cuadros, without acknowledging it in Geneva and despite the difficulties he had faced in bringing the Commission to a close, certainly a factor that led other groups and countries to consider that the presidency of the Human Rights Council should be held by another region. Eastern Europe, in particular, with some support from the European countries, sought - albeit unsuccessfully - to hold the presidency. Proposals, with Asian support, for the post to be decided by drawing lots amongst the five regional groups, with the winning group choosing

a candidate by consensus, fared no better. In any case, it was clear that the post was not guaranteed for GRULAC and that, if our group could not reach unanimous agreement on a candidate, it would lose the opportunity to hold the first presidency of this new HRC. Faced with this situation, on 11 May, Ambassador Rodríguez Cuadros himself proposed that Mexico should hold the post and GRULAC immediately unanimously approved this proposal. This is how Mexico became the region's candidate and was subsequently supported by the other regional groups.

On 19 May, I was elected first President of the Human Rights Council. The formal election took place on 19 June when the HRC sat for the first time. With this appointment, Mexico had the enormous responsibility of steering the international community's efforts to consolidate the establishment and ensure the operation of the new Human Rights Council. The challenge was to build a Human Rights Council capable of facing up to the challenges imposed by the international community in terms of the promotion and protection of human rights and fundamental freedoms, without any distinction.

As if by some paradox of history, the following states met during the first week of June to consider a strategy to support the adoption of the WGDD Text in the Human Rights Council's first session: Guatemala, Mexico, Peru and Spain. I then suggested that, having held the Presidency of the WGDD, it would be very important for Peru to be in a position to present the corresponding draft resolution and that I, in my position as President, would support all efforts to obtain its approval during the Human Rights Council's first session.

Peru indicated its willingness to present the resolution, and also the possibility of two "editorial changes" to the Articles 26 and 45 of the WGDD Text, although the risk of "opening up" the text was, in my view, colloquially speaking, "one of opening up a Pandora's box", with the possibility of losing the support both of states and the indigenous organisations, given that the balance reached was so delicate (it should be noted, in particular, that the "editorial" change to Article 26 was a proposal made by Canada, which was subsequently unable to maintain its commitment to supporting the adoption of the WGDD Text in the Human Rights Council).<sup>19</sup> In addition, it remained essential to maintain the close links between the WGDD Text and the Convention on Disappearances to retain the support of the European Union, particularly France and the United Kingdom. It was therefore agreed that the indigenous declaration should not be amended.

By mid-June it was well known that Australia, New Zealand and the United States were intensely lobbying against the adoption of the WGDD Text, and that Canada had had a radical change of position. Serious assessments were made of the possible consequences this might have. By then, Peru already had a draft resolution for approval of the WGDD Text and was seeking the co-sponsorship of other states. The indigenous peoples continued to support the WGDD Text and were stating that most organisations, including the UN Permanent Forum on



Indigenous Issues, were calling for its prompt approval. On 20 June, Peru organised informal open consultations on the draft resolution for the adoption of the WGDD Text; by then, seven countries had already signed up: Denmark, Guatemala, Mexico, Norway, Peru, Spain and Venezuela.

There was an extremely high level of participation from governments, NGOs and other interested parties in the first session of the Human Rights Council, and expectations of the initial work and its results were as high, if not higher than usual. This meant that the first session was extremely productive, adopting decisions of an historic nature: approval of the Convention on Disappearances and of the WGDD Text, and the creation of working groups to take on the tasks of the Human Rights Council's institution building, as stipulated by UNGA Resolution 60/251.<sup>20</sup> On 28 June, the Human Rights Council considered the report of the WGDD. Peru had already put forward a draft resolution that had around 40 co-sponsors. The Human Rights Council approved the declaration and sent it on to the UNGA for approval at its 61st session.

When presenting his report, the Chairperson of the WGDD, Luis Enrique Chávez, explained the origin of the proposals contained in his report and indicated that these were aimed at bringing positions closer together, and having the declaration adopted by consensus. He indicated that these proposals were the result of different options that had been placed on the table by the WGDD at one time or another. He stated that, after years of negotiations, it was unlikely that the most controversial aspects of the text (self-determination, land and territories and natural resources) could be approved by consensus and that there was no further room for agreement, even if more consultation time was approved. Quite simply, he indicated that the negotiations had reached their limit and the fundamental nature of the opposing players' positions on these issues was preventing any middle ground from being found. Chairperson Chávez insisted that his WGDD Text tried to incorporate the concerns of a majority of those involved in the process, both states and indigenous peoples' representatives, in a balanced and fair manner.

The atmosphere in the Human Rights Council was marked by Canada's announcement that it would be requesting a series of amendments to the draft resolution on the WGDD Text, which would delay the decision to adopt the WGDD Text until at least September. It was rumoured that Canada's strategy at the second session of the Human Rights Council would be to propose that the WGDD's mandate be extended for another one or two years. However, as noted, there had already been attempts to negotiate a similar proposal at the 61st session of the Commission, and this had been blocked by the very countries that were opposed to the declaration, and now including Canada.

A number of states and regional groups called on the Human Rights Council members to approve the declaration right away, stressing the need to respond to the historic demands of indigenous peoples in the context of a fundamental mo-

ment in history; the first session of the Human Rights Council. GRULAC championed the adoption of the WGDD Text at this first session, as did the European Union. The latter stated that although it had not been possible to reach agreement on all the articles, the WGDD Text presented was the best possible outcome. The Nordic countries also supported this intervention. The African Group called on Canada to withdraw its proposed amendments and championed the adoption of the resolution; this was the first time that this group had expressed itself clearly in this regard, although it was later to react differently in New York. China also maintained a favourable position.

Other minority positions favoured a continuation of discussions along the lines of that proposed by Canada. The most radical position was that of Australia, New Zealand and the United States of America, states that found the WGDD Text extremely problematic and described it as confusing, contrary to international law and likely to cause interpretation difficulties. The Russian Federation also continued to express reservations regarding the WGDD Text, although more discreetly.

With the exception of Canada and the Russian Federation, the other members of the HRC, including the European Union (and hence France and the United Kingdom), along with the African Group (which was to later make an astonishing U-turn in the UNGA's adoption process, following intense lobbying from the four Anglo-Saxon countries opposed to the declaration), all supported adopting the WGDD Text (thus making it the HRC Text). The debate in the room was, in any case, positive and the positions of Canada and Russia as Human Rights Council members, and Australia, New Zealand and the United States as observers, represented a clear minority that was unable to prevent the adoption of the HRC Text.

Another problem arising at the last moment was the rumour, which unfortunately turned out to be true, that Argentina would be the only GRULAC country not to vote in favour of the HRC Text, due in large part to internal concerns regarding the Falkland Islands. Fortunately, due to the adoption of the Convention on Disappearances, an instrument of particular importance for this country, the Argentine Foreign Secretary was in the room and he changed the vote from a no vote to an abstention. It should be noted that, later, in New York, Argentina turned out to be an excellent ally of the HRC Text, while Colombia (which had been in favour at Geneva), joined the opposition alongside Caribbean Community countries such as Suriname. It is essential to bear in mind these erratic changes in position on the part of states in one or other forum to understand the denouement of this process.

Before the session began, I met with the Argentine Foreign Secretary Taiana to assess the situation. We were both agreed that a no vote on the part of a GRULAC state could send out the wrong message with regard to the birth of the new Human Rights Council, not to mention the indigenous declaration and the Conven-

tion on Disappearances, particularly coming from a country as committed to human rights as Argentina, and particularly with the presence in the room of people with some political gravitas, such as the leader of the Mothers of the Plaza de Mayo and many indigenous leaders (who moments before the session were also talking to the Argentine Foreign Secretary). Given the delicate internal situation, and the political pressure in the Human Rights Council, Argentina abstained, thus minimizing damage.

On the NGO and indigenous peoples' side, the vast majority had made known their support of the WGDD Text by means of declarations from the regional indigenous caucuses of Asia, Africa, Latin America, North America and the Pacific. They all indicated that the text was not perfect and that they would have preferred something that established higher standards, but they gained the attention of the Human Rights Council by stating that now was the time to adopt it and move on to its dissemination and implementation. Obviously, they were highly critical of the states that were opposing it. Only a few indigenous organisations were opposed to adopting the HRC Text, although they were later to change their position. At the start of the first session, an indigenous organisation with its offices in New York announced that it would send a text stating its rejection of the draft declaration, an honest position maybe, but one that was totally counterproductive to the process. As in other cases, and as President of the Human Rights Council, I felt that the priority was to keep the process moving by neutralising this kind of action, using the best arguments to keep the atmosphere in the Human Rights Council open, for which I always had the support of my worthy team. Nevertheless, a majority of the indigenous peoples could now be seen to support the WGDD Text, as opposed to the Sub-Commission Text, for the first time and this, added to the desire of the vast majority of state delegations, enabled the Human Rights Council to approve the HRC Text.

So, it came to pass that during the Human Rights Council sessions that took place on 29 and 30 June 2006, in the context of the Human Rights Council's first session, various resolutions were adopted in consideration of the issue "Implementation of UNGA Resolution 60/251 of 15 March 2006, entitled 'Human Rights Council'". On Thursday 29 June 2006, the Resolution "International Convention for the Protection of All Persons from Enforced Disappearance" was adopted without a vote.<sup>21</sup> Immediately after, action was taken, i.e. a vote, on the resolution presented by Peru "Working Group of the Commission to elaborate a draft Declaration in accordance with paragraph 5 of UNGA Resolution 49/214 of 23 December 1994" (motion A/HRC/1/L.3) by which means the Human Rights Council adopted the HRC Text and recommended that the UNGA adopt it also.<sup>22</sup>

## Yet more hurdles in the UNGA

It was both appropriate and necessary for the President of the Human Rights Council to outline a strategy for the adoption of the HRC Text and the Convention on Disappearances at the 61st session of the UNGA in 2006. Firstly because of the importance of the instruments in question and, secondly, due to the autonomy and hierarchy of the Human Rights Council, the new UN body in which the instruments had been approved. In the UNGA, as in the Human Rights Council, it was important to keep the two instruments linked as far as possible, knowing full well that the Convention on Disappearances would not face the same difficulties as the HRC Text. It remained important for the President to continue to campaign for and promote the declaration, demonstrating the value of the instrument and exorcising the demons being invoked by some states.

In this context, on 12 July 2006, as President of the Human Rights Council, I received an invitation from the Mexican government, through the head of the National Commission for the Development of Indigenous Peoples, Xóchitl Gálvez, to attend the symbolic presentation of the HRC Text by the then President of Mexico, Vicente Fox, to the world's indigenous peoples. At this event, the importance of the approval of the declaration, if possible by consensus, by the UNGA at its 61st session was stressed before indigenous representatives, civil servants, members of the diplomatic corps in Mexico and the press.

Later, a Meeting for the Implementation of the UN Declaration on the Rights of Indigenous Peoples was held in Tulúm, Quintana Roo, from 4 to 6 September 2006, organized by the National Commission for the Development of Indigenous Peoples, the Mexican Foreign Office and the UN Office of the High Commissioner for Human Rights. This event picked up some of the ideas voiced at the Pátzcuaro Workshop, but focused more on implementation of the declaration. In my opinion, the value of this meeting lay in the fact that it brought together the indigenous caucus and states "friendly" to the declaration prior to the start of the 61st session of the UNGA in New York. There were obstacles looming on the horizon given that, since Human Rights Council's adoption of the declaration, states such as Canada and New Zealand had threatened to use the Third Committee of the UNGA to block its adoption.

At the Human Rights Council's second session, held from 18 September to 6 October and from 27 to 29 November 2006, a reminder and request to continue supporting the cause of human rights was made to the UNGA in the follow-up to Human Rights Council decisions, based on the states' commitment to establish a Human Rights Council and, in line with this, to support the adoption of the Convention on Disappearances and the HRC Text in the UNGA. This statement was not at all well received by the opposing states but was necessary to renew my commitment, as President, to the adoption of these instruments.

On 10 November 2006, agenda item 68 “Report of the Human Rights Council” was considered both in the plenary meeting of the UNGA and in the Third Committee.<sup>23</sup> The plan was to present the Human Rights Council’s report as a whole to the plenary meeting during the morning session, and the Convention on Disappearances and HRC Text in the Third Committee during the evening session, in the context of which action needed to be taken on the Human Rights Council’s recommendations to the UNGA, as well as a general discussion of these issues.

In my speech to the plenary meeting of the UNGA, I presented a general report on the Human Rights Council’s activities, noting its work to develop international human rights law and examine concrete issues, in the context of which it had approved the HRC Text and the Convention on Disappearances and recommended their adoption by the UNGA.

In my intervention before the Third Committee, I referred exclusively to the recommendations of the Human Rights Council to the UNGA regarding the development of international human rights law. I emphasised the fact that, in accordance with paragraph 5(c) of UNGA Resolution 60/251 establishing the Human Rights Council,<sup>24</sup> the Human Rights Council had made an important contribution to developing international human rights standards by approving the Convention on Disappearances and the HRC Text at its first session. I repeated that, together with the value of the declaration as a response to indigenous peoples’ historic demands after a long process of negotiations, the international community could now respond the Heads of State and Government’s request in September 2005 to adopt an indigenous declaration as soon as possible.<sup>25</sup>

Peru and France, with the support of various co-sponsors, submitted draft resolutions containing the HRC Text and the Convention on Disappearances respectively. It was hoped that, at the end of the general debate, the Third Committee would adopt both instruments. In the best-case scenario, this would take place either at the end of that day (Friday) or, should the debate continue longer, the following Monday (13 November). A draft resolution was already circulating,<sup>26</sup> which took note of Human Rights Council Resolution 1/2 of 29 June 2006, expressed its recognition of this approval (to the Human Rights Council) and also approved the HRC Text as adopted.<sup>27</sup>

However, that week, the Permanent Representative of Namibia, Chair of the African Group, sent a letter to the President of the UNGA, Sheikha Haya Rashed Al Khalifa of Bahrain, asking her to defer consideration of the HRC Text until member states had had a chance to consider and negotiate “in greater depth”. The Permanent Representative of Botswana also sent a response to a joint letter sent to member states by the group of states supporting the declaration indicating the serious difficulties it had with the HRC Text and that Botswana considered that more reflection was needed before it could be adopted. The letter was accompanied by an *aide-mémoire* detailing the aspects of the declaration that presented difficulties for Botswana, which were the same as those of the African

Group: lack of definition of indigenous peoples; the right to self-determination; natural resources and lands and territories; ILO Convention 169, among other things.<sup>28</sup>

Given that some countries in the African Group were in favour of adopting the HRC Text (Benin, Cameroun, Congo and South Africa), the opposing African states presented their case as one of procedure rather than substance. Informally, the African Group made known that it would ask for a continuation of negotiations until the end of the 61st session of the UNGA in September 2007.

On 13 November, the co-sponsors of the UNGA Third Committee resolution to adopt the declaration began a dialogue with members of the African Group to find a solution that would enable the concerns of these countries to be resolved, on the condition that the HRC Text would not be re-opened. Although the African Group stated that it was in favour, and that it was only seeking a path by which to address certain concerns, the truth is they never specified what that path was. In addition, their stated concerns were not minor ones but related to substantive and fundamental issues in the declaration. The co-sponsors proposed amending the draft resolution introducing the adoption of the HRC Text to add references to principles of the UN Charter and the diversity of indigenous peoples in the different regions of the world. It would also include mention of the work conducted by the respective bodies of the Commission on Human Rights in drafting the declaration.

Nevertheless, without the knowledge of the co-sponsors, Namibia, on behalf of the African Group, had already submitted a series of amendments that would necessitate the opening up a process for consideration of them prior to the conclusion of the 61st session. The African Group stated that it had submitted the amendments on the understanding that it would withdraw them if an agreement was reached with the co-sponsors. However, the African Group planned to present the amendments to the Third Committee, thus already negatively prejudging the results of the negotiations between them and the co-sponsors. By then, the African Group was already presenting a united front that included South Africa, whose Ambassador in New York was campaigning against the HRC Text, despite this state having stated a contrary position in Geneva and Pretoria.

Of course, I made known the inconvenience of supporting the draft resolution submitted by the African Group given that it, firstly, affected the Human Rights Council's autonomy and, secondly, was in contradiction to the agreement adopted by the UNGA with regard to the terms for considering agenda item 68,<sup>29</sup> the damage to the declaration aside. To add coal to the fire, things got more complicated in New York and the indigenous issue began to be manipulated for other purposes.<sup>30</sup>

On 28 November 2006, on behalf of 33 co-sponsors, Peru presented the resolution by which the UNGA would adopt the HRC Text.<sup>31</sup> However, arguing “sub-



stantive objections”, the African Group - at the initiative of Botswana, Kenya, Namibia and Nigeria - submitted amendments that would defer the examination and adoption of the HRC Text to gain more time to continue consultations and conclude the examination of the declaration before the 61st session of the UNGA almost a year later.

The sentiment of the amendments should here be recalled. In paragraph 1 of the operative part, which expressed its appreciation to the WGDD for the work conducted in elaborating a draft declaration, they sought the deletion of the phrase “and to the Human Rights Council for the adoption of the text of the United Nations Declaration on the Rights of Indigenous Peoples”. In paragraph 2, also in the operative part, it was decided to “defer consideration and action on the UN Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon”. Then it added an operative paragraph that “also decides to conclude consideration of the Declaration before the end of its sixty-first session”.

The African Group’s amendments to the draft resolution for the adoption of the HRC Text were adopted by 82 votes in favour, 67 against and 25 abstentions.<sup>32</sup> Subsequently, the draft resolution as amended obtained 83 votes in favour and 91 abstentions, with no votes against. Before voting on the amended draft resolution, the original co-sponsors withdrew their support and co-sponsorship for the Resolution in its amended form.<sup>33</sup> They also stated that: the African amendments distorted the main aim of the Resolution; that they were equivalent to a non-action motion; that they were moving away from the position that Algeria had expressed on behalf of the African Group in Geneva; that the deferral would not lead to more acceptable results either for states or for indigenous peoples; and that the motion for deferral put the declaration at risk and sent a message that the UN was incapable of acting in this regard.<sup>34</sup>

Two key factors influenced the success of the African countries’ initiative: their alliance with the main countries opposing the Declaration (Australia, Canada, New Zealand, the Russian Federation and the United States); and the debate that was taking place in the Third Committee on the presentation of the Human Rights Council’s report to a plenary meeting of the UNGA,<sup>35</sup> which China, Egypt and Iran opposed on the grounds that it challenged the relevance of the Third Committee as “the only universal body” on human rights issues.

On the basis of the amended resolution, the African Group conducted internal consultations to define its substantive position, something that it was unable to achieve given differences between states with substantive concerns and South Africa and Cameroon, which had co-sponsored and voted in favour of the HRC Text at Geneva. During this *impasse*, at the African Union Summit (31 January 2007) in Addis Ababa, Botswana encouraged the African Group to agree on a position for the coming negotiations. Despite this, however, the African Group’s

discussions in New York were at a standstill, particularly due to the amendments Kenya had presented, to more than 45 paragraphs!

Between January and March 2007, informal consultations took place between the main co-sponsors of the declaration. Fiji, Germany (then holding the Presidency of the European Union), Mexico, Norway, and Peru met with the President of the UNGA on 9 February to ensure that no formal mechanism would be established that could lead to the opening up of the text of the HRC Text and thus to new and interminable negotiations.<sup>36</sup>

On 3 May, a round table took place in New York at which African civil society's commitment to the HRC Text was clearly stated, thus compromising the African position yet further. On 16 May, the African Group presented a proposal for amendments to 37 paragraphs of the HRC Text to the UNGA President. Mexico immediately sent the UNGA's President a draft resolution accompanied by a letter signed by 67 countries proposing the alternative of reflecting the African countries' concerns in the introductory resolution rather than in the text of the declaration itself.

It should be noted that, at this time, in Geneva, in the context of its institutional architecture, the Human Rights Council had still not managed to discuss the future of the WGIP, which was later to be replaced by the Expert Mechanism on the Rights of Indigenous Peoples, subsidiary organ to the Human Rights Council. Nevertheless, as President of the Human Rights Council, I was frequently receiving representatives from the indigenous caucus who were closely monitoring the future of this WGIP, even though their main concerns revolved around the events taking place in New York.

In this regard, the Sixth Period of Sessions of the Permanent Forum on Indigenous Issues (PFII) (which had the special feature of having had just appointed its new experts), due to be held from 14 to 25 May 2007, presented itself as a more appropriate space in which to intensify the campaign in favour of the HRC Text. In the light of the above, I made sure to attend the Permanent Forum on the basis of an invitation extended to me.<sup>37</sup>

At the Permanent Forum, I mentioned that, regardless of the course being taken by the institution building process underway in the Human Rights Council, the PFII and the Human Rights Council should make efforts to work together, given their common interests. I am still convinced that close collaboration and cooperation between the PFII and the Human Rights Council will help to achieve the best results in terms of monitoring and improving indigenous rights. In terms of the HRC Text's lack of movement within the UNGA, I noted that, despite the obstacles, different government delegations had, on various occasions, called for its prompt adoption in the context of following up on the Human Rights Council's decisions, and so it was essential to intensify and strengthen the work and communication between the indigenous representatives and states.



I took advantage of my visit to New York to meet with different players, including the President of the UNGA and the Namibian Ambassador. I also spoke with the Philippine Ambassador on a number of occasions, who - at the request of the President of the UNGA - acted as facilitator of UNGA discussions on the declaration, and in all my contacts I emphasised the delicate nature of the situation for the declaration and for the Human Rights Council.

Almost one month later, on 29 June, the Philippine Representative, Ambassador Hilario Davide, presented a report on the consultations that had taken place.<sup>38</sup> In this Report, in addition to detailing the activities undertaken, he presented the options for a solution, reactions to these and an analysis of the different positions on the process for adopting the HRC Text. The Report anticipated three possible scenarios for overcoming the *impasse* with a compromise solution: 1) a header prior to the preambular part; 2) changes to the draft resolution introducing the HRC Text on the basis of the African amendments and inserting language into Article 46 of the HRC Text that would link the draft resolution to the declaration text; and 3) a "hybrid" model that would include inserting two paragraphs into the resolution and making one amendment to Article 46 of the HRC Text; also any other option that the UNGA might consider appropriate. The Report called for a limited re-opening of the text in the areas of concern to Australia, Canada, Colombia, Guyana, New Zealand, Russia and Suriname.

The situation within GRULAC was no less complex given that, as previously noted, Colombia - a country that in Geneva had been in favour of adopting the declaration - had now radically changed its position. On the other hand, Argentina was now of huge support in New York.

A first option was to reflect some of the African countries' concerns in the draft resolution introducing the HRC Text, without amending the text of the HRC Text itself. In principle, this was the best option but, given the position adopted in Addis Ababa, it was unlikely to succeed. In any case, it was considered necessary for the co-sponsors to present this proposal. A second option was to include a single paragraph in the HRC Text noting the national sovereignty and territorial integrity of states, although this ran the risk of other states then introducing other changes. In any case, this would be amending a Human Rights Council decision and setting an unfortunate precedent. Finally, if no agreement was reached, it might be possible to force a vote on the HRC Text, arguing that resources had been exhausted, in which case it would be adopted with a significant number of abstentions and/or votes against, as well as interpretive statements. Faced with this last option, the possibility of the UNGA taking no decision was also considered, thereby maintaining the HRC Text, but this was later dismissed given the importance the indigenous peoples themselves gave to the universal nature of the UNGA.

The African Group insisted on amending the text of the HRC Text itself. For their part, the states in favour of adopting the HRC Text stated that any option

that involved amending the original text could not be contemplated as a compromise proposal. However, we were aware that, by inserting a reference to the “territorial integrity of States”, the African Group would be divided, as a number of its members (Benin, Mali, Mauritius and South Africa) would then be able to vote for the text.

The states opposed to the HRC Text again tried to postpone a decision in the 61st session of the UNGA to facilitate substantive amendments.<sup>39</sup> It was also clear that, out of a political concern and concerns for regional unity, the African Group needed to find a solution that would enable the incorporation of at least some of its issues and yet that, at the same time, would avoid the region being perceived as historically responsible for having blocked approval of the Indigenous Declaration at the UN.

At this point in the process, the African Group was beginning to be considerably worn down, and so the Namibian representative contacted the Mexican and Peruvian representatives to again explore the possibility of reaching an agreement. From that point on, Mexico and Peru met regularly with Botswana, Gabon, Kenya, Namibia and Tanzania.

On 13 August 2007, Canada, Colombia, New Zealand and the Russian Federation sent a note to the President of the UNGA and the states involved, attaching their 34 amendments to the HRC Text that substantially altered the declaration on: lands and territories; free, prior and informed consent; self-determination; and intellectual property. Moreover, they were presented more than a month after Ambassador Davide had presented his abovementioned report.

As this note did not have the desired effect, Canada vehemently stated its dissatisfaction at the “lack of transparency” and for not having been included in the negotiation process promoted by Namibia. This argument, however, held no water. Everyone knew that consultations on the indigenous declaration had been ongoing for more than two decades, with Canada one of the countries that had led the process and that, despite this, had not been able to support a consensus solution. Moreover, the sending of this note coincided with a moment when the consultations appeared positive; the only outstanding issue was the preambular paragraph to the draft resolution in which Kenya insisted on including the concept of equality, which was unacceptable to Western delegations such as the United Kingdom. In addition, when the UNGA decided to extend the consultations, only two groups formally presented proposals and, at this point, those in favour of the declaration and the African Group were close to reaching an agreement with almost 120 states, a group which the Caribbean, Asian and Middle Eastern countries would also possibly join.

For its part, the indigenous caucus was aware of the latest version of the text revised during consultations, which was to be studied internally. In general and preliminary terms, it was felt that there would be an agreement acceptable to the regional caucuses, with the exception of North America.

Finally, on 30 August 2007, the agreement between supporters of the HRC Text and the African Group was formalised. The day before, Guatemala, Mexico and Peru had met with the indigenous caucus to explain the broad outlines of the agreed changes. Although some organisations stated their concern with the inclusion of a reference to the territorial integrity of states, the majority were in support of the agreement. That same day, human rights organisations and indigenous peoples' representatives held demonstrations outside the Australian, Canadian and New Zealand missions to protest at their opposition to the HRC Text even with amendments.

In the days that followed, the draft resolution by which the UNGA would adopt the declaration, on Thursday 13 September 2007, was put forward. As anticipated, the UNGA approved the UN Declaration on the Rights of Indigenous Peoples by, as noted above, an overwhelming majority.

## Conclusions

The creation of the Human Rights Council was a milestone in the history of the UN. At the closing session of the Commission, on 27 March 2006, Louise Arbour, UN High Commissioner for Human Rights, considered it to be a true "silent revolution in human rights".

One of the great challenges facing the international system for the promotion and protection of human rights was the institutional duplication and overlapping or superimposition of tasks with regard to human rights, which were becoming ever more polarised as they became the object of debate or negotiation between the Commission and the UNGA.

There is no doubt that the relationship between the Third Committee of the UNGA and the Human Rights Council has still not been fully resolved in terms of a balance of functions and a sound division of labour, and this remains an outstanding challenge. I have already, on other occasions, indicated my concern that the Third Committee may re-examine or re-open decisions taken by the Human Rights Council, many of which involve a delicate balance, and that this would weaken the credibility of the new institution and, in the long run, diminish its capacity for dialogue and achieving consensus. The route followed by the Declaration in its adoption by the UNGA following its approval by the Human Rights Council was a clear example of this, despite the favourable outcome of which we are now all aware.

During its initial months, although the Human Rights Council faced difficulties, it benefited from the adoption of the Declaration, which was as a major challenge that it managed to overcome, despite the complications that arose in the UNGA. In some ways, the adoption of the Declaration was one of the Human Rights Council's "acid tests". Its prompt adoption drew a line between it and the

UNGA, creating an equal and balanced handling of social, economic and cultural rights and the right to develop civil and political rights. In this context, the Declaration's adoption can be appreciated as an effort aimed at redressing this "generational" imbalance, as it "holistically" gathers together, as they say in indigenous fora, indigenous rights as an intrinsically harmonious and integrated whole.

There is no doubt that, in one way or another, the international political climate at the time favoured the adoption of the Declaration. We now have to hope that this turns into decisive support for its implementation. ○

## Notes

- 1 The author acknowledges the comments of Luis Javier Campuzano, Elía Sosa and Víctor Genina. I would particularly like to thank Gustavo Torres for his critical reading of the text and research.
- 2 UN Human Rights Council "Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994" (29 June 2006). The draft HRC Text was adopted by 30 votes for (Azerbaijan, Brazil, Cameroon, China, Cuba, Czech Republic, Ecuador, Finland, France, Germany, Guatemala, India, Indonesia, Japan, Malaysia, Mauritius, Mexico, Netherlands, Pakistan, Peru, Poland, Republic of Korea, Romania, Saudi Arabia, South Africa, Sri Lanka, Switzerland, United Kingdom, Uruguay, Zambia), 12 abstentions (Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, the Philippines, Senegal, Tunisia, Ukraine), 2 votes against (Canada, Russian Federation) and 3 no votes (Djibouti, Gabon and Mali). Although Algeria, on behalf of the African Group, stated (on 27 June 2006) its full support for the Declaration, only 4 of the 13 African members of the HRC voted in favour.
- 3 General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).
- 4 General Assembly "Resolution 60/251: The Human Rights Council" UN Doc A/Res/60/251 (2006).
- 5 "157. Pursuant to our commitment to further strengthen the UN human rights machinery, we resolve to create a Human Rights Council. 158. The Council will be responsible for promoting universal respect for the protection of all human rights and fundamental freedoms for all, without distinction of any kind and in a fair and equal manner. 159. The Council should address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote effective coordination and the mainstreaming of human rights within the United Nations system. 160. We request the President of the General Assembly to conduct open, transparent and inclusive negotiations, to be completed as soon as possible during the sixtieth session, with the aim of establishing the mandate, modalities, functions, size, composition, membership, working methods and procedures of the Council." See: UN General Assembly World Summit 2005 "Resolution 60/1: World Summit Outcome" UN Doc A/RES/60/1 (16 September 2005) §157-159. It is important to note that the international workshop-seminar held in Pátzcuaro, Michoacán, to discuss the important issues in the Declaration began some days later, on 26 September 2005, under the impetus of this very World Summit, in the context of the High-Level Plenary Meeting of the UNGA.
- 6 Ibid, para 127.
- 7 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities "Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples" UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).

- 8 UN Commission on Human Rights "Resolution Establishing a Working Group to Elaborate a Draft United Nations Declaration on the Rights of Indigenous Peoples" Report on the 51<sup>st</sup> Session UN ESCOR Supp (No 4) UN Doc E/1995/23 (3 March 1995) at 110.
- 9 UNGA "Resolution 59/174: Second UN Decade on the World's Indigenous Peoples" UN Doc A/RES/59/174 (22 December 2004).
- 10 This group was created at Mexico's initiative and was made up of around 14 states; its main objective was to present proposals for the reform of the UN and, in this regard, to support the Secretary-General. The Puebla meeting of the Group of Friends for the Reform took place on 30 June and 1 July 2005. A document containing conclusions emerged from this and was presented at the High-Level Plenary Meeting of the UNGA 2005 World Summit, thus influencing the final Summit document, which laid down the mandate to create the Human Rights Council in UNGA Resolution 60/251, above n 4.
- 11 At Mexico's request, an operative paragraph was introduced into this resolution by means of which note was taken (New Zealand argued that it could only accept "takes note" but not "welcomes") of the proposal to hold a workshop on the Declaration, which, as discussed, was to take place in Pátzcuaro, Michoacán, in September 2005.
- 12 See UN High Commissioner on Human Rts "Report of the First Decade of the World's Indigenous Peoples" UN Doc E/CN.4/2005/87 (2005) para 32.
- 13 See UNGA "Resolution 59/174: Second UN Decade on the World's Indigenous Peoples" UN Doc A/RES/59/174 (22 December 2004), para 12.
- 14 Resolution 2005/50 was adopted (52 votes in favour, none against, with the USA abstaining). The latter presented an amendment to operative paragraph 5 indicating that the 10-day extension of the Working Group's tasks (and eventually by another 10 days) had the aim of completing the negotiations for the declaration before the 62nd session of the Commission. This amendment was rejected by 49 votes to 2 (USA and Australia), with two abstentions (Romania and Togo).
- 15 Above n 5.
- 16 International Labour Organisation (ILO) Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries, 1989 adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991 and the World Conference against Racism, Racial Discrimination, Xenophobia and Related Tolerance "Durban Declaration" UN Doc A/Conf.189/12 (8 September 2001).
- 17 The Commission was dissolved on 16 June 2006. The first session of the Human Rights Council took place on 19 June 2006, with its first year coming to an end on 18 June 2007.
- 18 Amongst other reasons, the organisations had not been in agreement with the removal of Articles 8 and 11, nor the change in position of Article 31 to its new position as Article 3a (Article 4 in the Declaration); they had also expressed difficulties with Article 45.
- 19 These changes referred to the first paragraph of Article 26, replacing "*have the right to*" with "*have rights to*"; in Article 45 the idea was to replace "*obligations*" with "*standards*" in the second paragraph. This article became Article 46 after the amendments made to the text during the negotiations that took place in New York within the UNGA.
- 20 As an indication of the importance of this first session, it should be recalled that other identified issues were: the situation in the Middle East, the issue of religious defamation, the situation in Darfur and the need for increased protection of human rights defenders. These issues were addressed, as far as possible, avoiding their politicisation in order to ensure their best handling; however, military operations in the Gaza Strip introduced a political element.
- 21 Human Rights Council "Resolution on the "International Convention for the Protection of All Persons from Enforced Disappearance" UN Doc A/HRC/1/L.2 (June 2006). This Resolution was presented by France and adopted by consensus. It is noteworthy that, after its presentation, Jorge Taiana, Argentine Minister of Foreign Affairs, spoke and, among other things, recognised the important work of human rights activists in adopting the Convention and publicly acknowledged Martha Vázquez, mother of the Plaza de Mayo movement, who was present in the room. The adoption of this instrument was a landmark in history as it clearly demarcates the elements of the forced disappearance of persons and establishes an international obligation on the part of

states to classify such crimes in their domestic legislation and investigate and bring to justice those responsible.

22 Above n 2.

23 “At its 4th meeting, on 25 October 2006, the General Committee decided to recommend to the UNGA that agenda item 68, entitled “Report of the Human Rights Council”, be considered in plenary meeting and in the Third Committee, on the understanding that the Third Committee would consider and act on all recommendations of the Human Rights Council to the UNGA, including those that deal with the development of international law in the field of human rights. Taking into account this recommendation, the UNGA in plenary meeting would consider the annual report of the Human Rights Council on its activities for the year.” See UNGA General Committee “Resolution 61/250” UN Doc A/61/250/Add.2 (2006).

24 Resolution 60/251, above n 4.

25 The texts of both interventions can be found at: <http://portal.sre.gob.mx/oi/popups/articleswindow.php?id=53> and <http://portal.sre.gob.mx/oi/popups/articleswindow.php?id=54>.

26 UNGA Third Committee “Resolution on the draft Declaration on the Rights of Indigenous Peoples” UN Doc A/C.3/61/L.18/Rev.1 (28 November 2006). A huge quantity of documentation was produced over this period, which can be viewed at: <http://www.converge.org.nz/pma/decrips.htm> and <http://www.docip.org/Online-Documentation.32.0.html>.

27 The countries that had already agreed to co-sponsor this resolution were: Armenia, Bolivia, Congo, Croatia, Cuba, the Democratic Republic of Congo, Denmark, Ecuador, Estonia, Fiji, former Yugoslav Republic of Macedonia, France, Greece, Guatemala, Haiti, Hungary, Latvia, Liechtenstein, Lithuania, Mexico, Panama, Paraguay, Peru, Poland, Portugal, Slovenia and Spain.

28 African Group “Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples” New York (9 November 2007). The Africans put forward two kinds of argument. Procedural, because, according to them, the Chairperson of the WGDD had been unwilling to take the concerns of some countries into account, resulting in a text that was submitted to a vote and approved with interpretive statements, and also because of the absence of some African countries from the negotiation process in Geneva. The other argument was substantive because of the way in which issues such as self-determination, natural resources (minerals, essentially), political rights, the lack of definition of indigenous peoples and the absence of specific references to the territorial integrity and sovereignty of the states were handled.

29 Above n 23.

30 On 22 November of that year, the Third Committee rejected the draft resolution “Situation of indigenous peoples and immigrants in Canada” UN Doc A/C.3/61/L.43 by 107 votes against, 6 in favour (Belarus, Cuba, Iran, Myanmar, the Popular Democratic Republic of Korea and Syria) and 49 abstentions. Representatives of the indigenous caucus expressed their surprise because they expected a greater number of abstentions, without considering the political use of the issue.

31 Above n 26

32 Ibid.

33 The amended text was co-sponsored by Angola, Algeria, Botswana, Burkina Faso, Burundi, Côte d’Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Gabon, Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Malawi, Morocco, Mauritania, Mozambique, Namibia, Nigeria, Sudan, Swaziland, Tanzania, Togo, Tunisia and Zimbabwe.

34 Australia, Canada, Colombia, New Zealand, the Russian Federation and Turkey explained that they would vote in favour of the amendments. In general terms, they considered it necessary to address the concerns in order to achieve universal support. For New Zealand, the Declaration has (and the country has not changed its position) fundamental flaws and is the result of an unsatisfactory process. Benin, Congo and Rwanda gave explanations in the sense that they supported the amendments because they considered them to be a procedural issue and hoped that a wide process of consultation would lead to consensus around the Declaration. Botswana indicated that its country was not hostile to the Declaration and Kenya stated its opposition given a lack of definition of the term “indigenous” and the use of the concept of self-determination in a context other than peoples under colonial domination; it also stated its concern with regard to the provi-



sions on ownership and use of natural resources. Jamaica and Guyana gave similar explanations.

35 Above n 26.

36 It was also known that, at the proposal of the President of the 59th UNGA, Jean Ping (Gabon), the UNGA President intended to appoint the Permanent Representative of Liechtenstein, Ambassador Christian Wenaweser, as facilitator of the consultations. In a meeting held on 10 April between the President and Mexico, Peru, Canada, Botswana, Namibia, Nigeria and Gambia, it was agreed that the President herself should lead the informal consultations, and restrict them to the main states involved.

37 It should be recalled that, the previous year, in May 2006, during the Fifth Period of Sessions, the probable adoption of the draft Declaration in the HRC had been discussed. The opening message was very clearly in favour of the Declaration, and the debate that took place between the PFI experts and the states only magnified this. It was recognised that the document was not perfect but it offered a good basis on which to promote indigenous rights. The members of the Río Group, Norway and Denmark, sent very clear messages of support marking out the process as an objective of the Millennium Development Goals. Canada was outstanding in its lack of commitment and limited itself to saying that it was actively participating in the process, an aspect that was challenged by the Canadian expert William Littlechild. Australia, the United States and New Zealand presented a joint statement that was considered highly unfortunate. They addressed the procedure, establishing that the draft Declaration only formed the basis for future negotiations; that there was no agreement or consensus on its content; and that, therefore, the process was deeply flawed. In terms of substance, they stated that Article 3 granted the unilateral right to possible secession and had the potential for creating instability in the nation state. They also stated that, should the Chairperson's text be approved, different categories of citizen would be created by virtue of Article 20. The provisions on lands, territories and resources were described as unacceptable and impossible to work with. These countries indicated that any attempt to adopt the Declaration would be false and irresponsible and that, in addition, it would create a bad precedent. In a paternalistic way, and clearly without taking account of the opinions and aspirations of the main stakeholders, they added that the Declaration was unrealistic, rhetorical and artificial, and would not help indigenous peoples. The same arguments were subsequently taken up by the African Group at the 61st session of the UNGA.

38 At the start of June 2006, the UNGA President appointed the Permanent Representative of the Philippines, Ambassador Hilario Davide, to conduct "open and inclusive" consultations on the Declaration. It was initially the President's intention to appoint the Permanent Representative of the Bahamas. However, a number of delegations expressed doubts as to the relevance of appointing a representative from a region in which a majority of states were in favour of re-opening the text of the Declaration. Consequently, a representative from an Asian country was suggested. Ambassador Davide was possibly appointed because he had sent a letter to the Chair proposing an "intermediary" solution.

39 Canada, New Zealand and the Russian Federation remained in close contact with the African countries and tried to reach a resolution that would defer consideration of the issue until the next session of the UNGA. Canada even requested a "thematic" negotiation of the text. The European Union did not have a common position on the Declaration, although the United Kingdom and Germany were expressing their concern at some of the precedents it was setting, and the only agreement that existed was to support the text in its current state. Ecuador, Guatemala and Peru, although the most committed countries in Latin America, did not make more concrete diplomatic negotiations nor *rapprochements* with other delegations. The most committed countries were the Nordic ones. Norway maintained a position very close to that of Mexico. It was active in its bilateral negotiations and held the most radical position against opening up the Declaration. New Zealand and Canada were very active in opposing the Declaration, particularly within the African Group. They promoted the establishment of a new formal process for amending the Declaration. Unlike New Zealand, Canada believed the involvement of indigenous groups in the negotiations to be essential. Although the United States did not support the Declaration, it made no moves against it and had already stated that it would abstain whatever the circumstances.



Colombia and the English-speaking Caribbean stated their reservations and joined the African position. In general, the Asian countries were in favour of making efforts to facilitate Africa's support for the Declaration. China, India, Indonesia and Pakistan voted in favour of the text in the HRC and so, should the African Group vote against, they would abstain.

# THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: THE FOUNDATION OF A NEW RELATIONSHIP BETWEEN INDIGENOUS PEOPLES, STATES AND SOCIETIES<sup>1</sup>

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## Introduction

With the adoption of the UN Declaration on the Rights of Indigenous Peoples (the Declaration), first in the Human Rights Council (29 June 2006) and subsequently in the UN General Assembly (UNGA) on 13 September 2007, indigenous peoples the world over have taken an enormously significant step along the long path of demanding and defending their individual and collective rights. It is an historic step that will form the basis of a new relationship between indigenous peoples and the states and societies within which they live and with which they co-exist on a day-to-day basis.

The Declaration has, in large part, been possible because of indigenous peoples' capacity to recognise themselves as full subjects, with dignity and rights, on a par with other peoples of the world. They have understood the need to transcend their own cultural, territorial, organisational and symbolic horizons in search not only of a greater understanding of "otherness" but of an interrelationship and interaction with the other peoples and cultures with whom they share realities and dreams.

To paraphrase an idea inherent in one of the last interviews given by Claude Lévi-Strauss to Véronique Mortaigne of the French newspaper *Le Monde* in March 2005,<sup>2</sup> the author of *The Sad Tropics* indicates, with a certain nostalgia permeating

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his words, that the science of man, exercised by him, can no longer be practised, and not only because of the advances within science itself but because of the metamorphosis of indigenous societies. When the famous ethnographer first met the indigenous peoples of the Amazon rainforest, they were living in isolation and their world was limited to conceptual, religious and spatial frameworks that encapsulated the idea of their territory, just like most of the world's indigenous peoples at that time. Nowadays, although some rare indigenous peoples still live in such isolation, for most of them the reality is quite different.

Nowadays, says Lévi-Strauss, indigenous peoples are aware of the existence of other indigenous peoples throughout the world, and this has clearly been accompanied by an international movement, as we have seen in many different global fora and arenas. Members of the following peoples have come together, for example, in the indigenous peoples' caucuses: Amazigh, Aymara, Brunca, Gabi Gabi, Diaguita, Innu, Inuit, Kaingang, Kankana-ey Igorots, Kuna, Maori, Mixe, Mohawk, Maasai, Nahua, Otomi, Quechua, Saami, Yaqui, and Zapotec and many more, from the most far-flung corners of the planet.

And yet the above does not necessarily mean that indigenous peoples' living conditions, and respect for their languages, cultures, lands, territories, social and political organisational systems, among other things, have improved since the time of the ethnologists who first discovered these remote cultures. Perhaps they have even deteriorated, as indeed these peoples have told us at one time or another in their long struggle to defend their rights and demands. Theirs is often a difficult and complex reality, characterised by extreme poverty and marginalisation, exclusion and abandonment by governments, racism and discrimination, injustice and inequality, exploitation and different forms of oppression, open ignorance and violation of their most basic rights. It is a painful reality that has denied humanity to these indigenous peoples, the world over.

Faced with this situation, indigenous peoples have had to raise their voices saying "enough is enough", and begin a long and winding path in search of recognition of their legitimate rights. It is in this way that the international community has had to move towards a greater and better visualisation of the indigenous reality, and spaces have had to open up for debate and reflection on the rights and aspirations of indigenous peoples.

Of course, this process is neither a new one nor a recent one; its roots run deep. Who does not remember, for example, the famous debate in the Santa Cruz State Palace, Valladolid (1550-1551) between Juan Ginés de Sepúlveda on the one hand and Bartolomé de las Casas on the other, on the right of some peoples to subject others to natural law, thus giving rise to the notion of "just wars", the aim of which was to offer a safe theological and legal basis on which proceed in the discovery and conquest of the Indian population.<sup>3</sup> It was out of this dispute that the principle of *ius gentium* arose, which ended the justification of supremacy on the basis of differences between some men and others.<sup>4</sup>

In their struggle to overcome the challenges facing them, the path of indigenous peoples to the UN began with Chief Kayuga Deskaheh, who visited the headquarters of the League of Nations in Geneva in 1923 as representative of the Six Nations of the Iroquois. The following year, in protest at Crown failure to comply the Treaty of Waitangi (Aotearoa/New Zealand, 1840), which guaranteed indigenous Maori ownership of their land, T W Ratana, Maori religious leader, sent part of his delegation to Geneva to speak to the League of Nations. There, he received the same welcome that Chief Deskaheh had before him: he was completely ignored. The first step along the path had, however, been taken.<sup>5</sup>

More than 80 years after this historic journey began, and after almost 25 years of debate and negotiation, first in the Working Group on Indigenous Populations (WGIP) and later in the Working Group on the draft Declaration (WGDD) of the now defunct Commission on Human Rights, the Declaration became a reality.

This Declaration undoubtedly forms an instrument of enormous importance for both indigenous peoples and states, as it has been negotiated and approved via a unique process within the UN, and it reflects the highest possible level of consensus between states and indigenous peoples.

As already indicated, the Declaration will form a full and comprehensive framework by which to improve relations between states and indigenous peoples. One example of this can be seen in the provisions on self-determination contained in Article 3, which must be viewed as a means by which to fully recognise and guarantee indigenous peoples' capacity for decision-making and action, in their different spheres and levels, as well as to promote their participation in a plural, diverse and democratic society. These provisions must, at the same time, be exercised in accordance with international law.

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From the principle of *omnis determinatio est negatio* ("all determination is negation"), which some thinkers still consider as the "true and simple" principle, we would like to establish the positive character of the Declaration through a connection based on its denial.<sup>6</sup> In other words, sometimes it is simpler to assert something not for what it is but for what it is not, and this is undoubtedly applicable to the Declaration. It has to be acknowledged in this respect that the Declaration is no perfect tool and, clearly, it has some limitations. This is unsurprising given that the text is the result of a process of international and multilateral negotiations. The Declaration is the result of long formal and informal consultations during which many compromises were reached to resolve different concerns. The text is undoubtedly the best compromise that could have been realistically achieved.

The Declaration is not an instrument that is intended to create conflicts but one that tries to resolve them in a context of good faith, cooperation and co-existence. It contains no threats to states in terms of their territorial integrity, as has been argued by some governments when trying to distort, water down or undermine the principles and norms of the Declaration.

The Declaration can but be ambiguous, but this is a virtue and not a defect. It does not enshrine preferential or special rights but rather recognises specific rights aimed at recognising and protecting a vulnerable and historically-excluded sector of society.

Nor is it a consensual text, although this should not be a reason for concern in human rights negotiations as it is increasingly difficult to achieve unanimity in this regard. Faced with this situation, the most important thing was that the states took a decision to support indigenous peoples. The Declaration will be a great encouragement to indigenous peoples, and will help to strengthen and consolidate their organisational, regenerational and development processes, in all spheres and at all levels as a result. Now that the Declaration has been adopted, each state will need to commence an internal assessment of the text with the major challenge being to implement the Declaration in their national legal systems.

With the adoption of the Declaration, which comprises principles and standards that globally and comprehensively recognise and guarantee indigenous peoples' rights, one of the biggest vacuums in international human rights law has now been filled. It is therefore an historic achievement and development, and one that will form an excellent tool for the effective work of protecting and promoting human rights around the world.

## **The process of negotiating and debating the Declaration**

### **9th and 10th period of sessions (2003 and 2004)**

Little progress was made in negotiating the Declaration throughout the whole of the First International Decade of the World's Indigenous People (1995 – 2004). Over this period, only two articles (for which no objections were raised) of the text adopted by the Sub-Commission for the Protection and Promotion of Human Rights in 1994 (the Sub-Commission Text) were approved, one on the right of indigenous peoples to a nationality (Article 6), and the other on equal rights between indigenous men and women (Article 44).

Despite state negotiations during the WGDD sessions, with the involvement of indigenous representatives, the aim of adopting the Declaration within the period anticipated of the First Decade was not achieved. This was primarily because issues of self-determination, indigenous rights to lands, territories and

natural resources, and the concept of collective rights, among others, represented obstacles for some states.

The 9th period of WGDD sessions (2003) was extremely relevant as a substantive debate started to take in place on the keystone issue of the Declaration, the right to self-determination. The Nordic countries (Denmark, Finland, Iceland, Norway and Sweden) presented an amendment on preambular paragraph 15 of the Sub-Commission Text including a reference to territorial integrity and political unity of the States. This proposal was, according to this group of countries, based on Resolution 2625 (XXV) – *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations* and the *Vienna Declaration and Program of Action* of 1993.<sup>7</sup> Their purpose was to mention the territorial integrity and the political unity of States, but only in the preambular section of the draft declaration, and therefore maintaining the integrity of Article 3.

In the same vein, Guatemala proposed an amendment to the same preambular paragraph 15 by simply referring to the principles of international law, already included in the declaration. For some delegations, particularly for the indigenous caucus, Guatemala's proposal was acceptable because the principle of territorial integrity did not need to be made explicit in the text itself as it is implicit in international law. Luis Enrique Chávez, Chairperson-Rapporteur of the WGDD, adopted this proposal, with small changes, as a basis to resume the debate.

Taking into account the progress made in the 9th period of sessions, as well as the introduction of a proposed revision of the draft declaration (known as CRP.1) by the Nordic countries, New Zealand and Switzerland, the indigenous caucus reacted with a document titled "Indigenous Peoples' Proposed Amendments Relating To The Right Of Self-Determination" (September 20, 2004). From the perspective of the Latin American indigenous organizations participating in the 10th period of sessions, the strategy had two components: to maintain Article 3 in one piece with no explicit reference to territorial integrity and the political unity of the States. In any case, they could also accept a tacit reference like that in the Guatemalan proposal, as recaptured by the Chairperson-Rapporteur. The indigenous caucus strategy, on the other hand, was then composed of three elements: the Guatemalan amendment, "[b]earing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in accordance with principles of international law, including the principles contained in this Declaration"; a new preambular paragraph, "[e]ncouraging harmonious and cooperative relations between States and indigenous peoples based on principles of justice, democracy, respect for human rights, non-discrimination and good faith"; and keeping Article 3 unchanged as in the Sub-Commission Text. This strategy would be followed in the forthcoming debates.

The 10th period of sessions, held during the second half of 2004, resulted in a somewhat paradoxical crisis. On the one hand, given that the First International Decade was coming to an end, great efforts were being made to reach agreement on packages of articles so that a positive signal could be sent to the Commission on Human Rights to extend the deadline for negotiation. Moreover, some of the most interested parties made additional efforts to analyse some of the issues of general concern in greater depth.

On the other hand, this period was marked by the unfortunate way in which the work was being conducted, and some indigenous organisations took part in a hunger strike in front of the Palais des Nations in protest. Consequently, between 2004 and the following session of the Commission on Human Rights, a serious rift endangered the unity of the indigenous caucus. Two contrasting positions were being circulated in two different letters. The first called for a withdrawal from the negotiations to prevent any changes being made to the Sub-Commission Text. This position advocated waiting a few years before taking up the process once again with new and more modern working methods, possibly even under the guidance of another Chairperson-Rapporteur. The second position believed that the negotiations had to be continued and the proponents of this placed great importance on all the efforts being made to try to reach an agreement on the relevant issues of the declaration, as a basis on which to continue. In addition, this group felt that if the process came to a halt then it would be very difficult for it to be struck up again at a later date. Most of the governmental delegates shared this reasoning, which proved, in the end, to be the most appropriate.

In the midst of this strained atmosphere, replete with scepticism and mistrust between all interested parties, the Commission on Human Rights extended the mandate of the WGDD for one further year, to conclude its work by March 2006.<sup>8</sup> The prompt adoption of the Declaration was therefore a priority objective of the Programme of Action for the Second International Decade of the World's Indigenous People (2005-2014),<sup>9</sup> and a firm intention of the international community.

To fulfil this commitment, and with the key objective of reaching a compromise agreement outside the rigid format of the WGDD that sat in Geneva, with its prevalent atmosphere of mistrust, an International Workshop on the draft Declaration was held in Pátzcuaro.

The Pátzcuaro Workshop (Michoacán, Mexico)<sup>10</sup> was organised by the Government of Mexico and the Office of the High Commissioner for Human Rights from 26 to 30 September 2005. The Workshop was not a negotiation aimed at substituting the WGDD or creating a parallel forum: its main objective was to informally contribute to the debates on issues fundamental to the draft declaration, namely, self-determination, lands, territories and resources, and the general provisions. The workshop enabled a frank and sincere exchange of different opinions that produced a better understanding of the problems and created ideas



to on how to bring positions closer together to produce a dynamic declaration on indigenous rights.

On extending the mandate of the WGDD responsible for producing the draft Declaration, the Commission on Human Rights accepted the Mexican government's offer to hold an international workshop

*with the participation of representatives of States, indigenous experts, internationally recognized academics, independent experts and civil society organizations, [...] hosted and co-sponsored by the Government of Mexico, on issues related to the draft declaration with the purpose of promoting the rapprochement of positions of all partners involved, and invites the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people to participate in this workshop.*<sup>11</sup>

These discussions were influenced positively by the results of the 2005 World Summit, at which the Heads of State and Government reaffirmed their commitment to present "for adoption a final draft UN declaration on the rights of indigenous peoples as soon as possible."<sup>12</sup> Through a December 2005 resolution, the UNGA also called for "all Governments and indigenous organizations concerned to take every action necessary to facilitate the adoption of the draft UN declaration on the rights of indigenous peoples as soon as possible".<sup>13</sup>

Pátzcuaro holds a special place in the history of relations between states and indigenous peoples. The 1940 Inter-American Indigenous Conference resulted in the creation of the Inter-American Indigenous Institute, the aims of which basically revolved around coordinating the indigenous policies of member states, with the subsequent developments of which we are all aware. In 2006 the Workshop was held to analyse the fundamental issues of the declaration which, clearly, formed another milestone in the long history of meetings (successful in some cases, disappointing in most) between indigenous peoples and states. Although the First Indigenous Congress held in Pátzcuaro resulted in policies of assimilation and integration of indigenous peoples into national societies, the 2005 seminar addressed indigenous rights in the full meaning of the word.<sup>14</sup>

The event, which was very clearly an informal one, fostered an atmosphere of understanding that became known as the "spirit of Pátzcuaro", and even went further than its main objective of providing a space for reflection, given that it explored a possible narrowing of positions on the outstanding issues in the declaration, with a view to supporting the efforts of the WGDD at its 11th and last period of sessions.

Drawing on the "spirit of Pátzcuaro", the WGDD managed, after 10 years, to complete its task. It was the "spirit" of trust, comradeship and sincerity that had been achieved at Pátzcuaro that helped all those involved to commit to reaching

a compromise text, endeavouring to understand each other's positions in the negotiations.

Key solutions also came out of the meeting, such as the now famous preambular paragraph 18a (now Article 17(1), a construction of the United Kingdom and Guatemala, which, in the end, enabled the European Union to support the Declaration by placing individual rights on a par with collective rights, a key concern of Western countries.<sup>15</sup>

### **The 11<sup>th</sup> Period of Session: December 2005-January 2006**

The 11th and final period of sessions of the WGDD took place between December 2005 and January 2006. Consensus was achieved on a large number of draft articles, and positions were narrowed on most of the outstanding ones. Consequently, in February 2006, the WGDD's Chairperson-Rapporteur, Luis Enrique Chávez, presented a draft declaration that sought to address the major concerns expressed during the final period of sessions of the WGDD. This draft eventually gained the support of a majority of indigenous peoples and a large number of states and was submitted to the then-recently-established Human Rights Council for its consideration.

A majority of both governmental and indigenous representatives realised that any further prolongation of the negotiations would be to the detriment of the declaration, as it was now accepted that the text reflected the greatest consensus possible.

The main changes were the tacit acceptance of the Chairperson's draft as a basic working document, a willingness on the part of both parties to negotiate, and the preliminary adoption of 10 preambular paragraphs and 14 articles of the Declaration, through an open and informal working group led, with great transparency and spirit of commitment, by the Norwegian delegation.

The above was made possible by the fact that many indigenous representatives considered the Chairperson's text acceptable because it included a large proportion of the language of the Sub-Commission Text and, in some cases, improved on it in that it: maintained the right to self-determination (Article 3) and the collective rights of indigenous peoples; did not include references to the territorial integrity and political unity of states; and presented more viable proposals on land and territories.

In this context, the Latin American caucus played an important role in the attainment of a constructive position and moving negotiations forward within the global caucus, given that it used legal reasoning to become a key player and engine behind the positions. The involvement of the Latin American caucus was considered fundamental in the last session of meetings of this 11th period of sessions of the WGDD, held from 30 January to 3 February 2006.

An atmosphere began to emerge that was aimed at concluding the negotiations as rapidly as possible. Both Canada and Denmark, two of the most proactive delegations in the process, stated that they were in favour of completing the work by February 2006. The majority of European Union members shared this position. Some of the indigenous organisations showed their willingness to find compromise solutions, to prevent them from being excluded from the agreements to be approved.

Nevertheless, a highly difficult issue, and one fundamental to the declaration, had still not been resolved: the collective nature of indigenous rights. Various delegations within the Western group, particularly France and the United Kingdom, had serious reservations in this regard. Another related issue of great importance was that of the self-identification of members of indigenous peoples.

In addition, Australia, New Zealand and the United States repeated their intransigent position with regard to self-determination, linking it clearly to the exercise of internal autonomy. They insisted on establishing explicit guarantees in the operative part of the text relating to the territorial integrity and political unity of states. They proposed a package that addressed preambular paragraphs 14, 15, 15a and Articles 3 and 45 of the Sub-Commission Text. In essence, their proposal to amend Article 3 was the following:

*Indigenous peoples have the right to self-determination as enunciated in this Article.*

- a) By virtue of this right they freely participate in determining their political status and freely pursue their economic, social and cultural development;*
- b) In exercising this right to self-determination, they have the right to autonomy and self-management in matters relating directly to their internal and local affairs*
- c) This right shall be exercised in accordance with the rule of law with due respect to legal procedure and arrangements and in good faith.*

With this, Australia, New Zealand and the United States of America (including, to a lesser extent, the Russian Federation),<sup>16</sup> assumed a radical position within the negotiations, as radical as those indigenous representatives who wanted to reinforce the concept of full self-determination, with the aim of leaving open the possibility of a partnership with states or, failing this, their secession. Australia, New Zealand and the United States of America argued that Article 3 of the Declaration could not be an identical repetition of Article 1 of the International Covenant on Civil, and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>17</sup> as a new understanding of the right of self-determination within a state context was being discussed.

In addition, these states added that the WGDD did not have a mandate to discuss the right to self-determination and that indigenous peoples and states

did not share the same desires and aspirations, citing their domestic realities as an example. Finally, Australia, New Zealand and the United States of America felt that Article 3 as drafted did not enable progress of real and practical benefit to indigenous peoples (as if their proposal did). It was at this moment in the negotiations, in a plenary session, that the Mexican Ambassador, Luis Alfonso de Alba, put a stop to Australia, New Zealand and the United States' attempts by, for the first time, stating that Mexico was prepared to request a vote, as there was no way of reaching a consensus.

The Chairperson-Rapporteur of the WGDD conducted unofficial consultations with regard to the articles on self-determination and on land and territories in the plenary session.

The consideration of lands, territories and resources began with a presentation of the conclusions and recommendations of the *Expert Seminar on Indigenous Peoples' Permanent Sovereignty over Natural Resources and on their Relationship to Land* held from 25 to 27 January 2006.<sup>18</sup> Many criticisms arose regarding the decision to organise this seminar in the last week of negotiations on the declaration, as it was perceived that it could harden the position of some parties and thus delay the possibility of reaching agreements on sensitive issues related to the declaration. Indeed, some of the Seminar's recommendations were mentioned directly in the following WGDD session.

Alongside this, Norway was commissioned to lead consultations to reach a compromise on other articles. These consultations began with a package similar to the one Norway had negotiated a year earlier, with the central focus being preambular paragraph 18a as proposed by Guatemala-United Kingdom, a text which the Chairperson took up as his own.

The exercise culminated in "the provisional agreement" (which meant that although it was not a formal approval, it was at least a decision not to continue the deliberations further), on preambular paragraphs: 2, 3, 4, 7, 8, 9, 11, 17, 18, 19; and Articles: 4, 6, 9, 14, 16, 17, 19, 22, 23, 24, 37, 41 and 44. The plenary session came to an agreement on Article 38.

## **The split in the Western block**

The key role played by the United Kingdom must be mentioned, as one of the main opponents of the declaration and as the European Union's representative. The collective rights in the declaration represented an essentially theoretical problem for the United Kingdom, given that human rights, in its view, are based on an individual subject, neither social nor collective, in contradiction to indigenous peoples' conceptions of rights. To this day this position consists of the fact that, with the exception of the right to self-determination, no other collective rights under international law are recognised given that the international human

rights legal framework is focused on protecting individuals, and this was stated very vehemently, if not dogmatically, indeed.<sup>19</sup> The change in attitude came about on the basis of a solution found to a preambular paragraph proposed by the United Kingdom, then known as 18a. The insertion of this paragraph did not please the indigenous representatives as it referred to indigenous persons having the right to all human rights, and that indigenous peoples collectively possess other rights.

The solution was found at the Pátzcuaro Workshop when, in a totally informal manner, the representatives of Guatemala and the United Kingdom tried a new formula that replaced the adverbial form to transform it into the subject: "*indigenous peoples possess collective rights*". This key paragraph enabled the United Kingdom, and hence the European Union, with Spain's support (as this state also played an important role in supporting the declaration) to accept almost 40 of the declaration's articles, both preambular and operative (as discussed below).

Something must also be said about Articles 1 and 2, where negotiations were necessary to reflect that indigenous peoples have an equal right to the full enjoyment of all human rights, collectively or individually, albeit with constructively ambiguous language. This is very important because it was at this moment that the group of Western countries split, and the more severe positions of some countries became isolated and weakened. Canada suffered the effects of these agreements because, due to a change in its government from a liberal to a highly conservative one, it changed from playing the comfortable role of promoter and defender of the declaration to a state that categorically opposed its adoption.

Some states, however, were not satisfied with the Chairperson-Rapporteur's draft. Australia, New Zealand and the United States undertook significant lobbying in opposition to the text, based on its non-consensual nature and arguments related primarily to territorial integrity, self-determination and lands and territories. Finally, Russia joined the opposition, arguing that the Chairperson-Rapporteur's text was not based on a consensus.

Following the publication of the draft declaration proposed by the Chairperson-Rapporteur of the WGDD in February 2006, a major campaign was unfurled to promote its approval during the first period of sessions of the Human Rights Council. This campaign was in no way a chance one. It was in response to a similar campaign being conducted in capitals around the world by countries opposed to the Declaration: Australia, New Zealand and the United States of America, now joined by Canada and the Russian Federation.

## **Adoption of the declaration in the Human Rights Council in June 2006**

Adoption in the Human Rights Council was no simple matter, despite the Chairperson's text being a "compromise text" that attempted to accommodate most

concerns. For this reason, and also given the uncertainty generated by the creation of the new UN specialist international human rights body to replace the Commission on Human Rights - no longer, moreover, a subsidiary organ of Economic and Social Council (ECOSOC) but of the UNGA - strategic alliances were forged. In addition, that the President of the new Human Rights Council was the Mexican Ambassador, Luis Alfonso de Alba, was circumstantially favourable to the process. The aim of one of these alliances was to “tie together in a package”, as part of the new Council decisions, the indigenous peoples’ declaration and the International Convention for the Protection of all Persons from Enforced Disappearance. This was fundamental to France and Argentina, the main driving forces behind this proposal, and a tacit agreement was thus established around both instruments, although the declaration continued to be viewed with some mistrust by various countries.

Thus on 29 June 2006, the Human Rights Council adopted Resolution 2006/2,<sup>20</sup> presented by Peru,<sup>21</sup> at its first period of sessions, thereby adopting the final draft of the declaration presented by the Chairperson-Rapporteur of the WGDD. It was then sent for final adoption at the 61st period of sessions of the UNGA. The Resolution was passed in the Human Rights Council with 30 votes for, two against,<sup>22</sup> and 12 abstentions.<sup>23</sup>

### **The declaration’s difficulties in the 3rd committee of the UNGA**

Once the Human Rights Council had adopted the declaration, it sent the report of its meetings to the UNGA, including the decisions to adopt the UN declaration on the rights of indigenous peoples and the International Convention for the Protection of all Persons from Enforced Disappearance.

This created a problem of uncertainty about the place of the Human Rights Council, and its decisions, as a subsidiary organ of the UNGA rather than, as the Commission of Human Rights had been, the ECOSOC. The UNGA is made up of various committees with responsibility for dealing with different economic, legal and human rights issues that are not considered in a plenary sitting but which remain a part of the UNGA. The relationship between the UNGA’s Third Committee, responsible for human rights, and the Human Rights Council was politically exploited by the states opposed to the declaration, and thus gave rise to a very long and complex adoption process in the UNGA. Australia, Canada and New Zealand launched an intensive lobbying campaign with one of the key groups involved in adopting this instrument: the African Group.

In the UNGA held on 20 December 2006, the African countries, headed by Botswana, Namibia and others, backed by those powers that had played a leading role in the most recent chapters of colonisation of indigenous lands and ter-

ritories, decided to postpone the examination and adoption of the declaration to have more time to continue holding consultations in this regard.<sup>24</sup>

But how can it be that the African bloc was the one that resisted the approval of the declaration, given that they were the very ones who had used their historic claims as peoples to achieve independence?

One of the African arguments was (and remains) that all their inhabitants (with the exception of the white population) are indigenous, because the settlers came from outside. But within these countries, too, there are differences between ethnic groups, between groups and peoples that have different cultural identities and different histories, given that some hold power and others are marginalised within their countries. Within these countries there are social groups, relatively marginalised, distinct from the majority, who have also traditionally been the victims of discrimination and marginalisation, often the victims of violence, dispossession, genocide even, and a lack of recognition of, and respect for, their ancestral lands.

As the African Commission on Human and Peoples' Rights indicates (and this is also perhaps applicable to Asian realities), a rigid definition of indigenous peoples is not possible, and perhaps neither necessary nor desirable. African indigenous peoples practise diverse economic systems that range from hunter-gathering to small-scale farming, not forgetting nomadic pastoralists. They are distinguished by their cultures, their social institutions and their religious systems. Their way of life differs considerably from that of the dominant society, and their culture is under threat, if not on the verge of extinction. A key feature of these peoples is that their specific means of subsistence depends directly on access and related rights to their traditional territories and the natural resources found therein. It is not the issue of "aboriginality", who came first, that is a fundamental aspect of the definition of indigenous peoples, as suggested by the states, but rather the current relations of oppression within those African societies. Self-identification thus plays an essential role in defining indigenous peoples.<sup>25</sup>

## **The final hurdle: adoption of the Declaration by the UNGA**

In fulfilment of UNGA Resolution 61/178, under which it was decided to hold more consultations on the Declaration and to conclude its examination before the end of its sixty-first period of sessions,<sup>26</sup> intense negotiations were conducted between the different interested parties and the African Group. As a result, the African countries made nine amendments to the declaration as adopted by the Human Rights Council, undoubtedly damaging the stature of this recently-established body.

The most worrying of all these amendments was that to Article 46(1), which states: "Nothing in this Declaration (...) may be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the



territorial integrity or political unity of sovereign and independent States.” With this, states intended to place clear limitations on the right of indigenous peoples to self-determination. However, taking advantage of the windows existing in international law and in preambular paragraph 16 to the Declaration itself, this provision has to be read and interpreted in line with the provisions of the 1993 *Vienna Declaration and Programme of Action* (which reaffirms the stipulations of the 1970 Declaration on principles of international law concerning friendly cooperation and relations among states),<sup>27</sup> and which literally states:

*In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in accordance with the Charter of the United Nations, this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind (our emphasis).*

In other words, the principle of “territorial integrity or political unity” cannot be invoked under any circumstance by states, but there is instead a fundamental condition that the states must comply at all times with the principle of “equality of rights and self-determination of peoples”, which, as we all know, is often not the case in many countries, and thus the application of this right (self-determination of indigenous peoples) is justly demanded.

With these amendments, and once the consent of the indigenous caucus had been received, which also conducted broad consultations amongst the regional caucuses, on 13 September 2007, the last day of its 61st period of sessions, the UNGA adopted the Declaration by an overwhelming majority of 143 votes in favour, after almost 25 years of long and complex deliberations between indigenous peoples’ representatives and governmental delegations.<sup>28</sup> As was to be expected, Australia, Canada, New Zealand and the United States of America voted against, and a group of 11 countries abstained, including Colombia, the only country from Latin America to do so.

## **The fundamental rights contained in the Declaration**

The Declaration recognises the importance of the cultural diversity and individual and collective human rights of indigenous peoples. The main aim of the instrument is to encourage “harmonious and cooperative relations between States

and indigenous peoples based on principles of justice, democracy, respect for human rights, non-discrimination and good faith”.<sup>29</sup>

It also expressly recognises the right of indigenous peoples to self-determination in the political and legal spheres, as well as in terms of their social, cultural and economic development, “retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State”.<sup>30</sup>

Among its most important provisions, it recognises the right of indigenous peoples to participate in decisions regarding issues that affect their rights, lives and destinies, and requires states to hold consultations and cooperate in good faith with the relevant indigenous peoples in order to obtain their free, prior and informed consent before adopting or applying any legislative or administrative measures that might affect them (Article 19).

The Declaration also recognises the spiritual relationship that indigenous peoples have with their lands, territories and natural resources, along with their right to own, use, develop and manage them by means of their own laws and land tenure systems. In accordance with the Declaration, the use and enjoyment of lands, territories and resources by third parties requires the free, prior and informed consent of the indigenous peoples and, if this is not forthcoming, must be accompanied by redress. It also prohibits the forced relocation of indigenous peoples from their lands or territories, establishing a requirement to obtain their free, prior and informed consent for any relocation, or redress of the same.

The Declaration also contains important provisions protecting the traditions and cultural, spiritual and religious customs of indigenous peoples, along with their traditional medicines, intellectual property and associated traditional cultural expressions, plus their genetic resources and employment rights. It emphasises the protection of indigenous peoples’ right to impart education in their own language and use it in political, legal and administrative proceedings, requiring the state to provide interpretation services or other appropriate measures.

The Declaration also contains a good number of important, complex and controversial issues, which we shall describe in broad outlines in the following sections.<sup>31</sup>

## **Defining indigenous peoples**

As paradoxical as it may seem, after years of deliberations in this regard, there is no legal definition of the concept of “indigenous peoples” that is capable of encapsulating all their social and political realities, as diverse as they are. There are even some who state that this is neither necessary nor desirable, particularly in the context of countries or regions where there is a reticence to recognise these peoples, such as Africa or Asia. The most common approach is that proposed in ILO Convention 169 on Indigenous and Tribal Peoples (ILO Convention 169)

and,<sup>32</sup> of course, the Martínez-Cobo Report to the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities (1986).<sup>33</sup> One definition suggested by the Chairperson of the WGIP, Erica Irene Daes, inspired by the Martínez-Cobo Report, is also used, discussed below. Some national legislation has definitions of “indigenous people”, sometimes likened – incorrectly – to “ethnic groups”, but these are local adaptations that are not always appropriate at the international level.

The definition outlined by the Chairperson of the WGIP defines people as indigenous according to their descent from groups already established within the country’s territory at the time of the arrival of other groups with different cultures and ethnic origins, who due to their isolation from other sectors of the society have retained the customs and traditions of their ancestors virtually intact, traditions which are similar to those considered to be indigenous, and because they are subject, albeit formally, to a state structure that incorporates national, social and cultural features other than their own.<sup>34</sup>

According to the Martínez-Cobo Report to the Sub-Commission,<sup>35</sup> indigenous communities, peoples and nations are ones which, having an historical continuity with pre-invasive and precolonial societies that developed on their territories, are considered unlike other sectors of the dominant society in those territories or parts thereof. They now comprise non-dominant sectors of society and are determined to preserve, develop and transmit their ancestral territories and their ethnic identity to future generations as the basis for their continuity as peoples, in accordance with their own cultural patterns, social institutions and legal systems. This historical continuity may include the persistence, over a long period of time and up to the present day, of one or more of the following factors: occupation of ancestral territories or parts thereof; common ancestry with the original inhabitants of those territories; culture in general or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of subsistence, lifestyle, etc.); language (whether used as sole language, mother tongue, the usual means of communication at home or amongst family or as the main, preferred, usual, general or normal language); residence in certain parts of their country or in certain regions of the world; and other relevant factors.

For its part, ILO Convention 169 establishes that a people can be considered indigenous if it is descended from those that were living in the area prior to its colonisation and if it has maintained its own social, economic, cultural and political institutions since the time of colonisation and the establishment of the new states. In addition, the Convention states that self-identification is crucial for indigenous peoples.

The Chairperson-Rapporteur of the WGDD removed Article 8 from the original Sub-Commission Text, which defined indigenous peoples in terms of their self-identification: “Indigenous peoples have the collective and individual right

to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.”

This decision was probably taken because the paragraph did not contribute much to the overall text. Its removal was a political measure that enabled the Asian and African countries to join the consensus, given that, as we have said, they do not recognise indigenous peoples *stricto sensu* because, apart from the fact that their colonisation processes were different from those of the Americas and Oceania, the dominant social groups had inhabited the same regions as those who identify as indigenous.

The lack of definition of the term “indigenous peoples” in the Declaration is part of the text’s constructive ambiguity and should not necessarily be seen as something negative; on the contrary, it is something that has to be established and resolved within national states, in cooperation with indigenous peoples.

### **Scope of indigenous peoples’ self-determination**

The crucial issue in the Declaration is undoubtedly self-determination. It was the one issue that sent shivers down the spines of many states due to the supposed threat it represents for territorial integrity. Article 3 of the Declaration, which states: “*Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development*”, comes from the same language used in Article 1 of the IC-CPR and the ICESCR.

To overcome the states’ concerns regarding territorial integrity, the Chairperson-Rapporteur agreed to bring draft Article 31 of the original text closer to Article 3 and turn it into an Article 3a (4 in the Declaration as adopted by the UNGA), in line with a proposal presented by Mexico during the Pátzcuaro Workshop: “Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.” This was with the purpose of contextualising the self-determination contained in Article 3 of the Declaration.

The Mexican proposal consisted of a package, the basic premise of which was to maintain Article 3 of the Declaration intact, as proposed in the Sub-Commission Text, and to address the states’ concerns with regard to the issue of territorial integrity and political unity without having to explicitly mention this. To this end, the package included a preambular paragraph 15 (merger of paragraphs 15 and 15a, amended), in which the reference to “*the principles contained in this Declaration*” was removed from paragraph 15 so not to create confusion with the principle recognised in international law regarding the right of all peoples to self-determination, and an amendment was introduced in 15a to indicate that recog-

inition of the rights in this Declaration would improve harmonious and cooperative relations between the state (singular and not plural, as previously) and indigenous peoples. In addition, as mentioned the package retained operative paragraph 3 (intact) and added Article 31, slightly amended, as Article 4 of the Declaration as adopted by the UNGA.

The discussions on this issue were positively assisted by the adoption, by the Heads of State and Government, of the final outcome document of the 2005 World Summit, in the context of the plenary high-level meeting of the UNGA. This document consolidates recognition of the term *indigenous peoples* and endorses the commitment to the *rights of indigenous peoples*. Paragraph 127 of the World Summit final document reaffirmed the commitment to continue to advance the promotion of the human rights of the world's indigenous peoples on a local, national, regional and international level, including by means of consultation and collaboration with them, and to present as soon as possible a final draft of the declaration on the rights of indigenous peoples for its approval.<sup>36</sup> It is important to reiterate that the Declaration did not necessarily create new principles of international law but that it repeated and re-affirmed those already existing, which had already been recognised in international case law, in international instruments and in customary international law.

In general, there are two ways in which self-determination has been implemented in the context of the UN. Firstly, the application of this principle of international law to the trust and non-self-governing territories in the context of decolonisation (Chapters XI, XII and XIII of the UN Charter), against which back-drop UNGA resolutions 1514 (XV) – “*Declaration on the Granting of Independence to Colonial Countries and Peoples*”, 1541 (XV) – “*Principles which should guide members in determining whether or nor an obligation exists to transmit the information called for under Article 73e of the Charter and 2625 (XXV) – “*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*” take on importance.<sup>37</sup> Secondly, self-determination has been expressed as a fundamental and collective human right (Article 1 of the ICCPR and ICESCR).*

A wide debate has taken place on the implications of the recognition of self-determination and the use of the same language as in common Article 1 of both the ICCPR and the ICESCR. It has been noted, historically, the term “peoples” has been interpreted as describing the whole population of a state. However, discrimination against other peoples must be avoided and, for this reason, the direct relationship between common Article 1 of both Covenants and Article 3 of the Declaration continues to create some difficulties.

It is important to avoid discriminatory interpretations of the Declaration and language that restricts the legitimate rights of indigenous peoples on the pretext of respecting the territorial integrity of states. In this context, and with the aim of addressing different concerns, the right of self-determination established in inter-

national law should not be interpreted in absolute terms with reference to indigenous peoples.

Thus in the context of a complex debate on the scope of the right to self-determination in international law in general, the aim of the Declaration is to express the indigenous peoples' right to self-determination in the context of their co-existence with states, and does not attempt to address other questions about the meaning of self-determination that remain in international law.

An indigenous people's right to self-determination must be seen in a positive context, as the basis for dialogue and partnership, a catalyst for their effective participation in the process of state construction, and as a basis for the construction of a new relationship between indigenous peoples and the State under terms of mutual respect, encouraging peace, development, coexistence and common values. The preambular paragraphs of the Declaration thus state as follows:

- *Also considering that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States;*
- *Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, along with the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development;*
- *Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,*

The right of indigenous peoples to self-determination under the Declaration is a vehicle by which to prevent discrimination and oppression as well as to encourage solutions aimed at correcting historic injustices.

For this reason, the implications inherent in the recognition of an indigenous peoples' right to self-determination should not be interpreted in a restricted or discriminatory manner in relation to indigenous peoples, despite the concerns of a few states. It was felt that these concerns had been duly resolved through the positive language contained, particularly, in preambular paragraphs 17 and 18, as well as in the last article of the declaration approved by the Human Rights Council, which put all the provisions of that instrument in context within the framework of the Charter of the United Nations. Nevertheless, as already noted, as a result of amendments made in New York, the Declaration now includes an

explicit reference to the territorial integrity or political unity of the states in Article 46(1).

During the negotiations, most of the states, to different extents, argued that the text should explicitly express their territorial integrity and political unity. Australia, New Zealand and the United States (in addition to others such as the Russian Federation) were at one extreme, demanding that territorial integrity be included in the operative part of the Declaration. In line with the above, it was proposed to take part of preambular paragraph 14b, which had been proposed at previous sessions, and turn it into a new Article 45a, and also to incorporate a partial quote from the *Vienna Declaration and Programme of Action* with regard to territorial integrity and political unity.

At the other extreme were Denmark, which supported a position by which the declaration could accommodate free association or even independence, and Spain, which wanted to leave open the possibility that self-determination would not be limited to self-government or autonomy.

The indigenous representatives also had different visions and positions. While some were calling for self-determination to be exercised in the context of a new relationship of respect and coordination with states, others had demands of an independence or secession.

The aim of these latter indigenous representatives could be interpreted as an attempt to change the rules of the UN so that peoples could claim self-determination for reasons other than a situation of colonisation or occupation by a foreign power (under Article 1(1) of the Covenants). They were also in favour of the situation of indigenous peoples being recognised as one of continuing colonisation, through the possible application of Chapter XI of the Charter of the United Nations, which sets out the basis for non-self-governing territories to exercise their self-determination (see, for example, preambular paragraph 5 of the Declaration).

Consequently, the reference to common Article 1 of the ICCPR and ICESCR (in Article 3 of the Declaration), and the Charter of the United Nations (Article 1 of the Declaration) was of particular importance to indigenous peoples, as was the fact that no limit should be placed on Article 3 as a result of the Article 31 of the Declaration, now Article 4, which sets out the right to self-government and autonomy. The main argument was that, by being considered peoples, they now had the possibility of exercising self-determination, including in its wider ramifications.

## **Free, prior and informed consent**

Indigenous peoples' right to free, prior and informed consent is concretely established in the Article 32(2), which states:



*States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

The right to free, prior and informed consent is included in relation to other aspects of the Declaration, such as: forced displacements and relocations (Article 10); reparation, including restitution, respect for cultural, intellectual, religious and spiritual expressions (Article 11); consultation on legislative measures (Article 19); compensation and/or restitution of lands (Article 28); and environmental protection (Article 29).

Recognition of the right to free, prior and informed consent is important, particularly in terms of large development projects, which, as we know through numerous examples, have invariably been disastrous for indigenous peoples. Although ILO Convention 169 contains provisions on consultation, its limitations in the context of international law are also known, along with its applicability within states.

Some states are fearful of the recognition and exercise of this right to free, prior and informed consent. In its explanation of why it voted against the Human Rights Council's approval of the declaration, Canada stated (and it continues to use this as an argument) that to recognise this right would be to give indigenous peoples a right of veto over state decisions. To give this as an explanation as to why it voted against the Declaration seems contradictory, given that the very aim of the Declaration was to express such important rights of indigenous peoples in an international instrument.

## **Concept and scope of indigenous peoples' collective rights**

Perhaps the second greatest area of difficulty in the Declaration negotiations, after the issue of lands, territories and resources and self-determination, was that of the interpretation of human rights in their collective dimension.

During the debates on the Declaration, some delegations – headed by the United Kingdom – clearly made known their difficulty in recognising collective rights as part of the international human rights system, a system that, for some delegations, was understood only as a set of individual rights.

These concerns were expressed around preambular paragraphs 15, 15a and 18b of the Sub-Commission Text. As previously mentioned, Guatemala and the United Kingdom achieved a consensus proposal at Pátzcuaro around preambular paragraph 18a which, by taking as its basis the concept of collective and individual rights, enabled the adoption of a large number of articles referring to these

rights in the negotiation process.<sup>38</sup> With this good news, the negotiations on the Declaration began at the 11th period of sessions of the WGDD.

The text was established as follows: “Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples.”

In this respect, and given the very nature of indigenous peoples and their collective identity, the Declaration clearly introduces the concept of collective rights as one of the new contributions to the international legal system. Nevertheless, it emphasises the importance of harmonising collective rights and individual rights to the benefit of indigenous peoples, and noting the importance of protecting women’s and children’s rights.

However, it is clear in the Declaration that the recognition of collective rights establishes a framework for the effective protection of the individual rights of indigenous peoples. In other words, recognition of the collective rights of indigenous peoples constitutes the ideal method for the effective achievement of many of the universally-enshrined individual human rights. The intrinsic and harmonious relationship between individual and collective rights can be seen in relation to land. It would thus be extremely difficult for an indigenous person to use or enjoy lands and natural resources if there were no prior recognition of the collective ownership of said lands and territories by the indigenous community or people in question.

### **Lands, territories and resources**

The provisions on lands, territories and natural resources in the Declaration (Articles 25 to 32) refer to issues that have been, and remain, highly significant for indigenous peoples and form the focal point of their demands, closely linked to the issue of self-determination and collective rights. This issue has in turn caused concern amongst states, insofar as they understand it to be closely linked to states’ territorial integrity, public order or interest, and recognise the need to balance the population’s access to land and natural resources and the use of strategic resources.

In this regard, principal issues related to: the scope of the category of “territories”, in relation to state territorial integrity and the breadth and diversity of indigenous demands; the extent of states’ obligations to provide restitution of lands, territories and resources “lost” of indigenous peoples in the distant past; the consequences of recognising rights and procedures for redress and, at the same time, to resolve the interests of third parties and the general public interest, including use of strategic resources on historical indigenous territories.

The Declaration addresses the historic phenomenon of dispossession of indigenous peoples' lands as a product of Western colonization. Indigenous peoples have achieved many breakthroughs by not giving up their land claims, in particular in the Americas and Australia, although in other parts of the world, such as Africa (Botswana), we are beginning to see some justice in this regard.<sup>39</sup>

It is clear that the definition of "territories", as advocated by indigenous peoples and under the Declaration, does not refer to, or compromise, states' territorial integrity. There are precedents in international law and abundant arguments in doctrine and practice that are sufficiently clear – ILO Convention 169, rulings of the Inter-American Court of Human Rights and others.<sup>40</sup>

Moreover, the combination of terms used in the articles in question – lands, territories, natural resources, waters, coasts, etc – represents an important effort to encapsulate the conceptual breadth and diversity of the situations in which indigenous peoples find themselves.

The use of the expression lands, territories and resources "which they have traditionally owned or otherwise occupied or used" gives legitimacy to indigenous peoples' claims irrespective of the historical or current legal status of their traditionally owned, occupied and used lands. However, questions remain as to the extent of state obligations to provide redress in relation to these territories, some of which have been out of indigenous control for a long period of time. This is particularly problematic given that third parties may have established legitimate ownership, occupation or use of those territories either exclusively or concurrently.

The content of Article 25 centres on indigenous peoples' spiritual relationship with the lands and territories, waters, coastal seas and other resources that they traditionally owned, occupied, or used, rather than their "material" relationship, with the reference to "material" being deleted from the Sub-Commission Text. States were worried about the implications of this material relationship, and wanted to limit it to lands indigenous peoples currently own, occupy or use. The indigenous representatives maintained that it was essential to refer both to their spiritual and their material relationship with their historically-held lands, as it corresponded to their own conception of the world and their existence. During the negotiations, some delegations even proposed a reference to indigenous peoples' "integral relationship", which was ultimately rejected.

Article 25 might be interpreted to mean that indigenous peoples do not have the right to own, possess or control lands historically possessed but no longer under their control in that it is directed at protecting the right of indigenous peoples to maintain and strengthen their spiritual relationship with said lands, territories and resources rather than at their ownership, possession and control of such lands.

Given indigenous peoples' survival through the reproduction of their culture, and the right of nomadic or cross-border indigenous peoples to their territories,

the term “*territories*” must be understood as referring to the physical space that enables the survival of the indigenous peoples through the reproduction of their culture. It does not, in our view, equate to the “national territory” or “nation state”. Such an interpretation should dissipate states’ fears in this regard. Territory here refers to the whole of the symbolic space in which a particular indigenous culture has developed, including not only the land but also the “sacred landscape” that corresponds to their world view, and which reflects the holistic and malleable capacity of indigenous peoples to demarcate space differently from other kinds of societies. We have to understand in this context that territory may cover not only the land as a commodity and source of wealth but a cave, mountaintop, lake/sea or desert, spaces or places often shared with other people, as common heritage, for their symbolic and religious dimension. The rituals and myths associated with indigenous peoples’ territories make land and ritual landscape a territory in the indigenous sense of the term.<sup>41</sup>

Article 26 refers to indigenous peoples’ right to own, develop, control and use lands, territories and resources they possess. The debate on this article revolved around the right of ownership, development, control and use of the lands, territories and resources to lands historically occupied or used but not necessarily still in Indigenous peoples’ possession, as set out in the Sub-Commission Text. For many states, the problem was that the reference to “lands, territories and resources they have historically owned” might include the whole of a state’s territory, regardless of the fact that Article 26(a) of the Sub-Commission Text, which became what is now Article 27, establishes a process for recognition and adjudication of indigenous peoples’ territories no longer in their possession. Article 27 includes an obligation on states to give due recognition to the laws, traditions, customs and land tenure systems of indigenous peoples when establishing and implementing the process to recognise and adjudicate the right of indigenous peoples to their lands, territories and resources. Nevertheless, doubts remain as to the real involvement these peoples can have in such a judicial process, being a party and not the state authority conducting the process.

The controversy regarding Article 28 revolved around technical and legal meanings of redress, restitution and compensation. States sought to minimise their obligations. Many argued that the right to redress had not been recognised under international law. New Zealand, for example, insisted that indigenous peoples should only have access to effective fora to present demands for redress. The other issue was opposition to redress in the form of restitution or replacement with lands and territories of equal value. While, in the end, the general right to “redress” was accepted to narrow down positions, the provision also mentions, in the following order, restitution and compensation subject to the limits of possibility established in international law.

Progress was made on Article 29, including states’ agreement to establish and implement assistance programmes for indigenous peoples to ensure the protec-

tion and conservation of the environment and the productive capacity of indigenous peoples' lands, territories and resources. However, there were differences regarding the possibility of regenerating or restoring indigenous peoples' environment. Another issue of divergence related to the imperative nature of the states' obligation in this regard.

Article 30 lays down the level of obligation that states agree to commit to when holding effective consultations with indigenous peoples, before using their lands or territories for military activities.

With Article 31, the debate revolved around the issue of indigenous peoples' collective intellectual property, as well as their control of their cultural heritage, their traditional knowledge, their traditional cultural expressions, and so on. The Declaration has thus far formed a key part of the debates of the Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore within the World Intellectual Property Organisation (WIPO).<sup>42</sup> In fact, at one of the sessions, the Declaration was circulated as a WIPO document. The Permanent Forum on Indigenous Issues (PFII) also held an "International Technical Workshop on Indigenous Traditional Knowledge" in Panama City from 21 to 23 September 2005 and published a report in this regard.<sup>43</sup> At its fifth session, the PFII recommended that Michael Dodson prepare a report on customary law in relation to indigenous traditional knowledge in response to the international seminar in Panama.<sup>44</sup> According to the Rapporteur, the most explicit provision for the protection of indigenous traditional knowledge is Article 31 of the Declaration.<sup>45</sup>

Finally, Article 32 provides that the state must obtain, or seek to obtain, in accordance with its legal obligations, indigenous peoples' free, prior and informed consent before approving any project that may affect their lands or territories and other resources.

## Conclusion

The Declaration contains a set of principles and norms that recognise and establish, within the international normative system, the fundamental rights of indigenous peoples, and these must now form the basis of a new relationship between indigenous peoples, states and societies the world over. In addition to other already existing legal instruments on human rights, therefore, the Declaration will become the new regulatory and practical basis for guaranteeing and protecting indigenous rights in different spheres and at different levels.

The fundamental issue around which the content of the Declaration revolves can be found in Article 3, which expressly recognises indigenous peoples as full subjects of the right to self-determination, as established in the ICESCR and the ICCPR. With this new provision, the discriminatory thesis that considered indig-

enous peoples to be “second class” peoples by not attributing any legal consequence to the concept of “indigenous peoples” under international law, has been overcome. By recognising the concept of “indigenous peoples” in normative regulations, and its direct link to the right to self-determination, indigenous peoples are now formally placed on an equal footing in their exercise and enjoyment of their rights. In this regard, it can be considered that progress has been made on ILO Convention 169 which, up until now, was the only international instrument providing specifically for recognition of indigenous rights; a legally binding instrument but limited given that it is recognised by little more than 20 countries.

Arriving at this new conception has not been an easy task. It has been a long and winding path along which it was not easy to reconcile different visions and perceptions of the life and realities in which we all live. Perhaps one of the most critical moments was the introduction of an explicit reference to the territorial integrity or political unity of states in Article 46(1), as previously noted. However, this is not an absolute principle and its limitations are clearly defined in international law itself. This underlies the importance of calling for an integral and coherent interpretation of the norms and principles contained in the Declaration, avoiding different yard sticks or discriminatory interpretations, as has often been the case.

Moreover, the concept of “territorial integrity” must be interpreted not only in relation to the “territory” of states but must also be used to guarantee and protect the “territorial integrity” of indigenous peoples, as established in various articles of the Declaration. In this respect, it is important to highlight that Article 26 of the Declaration recognises the concept of “indigenous territory”. This takes on importance when we reflect on the fact that one of the most serious problems facing indigenous peoples the world over today is the dispossession of their lands, territories and natural resources and threats of different kinds in this regard.

With the approval of the Declaration, one of the biggest vacuums in international law has been filled, particularly in the international human rights system. Whichever way you look at it, it is clear that the Declaration complements existing human rights standards such as the Universal Declaration of Human Rights, the ICCPR and the ICESCR and so on. At the same time, we are moving towards a universal acceptance of the collective dimension of human rights, in contrast to the discriminatory vision that tends to deny collective rights and prioritise individual rights.

To try to understand the Declaration’s significance, we believe it necessary to approach the Declaration from a plural, but at the same time integral and holistic, perspective.

In political terms, it recognises the legal and political existence of indigenous peoples as subjects of international law, with rights and obligations specific to them as peoples, particularly the right to self-determination, as established in the ICCPR and ICESCR and Article 3 of the Declaration. In addition, it establishes the

basis for a new relationship between indigenous peoples and states, in which indigenous legal and political systems, and those of the states, live side by side in mutual respect and harmony, banishing the histories of colonialism and imposition that have weighed on them.

In economic terms, by recognising the right of indigenous peoples to their lands, territories and natural resources, the foundations have been laid for indigenous peoples to be in a position to embark on and strengthen their economic development processes, autonomously and in line with their cultures, world views and belief systems.

In cultural terms, the Declaration recognises the fundamental contribution of indigenous peoples to the world's cultural diversity, which will be enriched and strengthened by the full exercise of their cultures, knowledge, languages, traditions, world vision, and so on. In this way the Declaration will serve as a basis and a bridge to make true dialogue and intercultural co-existence possible, synthesizing the ideal of human communication, which can be summarised as understanding, respect for and empathy with the "other".

In social terms, the Declaration will enable differences between indigenous and non-indigenous societies to exist on a basis of greater understanding and harmony. This will hold the seeds of a new relationship between indigenous peoples and the societies with whom they are in constant relationships on a day-to-day basis. In addition, it will enable them to regenerate and be strengthened as full social subjects and will lay the foundations for the elimination of the discrimination, poverty and marginalisation that these peoples have suffered.

And although the Declaration does not reflect all the indigenous demands that have been made over the course of many long years, it is one step further down the path. A step that now needs to be made concrete in the daily work aimed at the growth and blossoming of indigenous peoples: a step that will need to result in new norms within the spheres of respective countries and realities; a step further in the search for a "good life", in harmony with ourselves ("us" and the "others") as human beings and Mother Earth. ○

## Notes

- 1 The authors dedicate this article, and our work on the Declaration, to the memory of Joel Regino, Ayuuk of Alotepec Mixe.
- 2 Later published in a book **Claude Lévi-Strauss. 2005.** *Loin de Brésil; entretien avec Véronique Mor-taigne* (Paris: Chandeigne).
- 3 **Juan Ginés de Sepúlveda** *Tratado sobre las justas causas de la guerra contra los indios*, con una Advertencia de Marcelino Menéndez y Pelayo y un Estudio por Manuel García-Pelayo. 3ª reim-presión, México, FCE, 1996.
- 4 Although little is now said about the "natural servitude of the Barbarians", one of Sepúlveda's theses, based naturally on Aristoteles' *Politics*, the bitter aftertaste of the thesis, in terms of natural servitude and hence the duties of superior races to inferior ones, continued to echo in essayists



and politicians of the 19th and 20th centuries, who exerted great influence over racial theses, such as Gobineau, Tocqueville, Heinrich Leo, H.S. Chamberlain and even McKinley, President of the United States of America in his policies towards the Philippines after the war with Spain in 1898. Cf. **Silvio Zavala. 1984.** *Filosofía de la Conquista* (Mexico: Fondo de Cultura Económica, 1st reprint of the 3rd ed). Cf. also, by the author **André Pichot. 2000.** *La Société pure: de Darwin à Hitler* (Paris: Ed. Flammarion); **ibid. 2008** *Aux origines des théories raciales, de la Bible à Darwin* (Paris: ed. Flammarion). It is also worth consulting: **Tzvetan Todorov. 2008.** *La peur des barbares. Au-delà du choc des civilisations* (Paris: Robert Laffont).

- 5 See: <http://www.un.org/spanish/documents/esc/subsidiary.htm>. A recent approach to the issue of indigenous peoples is the book by **Catherine Clément. 2006.** *Qu'est-ce qu'un peuple premier?* (Paris: Editions du Panama). This includes as an annex the Declaration approved by the Human Rights Council in June 2006.
- 6 **José María Astorla. 1992.** "The Hegelian critique of Spinoza's philosophy" *Anales del Seminario de Metafísica Núm. Extra. Homenaje a S. Rábade* (Madrid: Ed. Complutense) 635-653.
- 7 UNGA "Resolution 2625: Declaration of Principles of International law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" UN Doc A/8028 (1971) and UNGA World Conference on Human Rights "Vienna Declaration and Programme of Action" UN Doc A/CONF.157/22 (25 June 1993).
- 8 The position of Mexico and Guatemala, and some other countries, was to extend the mandate for two years, at least, and thus the resolution sponsored by Canada was negotiated. Some countries from the Western bloc (USA, Australia) opposed this and proposed just one year, to which Canada, main sponsor of the resolution, was not opposed. Subsequently, Canada was to argue the need for more time for the negotiations, but with the aim of delaying the process, due to a change in government.
- 9 UNGA "Resolution on the Second International Decade on the World's Indigenous Peoples (2005-2014)" UN Doc A/60/270 point 4 on Human Rights, para 35 (2004).
- 10 See the results in: Commission on Human Rights "International workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples, Patzcuaro, Michoacán, Mexico, 26 – 30 September 2005, Information provided by the Government of Mexico" UN Doc E/CN.4/2005/WG.1.5/CRP.1 (2005). The National Commission for the Development of Indigenous Peoples has a video recording of the seminar, as well as a documentary on it.
- 11 The resolution originally included the expression, "welcomes" Mexico's offer; however, New Zealand insisted that it could only "take note" given that it did not view the fact that the discussion had been removed from the Geneva UN context positively. This was, of course, because the rigid format of negotiations was favourable to those countries opposing the Declaration and was perhaps also because of a justifiable fear of losing control of the situation.
- 12 UNGA World Summit 2005 "Resolution 60/1: World Summit Outcome" UN Doc A/RES/60/1 (16 September 2005), para 127.
- 13 UNGA UN Doc A/RES/60/142 (16 December 2005), para 7.
- 14 About 90 representatives of governments, specialists from the main indigenous regions of the world, non-governmental organisations (NGOs) and different scholars, along with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Dr. Rodolfo Stavenhagen, and the Chairperson-Rapporteur of the WGDD, Luis Enrique Chávez from Peru, participated in the Workshop. Representatives from different governments that, in the end, played a key role in the negotiations, such as Guatemala, Denmark (although he did not attend Pátzcuaro, the name of the Danish Ambassador, Tyge Lehrmann, will be associated with the Declaration due to his active participation and support in Geneva and New York), Norway (particular mention should be made of the Norwegian representatives in Geneva, who could not attend Pátzcuaro, Mrs Astrid Helle Ajamay and Mr Vebjorn Heines, who undertook impeccable work in the information consultations in Geneva), Spain (Mr. Joaquín de Aristegui) and the United Kingdom (Mrs Caroline Rees), were there, along with representatives from Australia, New Zealand and the United States of America. Indigenous leaders from different parts of the world attended, such as Dalee Sambo from the Inuit Circumpolar Conference, Romeo Saganash from the Grand Council of the Crees, Jim Rex Lee from the Navajo Council, Mattias Ahren from the

Saami Council, José Carlos Morales from Costa Rica, Azelene Kaingang from Brazil, Ratnaker Bhengra from India, Hassan Id Balkassm, an Amazigh from Morocco, Devasish Roy from Bangladesh and Les Malezer from Australia, along with academic experts such as Erica Irene Daes, Augusto Willemsen Díaz, Professor James Anaya from the University of Arizona and Claire Charters, Maori from Victoria University of Wellington. National civil society organisations such as the “Miguel Agustín Pro Juárez” Human Rights Centre and the Mexican Human Rights Academy (Academia Mexicana de Derechos Humanos), the National Centre for Support to Indigenous Missions (Centro Nacional de Apoyo a Misiones Indígenas - CENAMI) and the Mexican Academy of Human Rights (Academia Mexicana de Derechos Humanos) also attended, together with international organisations such as Amnesty International, Droits Humains et Démocratie, the International Work Group for Indigenous Affairs and the Netherlands Center for Indigenous Rights. There were also representatives from international bodies such as the Office of the High Commissioner for Human Rights.

- 15 This concern has in no way been overcome, as the Western states, primarily the United Kingdom, have in other fora continued to express their rejection of the possibility of conceiving that human rights can have a collective dimension.
- 16 The Russian Federation proposed compromise language that consisted of three elements: an amendment to OP31: “*this right (self-determination) shall be exercised in accordance with the rule of law, with due respect for legal procedures and rules and in good faith*”. A new safeguard: “*without prejudice to the rights provided in this declaration, no provision contained in it shall be invoked for the purposes of diminishing the sovereignty of the State, its political unity or its territorial integrity*”. And, if accepted and in line with the debates, they would consider respecting Article 3.
- 17 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976 and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976.
- 18 UN Expert Seminar on Indigenous Peoples’ Permanent Sovereignty over Natural Resources and their Relationship to Land in accordance with Sub-Commission of the Protection and Promotion of Human Rights Resolution 2004/9 UN Doc E/CN.4/Sub.2/2004/L.11 (25-27 January 2006).
- 19 **Fergus MacKay. 2003.** *The UN Draft Declaration on the Rights of Indigenous Peoples and the position of the United Kingdom* (London: Forest People Programme).
- 20 See UN Human Rights Council “Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994” (29 June 2006).
- 21 Co-sponsored by Armenia, Benin, Cyprus, Congo, Costa Rica, Cuba, Denmark, Estonia, Slovenia, Spain, Finland, France, Greece, Guatemala, Haiti, Lesotho, Mexico, Nicaragua, Norway, Panama, Peru, Portugal and Venezuela.
- 22 Canada and the Russian Federation.
- 23 Algeria, Argentina, Bahrain, Bangladesh, Ghana, Jordan, Morocco, Nigeria, the Philippines, Senegal, Tunisia and Ukraine.
- 24 UNGA “Decision to Defer Action on the draft declaration on the rights of indigenous peoples” UN Doc A/61/448 (20 December 2006).
- 25 The following, for example, are considered indigenous peoples: the Pygmies of the Great Lakes Region, the San of South Africa, the Hadzabe of Tanzania and the Ogiek, Sengwer and Yakuu of Kenya, all hunter-gatherer peoples. Nomadic pastoralists include the Pokot of Kenya and Uganda, the Barabaig of Tanzania, the Masai of Kenya and Tanzania, the Samburu, Turkana, Rendille, Endorois and Borana of Kenya, the Karamajong of Uganda, the Hinda of Namibia and the Tuareg, Fulani and Toubou of Mali, Burkina Faso and Niger, along with the Amazigh of North Africa (Cf. **African Commission on Human and Peoples’ Rights. 2006.** *Indigenous Peoples in Africa: the forgotten peoples? The African Commission’s Work on Indigenous Peoples in Africa* (Copenhagen: IWGIA)). All without considering the numerous peoples studied in classical anthropology such as the Dogon of Mali, the Nuer and Dinka of Sudan, the Ndembu of Zambia and the Lele of the Congo.
- 26 Above n 12.
- 27 Above n 7.

- 28 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 29 Preamble paragraph 15a of what was the draft declaration during the WGDD negotiations. Cf. Preamble section of the Declaration adopted by the General Assembly.
- 30 Article 5 of the Declaration.
- 31 For some of these reflections and the order of presentation, the authors have based their work on: **Mariana Salazar Albornoz and Gustavo Torres Cisneros. 2006.** “La Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas” in Juan Carlos Gutiérrez (ed) *Derechos Humanos de los Pueblos Indígenas* (Mexico-EU Human Rights Cooperation Programme) 49-75. Of course, the best reference work is: **James Anaya. 2005.** *Los Pueblos Indígenas en el Derecho Internacional* (Madrid: Ed. Trotta, SA). The following is very useful: **Mikel Berraondo. 2006.** *Pueblos Indígenas y derechos humanos* (Bilbao: Universidad de Deusto). Also: **Rodolfo Stavenhagen. 2007.** *Los Pueblos Indígenas y sus derechos. Informes temáticos del Relator Especial sobre la situación de los Derechos Humanos y las Libertades Fundamentales de los Pueblos Indígenas del Consejo de Derechos Humanos de la Organización de las Naciones Unidas* (Mexico: UNESCO).
- 32 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991.
- 33 Martínez Cobo “Study of the Problem of Discrimination Against Indigenous Peoples” UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983).
- 34 UN Doc E/CN.4/Sub.2/AC.4/1995/3 (1995).
- 35 Above n 33.
- 36 Above n 12.
- 37 UNGA “Resolution 1514: Declaration on the Granting of Independence to Colonial Countries and Peoples” (14 December 1960) and above n 7 (friendly relations)..
- 38 The United Kingdom, accompanied primarily by France, argued that human rights are only individual rights, and so collective rights are not human rights but form part of a new branch of international law. This position has apparently since hardened due to claims from groups of people lodged before the European human rights system, and which are currently in the process of being resolved. See: **Fergus MacKay**, above n 19.
- 39 At the end of 2006, the Botswana Supreme Court passed a resolution enabling the San people to return to their ancestral lands in the Kalahari Nature Reserve. On 18 October 2007, the Belize Supreme Court issued “the decision on land demarcation” declaring the rights of Belize’s indigenous Maya communities to their lands and resources, and stating that said rights were protected by the State Constitution in the light of relevant international law, mentioning the UN Declaration on the Rights of Indigenous Peoples, approved by the General Assembly on 13 September 2007 (Belize voted in favour) and ILO Convention 169 on Indigenous and Tribal Peoples (cf. **Maia Campbell and James Anaya. 2008.** “The Case of the Maya Villages of Belize: Reversing the Trend of Government Neglect to Secure Indigenous Land Rights” 8(2) Hum Rights L Rev 377-399). Recently, what is considered an historical decision on the part of Brazil’s Supreme Federal Court (STF) ratified a presidential decree that gave exclusively to the Raposa Serra do Sol indigenous peoples a territory of almost 17.5 million hectares in Roraima State, on the border with Venezuela and Guyana.
- 40 Cf. *Mary and Carrie Dann v United States* (Merits), I/A Commission HR, Report No. 75/02, Case 11.140 (27 December 2002); *Mayan Indigenous Communities of the Toledo District Toledo v Belize* (Merits), I/A Commission HR, Report No. 40/04, Case 12.053 (12 October 2004); *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 Arizona J Int’l and Comp Law 395); and *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs) I/A Court HR, Judgment of 28 November 2007, Series C No. 172. The authors want to thank Claire Charters for all the references.
- 41 Cf. **Gustavo Torres Cisneros. 2003.** Territorio y Territorialidad entre los Mixes de Oaxaca: un Caso de Geo-Visión in *Primer Congreso Internacional de Estudios Territoriales* (Cuernavaca: Universidad Autónoma del Estado de Morelos); **Adelfo Regino Montes.** Los pueblos indígenas: diversidad negada in: <http://eib.sep.gob.mx/files/doc0050.doc>; **Adelfo Regino Montes. 2001.**

¿Propiedad intelectual, propiedad territorial? Lo comunitario: una gran laguna en las leyes, *Ojarrasca* 56.

- 42 In the context of the World Trade Organisation, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) requires that an examination of Article 27(3)(b) be undertaken, which addresses the issue of whether the inventions related to plants and animals have to be protected by means of patents, and the way in which new plant varieties will be protected. Paragraph 19 of the 2001 Doha Declaration establishes that the TRIPS Council will also need to take account of the relationship between the TRIPS Agreement and the UN Convention on Biological Diversity and the protection of traditional and folkloric knowledge. Proposals on revealing the source of biological material and related traditional knowledge have recently been discussed.
- 43 UN Permanent Forum on Indigenous Issues "International Technical Workshop on Indigenous Traditional Knowledge" UN Doc (E/C.19/2006/2) (21-23 September 2005).
- 44 UN Permanent Forum on Indigenous Issues UN Doc E/C.19/2007/10 (2007).
- 45 Cf. **Victoria Tauli-Corpuz**. 2007. "Los pueblos indígenas y los conocimientos tradicionales" *Peripetecias* N° 56 - 11.



# RESPONDING TO THE CONCERNS OF THE AFRICAN STATES

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Albert K Barume\*

## Introduction

Shortly after the United Nations (UN) Declaration on the Rights of Indigenous Peoples (the Declaration) reached the UN General Assembly (UNGA), from the Human Rights Council in Geneva, African states raised serious concerns regarding several provisions and managed to defer its adoption. From such an openly hostile position, which dashed almost any hopes for adoption of the Declaration, in less than a year and a half the majority of African states had changed their opinion to vote in favour of the Declaration. How did this happen? Who acted and what kind of persuasive argument led to such an about turn? These are the key questions of this paper, which is based on the author's first-hand experience as an integral player in many of the initiatives highlighted here.

## Background

The Declaration was adopted by the Human Rights Council on 29 June 2006 with 30 votes in favor, 2 against and 12 abstentions.<sup>1</sup> Of the twelve African members of the Council, only three voted in favour of the Declaration (Cameroon, South Africa and Zambia), six abstained (Algeria, Ghana, Morocco, Nigeria, Senegal and Tunisia) and three were absent (Djibouti, Gabon and Mali).

In accordance with UN procedures, once in New York, on 28 November 2006, the Declaration went through the Third Committee of the UNGA, which focuses on social, humanitarian and cultural issues. At this meeting, Namibia presented an amending resolution which called for the vote on the Declaration to be deferred in order to allow more consideration of African concerns. Many African states expressed support for this Namibian proposed resolution. For instance, the

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Botswana Government argued: that the Declaration failed to define indigenous peoples; that all Africans are indigenous; that the right to self-determination would cause insurrection and division in Africa; and, finally, that the right to free, prior and informed consent would become a veto mechanism against governmental projects. The Namibia-suggested deferment resolution was upheld by the Third Committee with 82 votes in favor, 67 votes against and 25 abstentions.<sup>2</sup> All African states with missions in New York and present at this session voted in favor of this Namibian-led amendment, with the exception of the Democratic Republic of the Congo, Equatorial Guinea, Sao Tome and Principe, Seychelles and Somalia, which surprisingly were absent from the voting room on that day.<sup>3</sup> Like many others, a former Chairperson of the African Commission's Working Group on Indigenous Populations/Communities officially expressed his concern to the Namibian government in the following words:

*We would like to express our deep concern about this situation, as we firmly believe that the UN Declaration, as adopted by the Human Rights Council in June 2006, represents a new path for the protection of the human rights of indigenous peoples and reflects not only an emerging international consensus on the rights of indigenous peoples but also the great progress made on this issue at the African Commission on Human and Peoples' Rights.*<sup>4</sup>

## **The African Group's formal concerns**

African states' concerns with the Declaration were not expressed until the text reached the UNGA in September 2006. By then, the text had spent more than twenty years being debated in Geneva by the UN Working Group on Indigenous Populations, State representatives and indigenous communities. Throughout all these years, most African states did not take meaningful part in the debates, for several and diverse reasons. Some African countries explain this with reference to a lack of human resources, whereas others simply argue that indigenous peoples' issues were not, then, at the top of their diplomatic agendas.

As a group, African States and Governments (the African Group) made public their seven major concerns in a five-page document entitled "Draft Aide Memoire" dated 9 November 2006.<sup>5</sup> First, the African Group underlined the need for a formal definition of the term "indigenous", which, it argued, would make it easier to identify the holders of the rights enshrined in the Declaration. Reference was also made to inter-ethnic tensions that could be exacerbated by recognising special rights to sections of African populations. Secondly, the African Group objected to an indigenous peoples' right of self-determination under articles 3 and 4 of the Declaration, fearing political instability, secessions and threats to the territorial integrity of African states. Third, Article 5 of the Declaration, on the



right of indigenous peoples to political social and cultural institutions, created fears among African states, which considered such a right to be in contradiction with several constitutions that promote unified states. Fourth, the right to belong to an indigenous community or nation in accordance with the traditions and customs of the nation or community was seen by the African Group as a green light for indigenous communities to change their nationalities freely, thus leading to political instability. Fifth, the African Group feared that the right of indigenous peoples to free, prior and informed consent would emerge as a veto mechanism to national legislation. Sixth, the African Group viewed indigenous peoples' rights to lands, territories and resources which they have traditionally owned, occupied, used or acquired as legally unworkable and in breach of states' rights over land and natural resources. Seventh, the African Group objected to the provisions of the Declaration on the right of indigenous peoples to recognition, observance and enforcement of agreements, treaties and other constructive arrangements historically concluded with states. Treaties, the African Group objected, were exclusively a State responsibility.

Between April and May 2007, the African Group came up with more than 35 amendments to the Human Rights Council adopted Declaration, with more than eight in the preamble alone. These suggested changes, most of them strongly worded, were circulated among African diplomats only but later served as a basis for discussions with the states in favour of the Declaration as adopted in Geneva (the Co-Sponsors Group).<sup>6</sup> For example, in Article 3, the words "right to self-determination" were replaced with "right to participate in the political affairs of the State". Furthermore, the following new paragraph was inserted in the preamble:

*Recognizing that the situation of indigenous peoples varies from region to region, country to country and from community to community, every country or region shall have the prerogative to define who constitutes indigenous people in their respective countries or regions taking into account its national or regional peculiarities.*

The African Group's proposed amendments contained the words "national law" twelve times, revealing that the Group was concerned to keep indigenous peoples' rights within domestic standards. One might, indeed, think that African states wanted their own UN Declaration. As a matter of fact, the large number and nature of the suggested amendments by the African Group left many skeptical about any chance of ever reaching a consensus between states and indigenous peoples.

### **The high level of African political influence**

From June to December 2006, debates on the Declaration went on among African diplomatic missions in New York. It appeared, right from the start, that not all Af-

rican states took the same position. Some African missions' representatives in New York had no precise objection of their own to the Declaration, as adopted by the Human Rights Council. Countries such as the Republic of Congo, the Central African Republic and South Africa, which had taken bold steps back home to recognize indigenous peoples' rights, did not see any major domestic legal implications of the Declaration. In other words, as the debate proceeded among the Africans on the Declaration, diverse individual positions on the part of African states emerged.

To address the division between African states, Botswana and other states seeking to amend the Declaration pushed for a high-level political directive on a common position. This explains why the Republic of Botswana proposed the item "Exchange of views on Draft United Nations Declaration on the Rights of Indigenous Peoples" to the agenda of the Executive Council of the African Union's (AU) 10<sup>th</sup> session held in Addis Ababa on 25-26 January 2007,<sup>7</sup> which produced a four-page concept note that summarized the African Group's concerns as presented in the "Draft Aide Memoire". The AU's Executive Council of Foreign Ministers is in charge of, among other matters, preparing the agenda of the AU UNGA. So, as expected, the African Heads of States and Governments, during their 8<sup>th</sup> Ordinary Session (AU General Assembly) held in Addis Ababa on 29-30 January 2007 endorsed the Executive Council's proposal and made a decision with four important points that were to impact on the whole negotiation process relating to the Declaration.<sup>8</sup> This decision brought down the concerns of the African Group to five, notably omitting the one on treaties. It reaffirmed that "the vast majority of the peoples of Africa are indigenous to the African Continent" and endorsed a common African position, instructing the African diplomats in New York,

*to maintain a united position in the negotiations on amending the Declaration and constructively work alongside other Member States of the United Nations in finding solutions to the concerns of African States [...] to continue to ensure that Africa's interests in this matter are safeguarded.*<sup>9</sup>

This intervention of African Heads of States and Governments not only brought a strong political influence into the negotiation process but it also tied up, or reduced, the manoeuvring space for African diplomats at the UN in New York. In private, several diplomatic missions expressed support for the Declaration but, at the same time, and in public, they could not afford to be seen to break the African Group's common position.

### **Addressing the African Group's concerns**

It appeared to many that, if the Declaration was to have a chance of adoption, it would be necessary to create an environment in which African states could take

individual positions on the Declaration, as a vote by the UNGA was increasingly seen as the possible endgame. Adopting this strategy, in March 2007, a group of sixteen researchers, indigenous leaders and scholars from ten African countries,<sup>10</sup> all active and interested in the work on indigenous issues being undertaken by the African Commission on Human and Peoples' Rights (ACHPR), prepared a twenty-page technical response (Response Note) to the African Group's Draft Aide Memoire.<sup>11</sup> Point by point, and following the same structure, the Response Note addressed the concerns of the African Group, illustrating that the African regional human rights mechanism had been working on the issue of indigenous peoples' human rights for more than five years. Notably, many African diplomats in New York and Geneva were unaware of the landmark ACHPR human rights and conceptual report on indigenous peoples,<sup>12</sup> which brings to shore Africa-grown understandings of indigenous peoples' rights (to self-determination, to lands and culture) that fit well with states' territorial integrity. The Response Note also tapped into African jurisprudence and states' practice to reveal that numerous African states had adopted the concept of indigenous and taken bold steps, including restitution of lands to indigenous peoples within protected and mineral-rich areas. On the definition issue, the Response Note cited examples of several African countries, including South Africa, to demonstrate that "consistent practice reveals that African states do not use a formal definition of their indigenous communities or peoples in order to correct the historical injustices affecting them".<sup>13</sup> It further quoted the ACHPR's report, which indicates that:

*in Africa, the term 'indigenous peoples or communities' is not aimed at protecting the rights of the 'first inhabitants that were invaded by foreigners'. Nor does the concept aim to create hierarchy among national communities or set aside special rights for certain people. On the contrary, within the African context the term 'indigenous peoples' aims to guarantee equal enjoyment of rights and freedoms to some communities that have been left behind. This particular feature of the African continent explains why the term 'indigenous peoples' cannot be at the root of ethnic conflicts or of any breakdown of the Nation State.<sup>14</sup>*

More importantly, the Response Note informed many African diplomatic missions in New York of recent developments in understandings of the right to self-determination on the continent, as developed by the ACHPR:

*The right to self-determination as entrenched within the provisions of the OAU Charter as well as the African Charter, cannot be understood to sanction secessionist sentiments. Self-determination of peoples must therefore be exercised within the inviolable national boundaries of the State with due regard for the sovereignty of the nation-state.<sup>15</sup>*

As shown below, countries such as Namibia welcomed and agreed with this argument, which seemed to ease some of their concerns. Once finalized, the Response Note was sent to each and every African Permanent Mission in New York and even non-African representations.

In addition to producing the Response Note, six members of the group of African experts went to New York,<sup>16</sup> where they held individual meetings, as well as group discussions, with almost thirty African diplomatic missions. With the help of the International Work Group for Indigenous Affairs (IWGIA) and the United Nations Permanent Forum on Indigenous Issues (PFII), a roundtable was also organized, bringing together African and non-African diplomats with various opinions on the Declaration.

Most African missions welcomed and appreciated the Response Note, which they said contained useful information and updates. The issues regarding the definition of indigenous peoples, the right to self-determination and access to land with resources appeared to be the main concerns. The Namibian embassy was the only African mission in New York that not only met the experts group but also presented its core argument, in a letter, which agreed with a number of points notably the one on self-determination:

*I am encouraged by the fact that the Response Note to the Draft Aide Memoire of the African Group on the Declaration on the rights of indigenous peoples serves to buttress the position of the African Group rather than negating it. In the Response Note the experts among others [indicate that] the right to self-determination as entrenched within the provisions of the OAU Charter as well as the African Charter, cannot be understood to sanction secessionist sentiments.<sup>17</sup>*

A number of other African delegations in New York referred to domestic situations as reasons for not supporting the Declaration. A Niger representative mentioned, for instance, the Tuareg conflict to justify why his government objected to several provisions of the Declaration. But most simply expressed lack of scope for manoeuvring given that the matter had gone to the Heads of States and Governments, some of whom seemed to be monitoring the process closely. Whether or not this was a coincidence, it so happened that Botswana's Attorney-General was also on an official mission in New York during this period. Several other African representatives did not understand why countries such as Botswana, Namibia, Kenya and Nigeria were insisting on having the declaration profoundly amended. Many were indeed sceptical about a whole-scale reopening of the text and concluding negotiations before the end of the 61<sup>st</sup> session of the UNGA in September 2007. It also came out that most members of the African Group were not prepared to bear a historical world responsibility for the Declaration's failure. Combined, all these factors and opinions provided a fertile ground for persuasion.

There were several other initiatives to try and persuade the African Group to support the Declaration, such as a press release by the Indigenous Peoples of Africa Coordinating Committee (IPACC),<sup>18</sup> a public statement by Amnesty International,<sup>19</sup> a statement by IWGIA to the ACHPR<sup>20</sup> and numerous statements by participants to the 6<sup>th</sup> session of the UNPFII.

One could also mention an initiative carried out in June 2007 by two indigenous leaders from Central Africa,<sup>21</sup> who visited the Republic of Congo, Cameroon, Central African Republic and Burundi, to convince the officials to support the Declaration. These indigenous leaders met with high-ranking officials from presidencies, prime ministers' offices and foreign affairs ministries. It was noticeable from these meetings that discussions on the Declaration among ambassadors in New York were not being closely followed in some capitals. In Cameroon, Central African Republic and the Republic of Congo, officials pledged support for the Declaration. This was particularly mentioned by the Prime Minister of Central African Republic, who underlined the domestic efforts by his government to improve the human rights situation of the country's indigenous peoples. It was thought that Central African countries could play a leading role in rallying support for the Declaration since some of them, namely Burundi and Cameroon, expressly mention indigenous communities in their Constitutions.

Numerous options were explored among the diplomats in New York. For instance, it was suggested that the concerns of the African Group could be addressed within the text of the resolution introducing the Declaration for adoption, which could specify or clarify the meaning of a number of articles of the Declaration with regard to issues such as the right to self-determination and respect for territorial integrity. However, most African states did not appear ready to settle for anything less than amendments to the core text of the Declaration.

## **Contribution of the African Commission on Human and Peoples' Rights**

As the Declaration was a human rights text, it would have been appropriate for AU bodies and member states (African diplomats in New York, the AU's Executive Council and Heads of States and Governments) to seek a legal advisory opinion from the ACHPR, which is mandated to advise all AU's bodies on issues relating to human rights. The need for the ACHPR's legal advice to the AU on the Declaration was expressed by the community of African human rights NGOs in Accra, Ghana, in May 2007, at what is known as the NGOs Forum, held before every session of the ACHPR. In Accra, the ACHPR adopted a resolution highlighting its work on indigenous issues, notably the 2003 Report of the African Commission's Working Group of Experts on Indigenous Populations /Communities, subsequently noted and authorized for publication by the 4<sup>th</sup> Ordinary

Session of the Assembly of Heads of States and Governments of the AU, held in January 2005 in Abuja, Nigeria.<sup>22</sup> That May 2007 the ACHPR Resolution mandated its Working Group on Indigenous Populations/Communities to draft a legal opinion to shed some light on matters similar to the concerns voiced by the African Heads of States and Governments on the Declaration.<sup>23</sup> On the meaning of the term “indigenous”, the Advisory Opinion referred to the report of the ACHPR on indigenous peoples to underscore that “in Africa, the term indigenous populations does not mean ‘first inhabitants’ in reference to aboriginality as opposed to non-African communities or those having come from elsewhere...”.<sup>24</sup>

On the issue of lands, the Advisory Opinion clarified that the Declaration’s land rights provisions were similar to those found in instruments adopted by the AU such as the:

*African Convention on the Conservation of Nature and Natural Resources, whose major objective is: “to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour” (preamble) and which is intended “to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of ... their ... traditional knowledge.*<sup>25</sup>

With regards to the right of self-determination, the Advisory Opinion states that:

*Article 46 of the Declaration [...] is in conformity with the African Commission’s jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity... the notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.*<sup>26</sup>

The ACHPR Advisory Opinion was distributed widely and sent to each and every African permanent mission in New York. Later on, the former Chairperson of the ACHPR, Mme Salamata Sawadogo, attended the 9<sup>th</sup> Ordinary Session of the Assembly of the African Union (Head of States) held in Accra, Ghana in July 2007. She is reported to have provided legal clarification to the Heads of States and other members of the AU’s bodies on the Declaration, as described in the Advisory Opinion. This initiative is likely to have contributed positively to the adoption of the Declaration, given that the positions of African diplomats in New

York had to be cleared back home, as the Heads of States had decided “to remain seized of the matter”. Furthermore, given that most of their concerns were legal in substance, African states could not ignore the ACHPR’s Legal Opinion that demonstrated there were legal safeguards against any negative impact of the Declaration on the continent.

## Final negotiations under UN supervision

As time went on and lobbying efforts multiplied, there were strong indications that African states might agree on a proposal for a reduced number of amendments to the text of the Declaration, around twenty-five. This window of opportunity may have influenced, on 6 June 2007, the appointment by the President of the UN UNGA of Ambassador Hilario G. Davide, from the Philippines, as “facilitator” mandated to bring the Co-sponsors’ Group, led by Mexico, and the African Group closer. Writing to all permanent missions in New York, the President said:

*I am pleased to inform you of my decision to appoint His Excellency Hilario G. Davide, Jr., the Permanent Representative of the Philippines to the United Nations, to undertake, on my behalf, further consultations on the Declaration on the Rights of Indigenous Peoples... Ambassador Davide, Jr. will conduct open and inclusive consultations, in formats that he will deem appropriate, with a view to reflecting the views of all concerned parties in this process. I expect him to report back to me on the outcome of his consultations as soon as possible, but not later than mid-July 2007.<sup>27</sup>*

By early August 2007, it emerged that Ambassador Davide’s work was starting to bear fruit. From an initial 35-plus proposed amendments, brought down to 25 in April 2007, it was reported that the African Group would accept a specific reference to respect for territorial integrity and, in exchange, all key provisions including those on land and resource rights, self-determination, free, prior and informed consent and treaties would remain intact. Both sides had something important to lose if a solution was not found. The Co-Sponsors’ Group feared that a vote by the UNGA, without some sort of consensus with the African Group, could lead to more damaging amendments on the floor. As for the African Group, it appeared that a growing number of its members were becoming increasingly uncomfortable with the strong stand led by a minority of African states, regardless of all the clarifications provided by, among others, the ACHPR. In private, several African states’ representatives expressed that they felt they were being dragged into positions that were unjustified or irrelevant back home. Numerous



other African countries expressed a reluctance to be responsible for the failure of a text that had taken such a long time, more than 20 years, to negotiate.

It is also believed that the ACHPR Advisory Opinion, the work of the Chairperson of the African Commission at the Assembly of the AU or Heads of States summit in Accra in July 2007, the Response Note by African experts and all the materials provided by various groups to diplomats in New York played a positive role in the softening of the African Group's position. Thus, on 30 August 2007, the African Group and the Co-Sponsors' Group announced an agreement consisting of nine amendments to the original text adopted by the Human Rights Council. They also agreed to vote against any amendments on the floor of the UNGA by other opposing states.

The first amendment was inserted into the first sentence of the preamble of the Declaration. It made reference to the Charter of the United Nations, responding thus to the African Group's concerns over the right to self-determination, which it argued should be understood within the context of the Declaration on friendly relations between states, which refers to states' territorial integrity.<sup>28</sup> The second amendment was a deletion of the whole fifteenth paragraph of the preamble, which had stated "[r]ecognizing that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect." It is believed this deletion was an immediate consequence of the deal on territorial integrity, since it would have been contradictory, on the one hand, to keep such a paragraph and, on the other, to safeguard states' territorial integrity. The third amendment added the Vienna Declaration and Programme of Action to the international instruments mentioned in paragraph 18 of the preamble, because the Vienna Declaration refers to states' territorial integrity.<sup>29</sup> A whole new paragraph on national and regional particularities was inserted in the preamble as the fourth amendment: "[r]ecognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration". This paragraph resembles a former one contained in the initial amendments proposed by the African Group, but without the phrase: "every country or region shall have the prerogative to define who constitutes indigenous people in their respective countries or regions", which, in the finish, was accepted as incompatible with the principle of self-identification. A fifth amendment to Article 8(2)(d), which requires states to provide effective mechanisms for the prevention of, and redress for, forced assimilation, was shortened following a deletion of the words "by other cultures or ways of life imposed on them by legislative, administrative or other measures". The sixth amendment consisted of a watering down of Article 30(1) by deleting the requirement that military activities only take place on indigenous peoples' lands and territories when justified by a "significant threat to" the public interest. The seventh amendment was the deletion of the pronoun "their"

before the words mineral, water or other resources in Article 32(2) on lands, territories and natural resources. The eighth amendment is seen as the paramount safeguard for states' territorial integrity, which ended up being the African Group's main demand. Reference to territorial integrity is also the most important issue on which much energy and time were spent. Its final formulation was the subject of several days' consultation with several groups, including indigenous communities. Reference to territorial integrity was indeed the main bargaining chip that those in support of the Declaration were to offer and, in exchange, the African Group agreed to drop most of its suggested amendments on other issues, including to the provisions on lands, territories and resources. The initial Article 46(1) text stated:

*Nothing in this Declaration may be interpreted as implying for any State, people or group or person any right to engage in any activity or perform any act contrary to the Charter of the United Nations.*

It was amended with the following additional phrase:

*or 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.*

The ninth amendment added the preposition "and" between the words "by law" and "in accordance" in Article 46(2) thus requiring that any limitation of the Declaration's rights and freedoms be both determined by law *and* in accordance with international human rights obligations. So, from an initial proposal for more than 35 proposed amendments, the African Group settled for virtually one major amendment, that on territorial integrity, with eight further more minor ones, as if saying "do whatever you want except tamper with our political powers".

On 13 September 2007, 143 states thus voted in favour of the Declaration as opposed to only 4 negative votes from Canada, Australia, New Zealand and the United States.<sup>30</sup> No African country voted against the Declaration, although three (Burundi, Kenya and Nigeria) were present in the voting room and abstained. However, it is intriguing that on the day of vote a staggering 15 African countries were absent from the room,<sup>31</sup> most of whom had been present and voted in favor of the Namibian-led deferment Resolution almost a year earlier. So why were they suddenly uninterested in the Declaration issue at its crucial moment? Was it because they did not want to appear either to be in support of or against the Declaration? Or were the big guns that voted against the Declaration putting pressure on these states? It is difficult to tell but it is believed that several African states preferred to be seen as being as neutral as possible. Thus more than 30 African states voted in favor of the Declaration, including countries such as Bot-

swana that had been openly opposed to it at the beginning. And this is how the Declaration became one of the most widely supported human rights instruments on the African continent, where it will likely have a positive impact on similar pre-existing efforts by the African Commission and the AU. ○

## Notes

- 1 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 2 The General Assembly decided “to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon”. Furthermore, the Assembly would also decide “to conclude consideration of the Declaration before the end of its sixty-first session” see UNGA Third Committee “Resolution on the draft Declaration on the Rights of Indigenous Peoples” Un Doc A/C.3/61/L.18/Rev.1 (28 November 2006).
- 3 Ibid.
- 4 African Commission on Human and Peoples’ Rights, Letter of the Chairperson of the African Commission’s Working Group on Indigenous Populations/Communities, Banjul Gambia, Doc ACHPR/STC/C/EM (20 November 2006).
- 5 African Group “Draft Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples” New York (9 November 2007).
- 6 The Co-Sponsors’ Group was led by Mexico and included more than 60 others UN member states.
- 7 African Union Executive Council, Doc EX.CL/327 (X) Add.5, Addis Ababa, (Tenth Session, 25-26 January 2007).
- 8 Assembly of the African Union “Decision on the Activity Report of the African Court on Human and Peoples’ Rights for 2006” Doc Assembly/AU/Dec.144 (VIII) (29-30 July 2007).
- 9 Assembly of the African Union “Decision on the United Nations Declaration on Indigenous Peoples” Doc AU/9 (VIII) ADD.6 (29-30 July 2007).
- 10 South Africa, Rwanda, Cameroon, DR Congo, Kenya, Mali, Burundi, Morocco, Tanzania and Niger.
- 11 African Group of Experts “Response Note to the Draft Aide Memoire of the African Group on the Declaration on the Rights of Indigenous Peoples” (21 March 2007). See on IWGIA’s website: [http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/Draft-Declaration/ResponseNoteToAideMemoire\\_EN.pdf](http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/Draft-Declaration/ResponseNoteToAideMemoire_EN.pdf).
- 12 “Report of the African Commission’s Working Group of Experts on Indigenous Populations/Communities in Africa 2003” (Copenhagen: IWGIA, 2005), adopted by the African Commission on Human and Peoples’ Rights November 2003.
- 13 Above n 11, 3.
- 14 Ibid, 4.
- 15 Ibid, 6.
- 16 The Group was led by Dr. Albert Barume and included Dr. Naomi Kipuri, Adele Wildschut, Joseph Ole Simel, Haasan Id Balkassm and Hon. Liberate Nicayenzi. This group was then joined by Andrew Chigovera and Professor Shadrack Gutto.
- 17 Permanent Mission of the Republic of Namibia to the United Nations, Letter to Dr. Albert Barume, acting Head of the African Group of Experts who produced the Response Note, New York (23 April 2007).
- 18 Indigenous Peoples of Africa Coordinating Committee, Press Release (5 December 2006) and available at <http://www.ipcaucus.net/HRday/IPACC.html>.
- 19 Amnesty International, Press Release, available <http://archive.amnesty.org/library/Index/ENGIOR410252006?open&of=ENG-393>.

- 20 International Work Group for Indigenous Affairs “Statement to the African Commission on Human and Peoples Rights” available [http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/ACHR/41st%20Session/41stSessionIWGIAStatementUNDec\\_pdf%27.pdf](http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/ACHR/41st%20Session/41stSessionIWGIAStatementUNDec_pdf%27.pdf).
- 21 Mr Kalimba Zephyrin (an indigenous leader from Rwanda) and Hon. Liberate Nicayenzi (indigenous woman Member of Parliament in Burundi).
- 22 African Union “Decision on 17<sup>th</sup> Annual Activity Report of the African Commission on Human and Peoples’ Rights” Doc AU/Dec.56 (IV) (January 2005).
- 23 African Commission on Human and Peoples’ Rights “Resolution on the United Nations Declaration on the Rights of Indigenous Peoples” (May 2007).
- 24 African Commission on Human and Peoples’ Rights “Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples” Banjul – Gambia (2007). See: [http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf).
- 25 Ibid, para.35.
- 26 Ibid, para.18.
- 27 Haya Rashed Al Khalifa, President of the UN General Assembly, Letter to Permanent Missions to the United Nations (6 June 2007).
- 28 UNGA “Resolution 2625: Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations” UN Doc A/8028 (1971).
- 29 UNGA World Conference on Human Rights “Vienna Declaration and Programme of Action” UN Doc A/CONF.157/22 (25 June 1993).
- 30 Above n 1.
- 31 Chad, Côte d’Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea-Bissau, Mauritania, Morocco, Rwanda, Sao Tome and Principe, Seychelles, Somalia, Togo and Uganda.

# THE RIGHTS OF INDIGENOUS PEOPLES

**PART THREE**

# THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION IN THE POST-DECLARATION ERA<sup>1</sup>

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S James Anaya\*

## Introduction

A centerpiece of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) is its Article 3,<sup>2</sup> which affirms that, “Indigenous 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.”<sup>3</sup> Recognition as “peoples” with rights of “self-determination” has been central to the chorus of indigenous peoples’ demands within the international arena. As representatives of indigenous peoples from around the world advocated for the Declaration through the UN system for over two decades, it became increasingly understood that self-determination is a foundational principle that anchors the constellation of indigenous peoples’ rights.

Yet Article 3 of the Declaration and its affirmation of indigenous self-determination proved to be one of the most contentious of the Declaration’s provisions during the negotiations preceding its adoption. Independent of the subjective meaning attached to the right or principle of self-determination by indigenous peoples themselves, a frequent tendency has been to understand self-determination as wedded to attributes of statehood, with “full” self-determination deemed to be in the attainment of independent statehood, or at least in the right to choose independent statehood. For obvious reasons, this tendency made explicit affirmation of indigenous self-determination the subject of lively debate.

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The Declaration ultimately resolves the debate in favor of recognizing indigenous peoples as entitled to self-determination. But what does self-determination really mean in this context? Do indigenous peoples have the same right of self-determination as other peoples, including those who have exercised the right to achieve independent statehood, or is it a different, lesser right? If it is the same right, as indigenous advocates generally have insisted, how can that be? I will try to answer these questions by looking to the Declaration itself and linking it to other contexts in which the international system has affirmed the right of self-determination and promoted its application.

### **Indigenous peoples have the same right of self-determination enjoyed by other peoples**

First, the Declaration, by its own terms, recognizes that indigenous peoples have the same right of self-determination enjoyed by other peoples. This follows from the principle of equality that runs throughout the text of the Declaration and is made explicit in Article 2, by which both “Indigenous peoples and individuals”<sup>4</sup> are declared to be “equal to all other peoples and individuals”. Additionally, the wording of Article 3 affirming the right of self-determination for indigenous peoples mirrors that of other international texts which uphold the right for “[a]ll peoples,” including the widely ratified international human rights covenants (Covenant on Civil and Political Rights and Covenant on Economic, Social, and Cultural Rights)<sup>5</sup> and General Assembly Resolution 1514,<sup>6</sup> which is aimed at decolonization. The Declaration is thus premised on the conception of a universal right of self-determination and, on that premise, it affirms the extension of that universal right to indigenous peoples.

As is well known, the application of the right of self-determination in the context of classical colonialism, such as that still existing in Africa in the mid-20th century, led to the formation of new independent states. If anything is clear, however, it is that, in endorsing indigenous peoples’ right of self-determination through the Declaration, states were not endorsing a right of indigenous peoples to form independent states. And indigenous peoples themselves have almost uniformly denied aspirations to independent statehood in demanding self-determination. Nor is it readily justifiable or practical to provide indigenous peoples, across the board, a unilateral choice of any status up to and including independent statehood. If there is a universal right of self-determination that extends to indigenous peoples, therefore, it cannot be one that necessarily entails a right to independent statehood; yet that right, if it is indeed the same one operative in the decolonization context, must be somehow linked to the independent state outcome in that context.



## Self-determination as a human right

Identifying the content of a universal right of self-determination begins by seeing the right as, in essence, a human right as opposed to a right of sovereigns or putative sovereigns. For a period in history, international law was concerned only with the rights and duties of independent states, disregarding the face of humanity beyond the state. International law continues to be concerned primarily with states and their relations with one another but, under the modern rubric of human rights, it is increasingly also concerned with upholding rights that are deemed to inhere in human beings individually and collectively. Self-determination is properly understood to arise within the human rights frame of contemporary international law, rather than its traditional states' rights frame. As already noted, the right of self-determination is included in the widely ratified international human rights covenants, and it is also featured in the African Charter on Human and Peoples' Rights.<sup>7</sup>

The human rights covenants and other international instruments declare that "peoples" have the right of self-determination.<sup>8</sup> This phraseology has led to endless debate about what constitutes a "people". Among those engaging in such debate, the typical underlying assumption has been that only those entities within a limited class of human aggregations denominated "peoples" are, as such, holders of the right. For some, the entities qualifying as "peoples" are to be identified by reference to certain objective criteria linked with ethnicity and attributes of historical sovereignty. For others, a "people" is synonymous with the aggregate population of a state, or one that is entitled to become a state. In either case, the assumption is that a "people" is an entity that *a priori* has actual or putative attributes of sovereignty or statehood and that has a legal existence distinct from that of human beings who otherwise enjoy human rights.<sup>9</sup>

But if self-determination is a human right, its designation as a right of "peoples" must refer to something other than a right that belongs fundamentally to such corporate or associational entities that are each deemed to have a distinct legal existence as sovereigns or quasi-sovereigns. More in keeping with the human rights character of self-determination is to see the reference to "peoples" as designating rights that human beings hold and exercise collectively in relation to the bonds of community or solidarity that typify human existence. Because human beings develop diverse and often overlapping identities and spheres of community—especially in today's world of enhanced communications and interaction on a global scale—the term "peoples" should be understood in a flexible manner, as encompassing all relevant spheres of community and identity.

Thus, the Declaration now identifies indigenous peoples as self-determining "peoples" without qualification, within a framework that is one of human rights as opposed to states' rights. As pertaining to "peoples", the right of self-determi-

nation and other rights affirmed in the Declaration are collective rights but they are, nonetheless, at bottom *human* rights or at least are derived from, or instrumental to, human rights. The human rights character of the Declaration is evident from its preamble and other provisions, which ground the instrument in concern for human rights, the discussions surrounding its drafting, and the very fact that its genesis came from within the UN human rights regime. The collective rights of indigenous peoples, including the right of self-determination, are human rights pertaining to them and their members in keeping with their own bonds of community.

Self-determination's affirmation as a human right has important implications. First, self-determination is a right that inheres in human beings themselves, although collectively as "peoples" in the broadest sense of the term. Second, like all human rights, self-determination derives from common conceptions about the essential nature of human beings, and it accordingly applies universally and equally to all segments of humanity. Third, as a human right, self-determination cannot be viewed in isolation from other human rights norms but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime.

### **The essential meaning of self-determination**

Understood as a human right, the essential idea of self-determination is that human beings, individually and as groups, are equally entitled to be in control of their own destinies, and to live within governing institutional orders that are devised accordingly. It is this universally applicable idea that promoted the downfall of classical colonial structures and that can now be seen as energizing authoritative responses to indigenous peoples' demands, including the adoption of the Declaration. This same idea was also at play in yet another, quite different, context in which the international community invoked and advanced the right of self-determination: the abolition of apartheid. The international community, through the UN, declared illegitimate, on grounds of self-determination, South Africa's previous governing institutional order, with its entrenched system of racial segregation and privileging of whites.<sup>10</sup> Apartheid was replaced with a constitutional order based on principles of racial equality and a system of affirmative action aimed at benefiting the non-white majority, after decades of that majority's exclusion from the reigns of power.<sup>11</sup>

Self-determination is grounded in the precepts of freedom and equality that can be found rooted across time and space in various cultural traditions throughout the globe. In his concurring opinion in the *Namibia* case,<sup>12</sup> Judge Ammoun found the concept of self-determination in streams of thought emanating from both sides of the Mediterranean, a Greco-Roman stream and African and Asian streams. Self-

determination precepts are also readily discernible in the traditional political systems and philosophies of indigenous peoples.<sup>13</sup> Accordingly, international human rights texts that affirm self-determination for “all peoples”, and authoritative decisions that have been responsive to self-determination demands, point to core values of freedom and equality that are relevant to all segments of humanity in relation to the political, economic, and social configurations in which they live.

Under a human rights approach, attributes of statehood or sovereignty are, at most, instrumental to the realization of these values—they are not the essence of self-determination for peoples. As now made clear by the Declaration, “peoples” are transgenerational communities with significant attributes of political or cultural cohesion that they seek to maintain and develop. And for most peoples—especially in light of cross-cultural linkages and other patterns of interconnectedness that exist alongside diverse identities—*full* self-determination, in a real sense, does not justify - and may even be impeded by - a separate state. It is a rare case in the post-colonial world whereby self-determination, understood from a human rights perspective, will require secession or the dismemberment of states.

Generally speaking, the concept of self-determination of peoples is one that envisions an ideal path in the way individuals and groups form societies and their governing institutions. Political theory feeds understanding about that ideal. Evolving and disparate political theories have over time yielded diverse understandings of the self-determination. Lenin and Wilson, for example, both championed the self-determination of peoples in the early part of the 20<sup>th</sup> century but they had very different notions of what self-determination was to bring about. Today, various strains of political theory coincide in certain common human rights postulates of freedom and equality and how they are to define the political order. Indigenous peoples have helped forge a political theory that sees freedom and equality not just in terms of individuals and states but also in terms of diverse cultural identities and co-existing political and social orders. Under this political theory, self-determination does not imply an independent state for every people, nor are peoples without states left with only the individual rights of the groups’ members. Rather, peoples as such, including indigenous peoples with their own organic social and political fabrics, are to be full and equal participants at all levels in the construction and functioning of the governing institutions under which they live.

It is thus mistaken to see self-determination as meaning a right to secede or to form an independent state in its fullest sense, with indigenous peoples’ right of self-determination being a different and inferior right. Such a notion, that *full* self-determination necessarily means a right to choose independent statehood, ultimately rests on a narrow state-centered vision of humanity and the world, that is, a vision of the world that considers the modern state—that institution of Western theoretical origin—as the most important and fundamental unit of hu-

man organization. This framework of thinking obscures the human rights character of self-determination, and it is blind to the contemporary realities of a world that is simultaneously moving toward greater interconnectedness and decentralization, a world in which the formal boundaries of statehood do not altogether determine the ordering of communities and authority.

### **Substantive versus remedial self-determination**

Furthermore, the linkage between self-determination and independent statehood is based on a misunderstanding of the normative grounds for the process that led to the decolonization of African and other territories in the 20th century. Invoking the principle of self-determination, the international community developed particular prescriptions to do away with government structures of a classical colonial type, prescriptions that, for most colonial territories, meant procedures resulting in independent statehood.<sup>14</sup>

Decolonization procedures, however, did not themselves embody the *substance* of the right of self-determination; rather, they were measures to *remedy* a *sui generis* violation of the right that existed in the prior condition of colonialism. The substantive idea of self-determination defines a standard in the governing institutional order for all of humanity based upon widely-shared values, a standard with which colonialism was at odds. Other forms of violation of self-determination may be identified, and the remedies forthcoming need not necessarily entail the emergence of new states. Substantive self-determination may be achieved from a range of possibilities of institutional reordering other than the creation of new states. What is important is that the remedy be appropriate to the particular circumstances and that it genuinely reflect the will of the people, or peoples, concerned.

Thus it is indeed possible to take seriously the proposition that self-determination applies to all segments of humanity, that is, all peoples. The substance of the right of self-determination, as opposed to remedies that may result from violations of the right, is the right of all peoples to control their own destinies under conditions of equality. This does not mean that every group that can be identified as a people has a free standing right to form its own state or to dictate any one particular form of political arrangement. Rather self-determination means that peoples are entitled to participate equally in the constitution and development of the governing institutional order under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis.

Logically, however, only those segments of humanity that have suffered a violation of self-determination are entitled to remedies for the violation. A violation of self-determination must thus be established in order for a group to have a legitimate claim to alter the status quo of political and social ordering. Additionally, not all peoples thus entitled to remedies are entitled to the *same* remedies but

rather to those remedies that are appropriate to the particular circumstances. This follows from close attention to the diverse contexts in which the right of self-determination has been widely admitted to apply – from decolonization, to the abolition of apartheid, to indigenous peoples.

### **The UN Declaration: a self-determination remedial regime**

The Declaration and related developments are based effectively on the identification of a longstanding *sui generis* violation of self-determination, one that is in addition to the *sui generis* violation represented by 20<sup>th</sup>-century classical colonialism. Indigenous peoples of today typically share much the same history of colonialism as that suffered by those still living in this century under formal colonial structures and targeted for decolonization procedures. But despite the contemporary absence of colonial structures in the classical form, indigenous peoples have continued to suffer impediments or threats to their ability to live and develop freely as distinct groups in their original homelands. The historical violations of indigenous peoples' self-determination, together with contemporary inequities against indigenous peoples, still cast a dark shadow over the legitimacy of state authority in many instances.

The very concept of indigenous peoples as it has developed in international legal and political discourse is bound to a concern for this situation, which has global dimensions. The most commonly cited definition of indigenous peoples, provided by UN special rapporteur José Martínez Cobo, emphasizes the characteristic of non-dominance as a result of historical colonization and its ongoing legacies:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society ...*<sup>15</sup>

The voluminous Martínez Cobo *Study on the Problem of Discrimination Against Indigenous Population*,<sup>16</sup> mandated in 1970 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (later the Sub-Commission on the Promotion and Protection of Human Rights), laid much of the early groundwork for the Declaration. The study describes the conditions of disadvantage of indigenous peoples worldwide, linking those conditions to histories of oppression and ongoing discrimination.

The Declaration does not itself define “indigenous peoples” but it makes clear who they are by emphasizing the common pattern of human rights violations

they have suffered. The second preambular paragraph of the Declaration affirms

*that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust ...*

The implication is that a common characteristic of indigenous peoples is having suffered such “doctrines, policies and practices”. And the fourth preambular paragraph specifically grounds the Declaration in a concern

*that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests ...*

By alluding to this history at the outset, the Declaration reveals its character as essentially a remedial instrument. It is not privileging indigenous peoples with a set of rights unique to them. Rather indigenous peoples and individuals are entitled to the rights enjoyed by other peoples and individuals, although these rights are to be understood in the context of the particular characteristics that are common to groups within the indigenous rubric. Thus, Article 3 claims for indigenous peoples the same right of self-determination that is affirmed in other international instruments as a right of “all peoples”. The purpose of the Declaration is to remedy the historical denial of the right of self-determination and related human rights so that indigenous peoples may overcome systemic disadvantage and achieve a position of equality vis-à-vis heretofore dominant sectors.

Projected back in time, the universal human right of self-determination can be seen as having been massively and systematically denied to groups within the indigenous rubric. Indigenous peoples, essentially as a matter of definition, find themselves subject to political orders that are not of their making and to which they did not consent. They have been deprived of vast landholdings and access to life-sustaining resources, and have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined. In both the industrial and less-developed countries in which indigenous people live, the indigenous sectors are almost invariably on the lowest rung of the socio-economic ladder, and they exist at the margins of power. Historical phenomena grounded in racially-discriminatory attitudes are not just blemishes of the past but rather translate into current inequities.

The Declaration's very existence and its explicit affirmation in Article 3 that indigenous peoples, in particular, have a right of self-determination represent recognition of the historical and ongoing denial of that right and the need to remedy that denial. The remaining articles of the Declaration elaborate upon the elements of self-determination for indigenous peoples in the light of their common characteristics and, in *sui generis* fashion, mark the parameters for measures to implement a future in which self-determination is secure for them.

With its remedial thrust, the Declaration contemplates change that begins with state recognition of rights to indigenous group survival that are deemed "inherent", such recognition being characterized as a matter of "urgent need".<sup>17</sup> Professor Erica-Irene Daes, the long-time chair of the UN Working Group on Indigenous Populations, has described this kind of change as entailing a form of "belated state-building" through negotiation or other appropriate peaceful procedures involving meaningful participation by indigenous groups. According to Professor Daes, self-determination entails a process

*through which indigenous peoples are able to join with all the other peoples that make up the State on mutually-agreed upon and just terms, after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the State, on agreed terms.*<sup>18</sup>

Accordingly, the Declaration generally mandates that "States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration,"<sup>19</sup> and it further includes particular requirements for special measures in connection with most of the rights affirmed. Such special measures are to be taken with the aim of building healthy relationships between indigenous peoples and the wider societies, as represented by the states. In this regard, "treaties, agreements and constructive arrangements between States and indigenous peoples" are valued as useful tools, and the rights affirmed in such instruments are to be safeguarded.<sup>20</sup>

Among the special measures required are those to secure "autonomy or self-government" for indigenous peoples over their "own internal and local affairs"<sup>21</sup> in accordance with their own political institutions and cultural patterns.<sup>22</sup> Also required are measures to ensure indigenous peoples "rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State"<sup>23</sup> and to have a say in all decisions affecting them.<sup>24</sup> The Declaration specifies that "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."<sup>25</sup>



Dual aspects of self-determination are represented here: on the one hand, autonomous governance and, on the other, participatory engagement. The affirmation of these dual aspects reflects the widely-shared understanding that indigenous peoples are not to be considered unconnected from larger social and political structures. Rather, they are appropriately viewed as simultaneously distinct from, yet joined to, larger units of social and political interaction, units that may include indigenous federations, the states within which they live, and the global community itself.

Also significantly, special measures are required to safeguard the right of indigenous peoples “to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”.<sup>26</sup> And because indigenous peoples have been deprived of great parts of their traditional lands and territories, the Declaration requires states to provide “redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation”, for the taking of the lands.<sup>27</sup> Special measures are also required to restore and secure indigenous peoples’ rights in relation to culture, religion, traditional knowledge, the environment, physical security, health, education, the welfare of women and children, the media, and maintaining traditional relations across international borders.

While the Declaration articulates rights and the need for special measures in terms particular to indigenous peoples, the rights affirmed are simply derived from human rights principles of equality and self-determination that are deemed of universal application. Other generally applicable human rights are also foundational, including the right to enjoy culture, the right to health, the right to life and the right to property, all of which have been affirmed in various human rights instruments as applicable to all segments of humanity. Indigenous peoples’ collective rights over traditional lands and resources, for example, can be seen as deriving from the universal human right to property, as concluded by the inter-American human rights institutions,<sup>28</sup> or as extending from the right to enjoy culture, as affirmed by the UN Human Rights Committee in the light of the cultural significance of lands and resources to indigenous peoples.<sup>29</sup> By particularizing the rights of indigenous peoples, the Declaration seeks to accomplish what should have been accomplished without it: the application of universal human rights principles in a way that appreciates not just the humanity of indigenous individuals but that also values the bonds of community they form. The Declaration, in essence, contextualizes human rights with attention to the patterns of indigenous group identity and association that constitute them as peoples.

It is precisely because the human rights of indigenous groups have been denied, with disregard for their character as peoples, that there is a need for the Declaration in the first place. In other words the Declaration exists because indigenous peoples have been denied self-determination and related human rights. It does not create for them new substantive human rights that others do not enjoy.

Rather, it recognizes for them rights that they should have enjoyed all along as part of the human family, contextualizes those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation.

### **State sovereignty: a counter norm**

As understood here, self-determination is a human rights norm that broadly benefits human beings in relation to the constitution and functioning of the government structures under which they live. It entitles peoples to remedial measures when the relevant governing institutional order fails in some respect to conform with self-determination values, and such remedial measures may bring about change, sometimes radical change, in the state-governing apparatus in relation to people or territory. The reach and application of the principle or right of self-determination, however, cannot be fully appreciated without attention to the doctrine of state sovereignty, which remains central to the international legal and political system. Whereas self-determination provides grounds to reform existing state practices or structures of government in appropriate circumstances, the sovereignty doctrine tends to keep self-determination issues from international scrutiny and to uphold the status quo of political ordering.

The doctrine of state sovereignty thus forms a backdrop and potentially limiting factor for the implementation of self-determination through the processes of international law and politics. The limitations of this state-centered doctrine are essentially twofold. First, the doctrine limits the capacity of the international system to regulate matters within the spheres of authority asserted by states and recognized by the international community. This limitation upon international competency is reflected in the UN Charter's admonition against intervention "in matters essentially within the domestic jurisdiction of any state".<sup>30</sup> This aspect of sovereignty doctrine manifests itself in a rule of conditional abstention, which applies generally to constrain international involvement in matters of human rights. Typically, international procedures for the examination of human rights problems require showing that domestic remedies have been exhausted, or that state actors at the domestic level are incapable of or unwilling to address the problems.<sup>31</sup> Hence, the international community can be expected to defer to domestic processes to allow them the opportunity to address violations of human rights, including the right to self-determination. Ordinarily, states should be expected to respond on their own, without international involvement, to self-determination claims by particular groups and should undergo necessary reforms on their own.

However, to the extent that domestic processes prove ineffective in addressing conditions that are contrary to self-determination, the matter becomes one of

international concern—no longer “essentially within the domestic jurisdiction”—and state sovereignty may be made to yield to an appropriate level of international scrutiny. Such was the case with classical colonialism, a long-standing and widespread problem that required international involvement for concrete and systemic measures to bring about a condition of self-determination for the colonized peoples. Apartheid was a similarly intractable problem that justified international intervention. The South African apartheid regime not only failed to take steps to remedy the systemic deprivation of self-determination, it was brutal in its efforts to keep the status quo.

The problems commonly faced by indigenous peoples worldwide have also become matters of international concern, inasmuch as these problems of historical origin have persisted through the passage of time without adequate remedial measures being developed at the domestic level. The international community has developed a concern for indigenous peoples in general through a series of programs – including the UN Permanent Forum on Indigenous Issues, the newly-established Expert Mechanism on the Rights of Indigenous Peoples and the UN Special Rapporteur on the situation of fundamental freedoms and human rights of indigenous people – and by the articulation of relevant standards, as represented most prominently now by the Declaration. However, the level of international involvement in the problems of particular groups is highly variable; it depends on the pace of relevant reform measures at the domestic level, the gravity and persistence of particular problem situations, and the success with which such situations are brought to the attention of relevant international actors.

A second limitation emanating from state sovereignty doctrine is its substantive preference for existing configurations of state authority over people and territory. This corollary of state sovereignty finds expression in provisions of the UN Charter and other texts which protect the territorial integrity and political unity of states.<sup>32</sup> It is notable that several states insisted on including in the Declaration language reiterating the principles of state territorial integrity and political unity.<sup>33</sup> In a world that remains organized substantially by state jurisdictional boundaries, such international protection for the *status quo* of political and territorial ordering can be seen to advance, in some measure, widely shared values of stability and ordered liberty among peoples.

But under contemporary international law and prevailing policy, the *status quo* is weakened when it would serve as an accomplice to the subjugation of human rights, including the right of self-determination, just as it was weakened to the point of breaking when the *status quo* represented colonial rule or apartheid. Existing configurations of state authority have been found, in various ways, to suppress the cultural patterns of indigenous peoples—including those cultural patterns that extend into social, economic, and political spheres—and to perpetuate inequities rooted in the very patterns of state-building that gave rise to the

*status quo*. As represented by the Declaration, the international system is developing to promote appropriate changes in the *status quo* of state political ordering in regard to indigenous peoples, in a manner that is calculated, not to dismember states but rather to ultimately strengthen state territorial integrity and political unity.

While state sovereignty doctrine limits the application of the self-determination norm through the international system, the limitations are conditional and should not be considered as incompatible with, or debilitating to, self-determination values. Ideally, sovereignty doctrine and human rights precepts, including those associated with self-determination, work in tandem to promote a stable and peaceful world. Where there is a trampling of self-determination, however, presumptions in favor of non-intervention, territorial integrity, or political unity of existing states may be offset to the extent required by an appropriate self-determination remedy.

## Conclusion

Self-determination is an extraordinary regulatory vehicle in the contemporary international system, broadly establishing rights for the benefit of all peoples, including indigenous peoples. It enjoins the incidents and legacies of human encounter and interaction to conform with the essential idea that all are equally entitled to control their own destinies. Self-determination especially opposes, both prospectively and retroactively, patterns of empire and conquest. To the extent that distinct segments of humanity have been denied self-determination by virtue of historical and continuing wrongs, they are entitled to remedial measures in accordance with the relevant circumstances and preferences of the aggrieved groups.

The Declaration affirms that indigenous peoples in particular have the right of self-determination, recognizes that they have been denied enjoyment of the right, and marks the parameters for processes that will remedy that denial.

It is perhaps best to understand the Declaration and the right of self-determination it affirms as instruments of reconciliation. Properly understood, self-determination is an animating force for efforts toward reconciliation—or, perhaps more accurately, conciliation—with peoples that have suffered oppression at the hands of others. Self-determination requires confronting and reversing the legacies of empire, discrimination, and cultural suffocation. It does not do so to condone vengefulness or spite for past evils, or to foster divisiveness but rather to build a social and political order based on relations of mutual understanding and respect. That is what the right of self-determination of indigenous peoples, and all other peoples, is about. ○

## Notes

- 1 This chapter is based on a paper that was presented at the International Conference on Sami Self-Determination: Scope and Implementation, held from 4 – 6 February 2008 in Alta, Norway, and published as part of the proceedings of the conference. The theory of self-determination incorporated here has been exposed in the author's prior works, written before adoption of the UN Declaration on the Rights of Indigenous Peoples, including **S James Anaya. 2004.** *Indigenous Peoples in International Law* (New York: Oxford Univ. Press, 2d ed), 97-128; and **S James Anaya. 1993.** "A Contemporary Definition of the International Norm of Self-Determination" 3(1) *Transnational Law and Legal Problems*, 131.
- 2 General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).
- 3 *Ibid*, Article 3.
- 4 *Ibid*, Article 2.
- 5 International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976, art. 1(1); International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976, art. 1(1).
- 6 UNGA "Resolution 1514: Declaration on the Granting of Independence to Colonial Countries and Peoples" (14 December 1960).
- 7 African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982), entered into force Oct. 21, 1986.
- 8 See Covenant on Economic Social and Cultural Rights, above n 4, art. 1(1); Covenant on Civil and Political Rights, above n 4, art. 1(1); African Charter on Human and Peoples' Rights, *ibid*, art. 20. See also UN Charter, 24 October 1945, 1 UNTS XVI, art. 1(2); Final Act of the Conference on Security and Cooperation in Europe, 1 Aug. 1975, 14 I.L.M. 1292, princ. VIII; and UNGA "Resolution 2625: Declaration of Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations" UN Doc A/8028 (1971), principle V.
- 9 See generally **Peter Jones. 1999.** "Human Rights, Group Rights, and Peoples' Rights" 21(1) *Human Rights Quarterly* 90, 97-101 (distinguishing between the conception of "peoples" as corporate entities that hold rights as such and that can assert those rights even as against the group's members and the more flexible conception of "peoples" under which rights are held collectively by the group's members themselves).
- 10 See UNGA "Resolution 2775" UN Doc A/8429 (1971); UNGA "Resolution 3411" UN Doc A/10034 (1975). See also UNSC "Resolution 392" UN Doc. S/Res/392 (1976); International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November 1973, 1015 UNTS 243.
- 11 See **Peter N Bouckaert. 1997.** "The Negotiated Revolution: South Africa's Transition to a Multiracial Democracy" (33) *Stanford J Int'l L*, 375; **Daisy M Jenkins. 1996.** "From Apartheid to Majority Rule: A Glimpse into South Africa's Journey Toward Democracy" 13 *Arizona J Int'l & Comp L*, 463. For a collection of papers assessing the political and economic factors leading to a new constitutional order in South Africa, see **Gavin Maasdorp & Alan Whiteside (eds). 1992.** *Towards a Post-Apartheid Future: Political and Economic Relations in Southern Africa* (New York: St. Martin's Press).
- 12 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 1971 ICJ 16, 77-78.
- 13 See generally **Robert A Williams Jr. 1997.** *Linking Arms Together: American Indian Treaty Visions of Law and Peace* (New York and Oxford: Oxford University Press).
- 14 UNGA "Resolution 1514" above n 5; UNGA "Resolution 1541: Declaration on Non-Self-Governing Territories" (15 December 1960).
- 15 Martinez Cobo "Study of the Problem of Discrimination Against Indigenous Peoples" UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21 (1981-1983).
- 16 *Ibid*.
- 17 Above n 2, preambular para. 7.

- 18 **Erica-Irene A. Daes. 1993.** "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (3) *Transnational Law & Contemporary Problems*, 1,9.
- 19 Above n 2, Article 38.
- 20 *Ibid*, Article 37.
- 21 *Ibid*, Article 4.
- 22 *Ibid*, Article 5; *ibid*, Article 20.
- 23 *Ibid*, Article 5.
- 24 *Ibid*, article 18
- 25 *Ibid*, Article 19
- 26 *Ibid*, Article 26(1)
- 27 *Ibid*, Article 28(1)
- 28 See *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 *Arizona J Int'l and Comp Law* 395); *Mary and Carrie Dann v United States* (Merits), I/A CHR., Report No. 75/02, Case 11.140 (27 December 2002).
- 29 Human Rights Committee "General Comment Adopted by the Human Rights Committee under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment No. 23(50) (art.27)" UN Doc CCPR/C/21/Rev.1/Add.5 (1994), para 7.
- 30 UN Charter, above n 7, art 2(7).
- 31 See generally **Hurst Hannum (ed). 1992.** *Guide to International Human Rights Practice* (Philadelphia: University of Pennsylvania Press, 2d ed).
- 32 See UN Charter, above n 7, art. 2 (4) stating that "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state ...".
- 33 See above n 1, Article 46(1)





# THE PROVISIONS ON LANDS, TERRITORIES AND NATURAL RESOURCES IN THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: AN INTRODUCTION

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Mattias Åhrén\*

## Introduction

On 13 September 2007, after more than twenty years of intense negotiations, the United Nations General Assembly (the UNGA) adopted the UN Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>1</sup> The adoption of the Declaration by the UNGA brought to an end perhaps the longest and most complicated standard-setting activity the UN has ever embarked on. The Declaration process was difficult for procedural reasons, but in particular for the complex negotiations on material rights the Declaration enshrines. This article addresses one set of rights in the Declaration: indigenous peoples' rights to lands, territories and resources (LTRs), which include waters and natural resources. They are probably the most complicated rights in the Declaration. To fully understand and adequately analyze the LTR provisions in the Declaration, it is necessary to touch upon why, historically, issues pertaining to indigenous peoples' rights in general, and to LTRs in particular, have been so complex.

The article will initially provide a brief overview of the evolution of international law on indigenous peoples' rights to LTRs since the establishment of the UN. Then I explain the implementation gap relating to these rights, which in turn sets the stage for the negotiations on the LTR provisions within the UN ad-hoc Working Group on the Draft Declaration on the Rights of Indigenous Peoples

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(the WGDD). Against this historical background, the article analyses the content of the LTR provisions and their legal status.

### **Indigenous peoples' rights: challenge to international law**

When, in the wake of World War II, the newly-established UN set out to craft a human rights system, for several decades it essentially ignored indigenous peoples' societal structures. The foundation for the human rights system of today was elaborated without indigenous peoples in mind. The crafters of the modern human rights system perceived that the rights and interests of indigenous, and other collectives, could be adequately protected through a human rights system that focuses solely on the rights of the individual. Corresponding with conventional individual liberal theories, the belief was that there is no need to protect the group as such, as a distinct cultural and legal entity, if the rights of individuals are protected. This position essentially equates to a conservative understanding of the individual's right to non-discrimination; i.e. a right for individuals to be treated equally but with no rights to have distinct cultural particularities taken into account. In other words, there is no right to be treated differently, even if you are distinctly different from the majority population. For example, all persons have the right to the language of the majority, while no one has any right to their mother tongue if it is different from that of the majority's. Premised on such an understanding of the human rights system, it was appropriate to gradually integrate and assimilate international law into the non-indigenous dominant society.

With time, however, both conventional liberal individualism and the complete focus on the individual within human rights law became increasingly challenged. It was acknowledged that policies and rights that ignored the fact that individuals belong to groups could be detrimental to the group as such and, when a group disappears, to the individual members of the group. At the same time, indigenous peoples had, to a large extent, managed to maintain essential elements of their distinct societies and cultures, despite the inadequacies of international law to protect indigenous societies, and colonization, forced assimilation and other atrocities directed against them. These two factors combined resulted in a gradual yet rather fundamental shift in international law as it relates to indigenous peoples. In a few decades, international law has evolved to hold, beyond doubt, that indigenous peoples – as distinct collectives – have the right to maintain and develop their particular societies, side by side with the majority society. Indigenous peoples cannot be integrated into the engulfing society against their will. This is a defining characteristic of indigenous rights compared to the rights enjoyed by ethnic and other minorities. Put simply, minority rights focus on catering for respect for individuals belonging to minorities *within* the majority society. Indigenous rights, on the other hand, aim at providing an envi-

ronment in which indigenous peoples, first and foremost, have the right to preserve their societies outside the dominant society.

While the UN has, by adopting the Declaration, accepted that the human rights system has evolved to encompass a right of indigenous peoples to exercise, maintain and develop their distinct cultural identities, as collectives, this recognition has been poorly transformed into practice. That is particularly true with regard to the three most important of indigenous peoples' rights: indigenous peoples' collective human rights in general; the right to self-determination; and LTRs.

First, the legal recognition of indigenous peoples' rights to maintain their distinct societies and cultures as collectives has raised the question, who is the beneficiary of such rights? Is it the individual members of the indigenous people or the people as such? As mentioned above, the notion that indigenous peoples, as collectives, could enjoy human rights that inhere in individuals runs contrary to the conventional human rights system, which recognizes only individuals as beneficiaries of human rights. On the other hand, if, having accepted that indigenous peoples enjoy rights to their cultural identity, as well as to autonomy, it would seem incoherent if the beneficiary of the right should not be the people as such.

Second - and closely related to the issue of whether indigenous peoples enjoy collective human rights proper - is the question of how the right to self-determination applies to indigenous peoples. Where do indigenous nations - who are not states but not minorities either - fit in the international political and legal map? It is clear that when self-determination evolved into a right, it was originally perceived as applying only to people in meaning the sum of the inhabitants of a state or a territory. Such an understanding is in conformity with conventional international law's inability to recognize legal subjects other than the state and the individual.

The two sets of rights touched upon above are beyond the scope of this article. The Declaration has settled the debate that international law recognizes collective human rights proper and has also affirmed that indigenous peoples are entitled to the right to self-determination. This article focuses on indigenous peoples' rights to their LTRs.

## **Indigenous peoples' rights to lands, territories and resources generally**

### **Cultural rights**

The indigenous rights discourse operates with a few working definitions of the term "indigenous peoples". For present purposes, it is sufficient to note that, regardless of the definition used, particular emphasis is always placed on the re-

quirement that a group - in order to constitute an indigenous people – must have occupied and used a fairly definable territory before present day state borders in the area were drawn. Indigenous peoples' cultures are further marked by an intrinsic spiritual connection to that very territory, and the natural resources situated in such.<sup>2</sup>

As a result of the above-mentioned developments in international law, the UN recognised the logical connection between a right to a cultural identity and a right of indigenous peoples' to their traditional territories. Thus, when international law started to address indigenous rights, it paid particular attention to indigenous peoples' rights to LTRs. Today, international law recognises that the intrinsic connection between indigenous peoples and their traditional territories results in their holding certain material rights to LTRs traditionally occupied and used. How far these rights stretch has been subject to intense debate. But some general conclusions can be drawn.

As a means to protect their cultural identity, it is clear that international law safeguards indigenous peoples in their traditional territories from competing activities that would prevent them from continuously exercising, or make it more difficult for them to continuously exercise, their traditional livelihoods and other culture-based activities. This right follows, for example, from Article 27 of the UN International Covenant on Civil and Political Rights,<sup>3</sup> as interpreted by the UN Human Rights Committee,<sup>4</sup> and ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO Convention 169) Articles 13-15, as interpreted by the ILO Secretariat.<sup>5</sup> No balancing test is allowed. If the competing activity makes it significantly more difficult for the indigenous community to exercise its culture, it is irrelevant that the activity, if allowed, would generate billion-dollar profits or would otherwise be of great value to the society as a whole.

## Property rights

More recently, legal scholars and international and domestic institutions have increasingly acknowledged that the right to culture is not necessarily the *only* basis on which indigenous peoples can claim rights to LTRs. Lately, the international legal discourse has recognised that indigenous peoples hold property rights to the territories they have traditionally occupied and used.

As explained above, a defining characteristic of indigenous peoples is that they have inhabited and used their traditional territories since before other populations started to move into these areas. With few exceptions, domestic jurisdictions today recognize initial occupation as a means through which property rights to land can be acquired. However, with few exceptions, such rights have traditionally only been recognized for the colonizing, non-indigenous, population. Indigenous peoples' use of their traditional territories has not, in most in-

stances, been regarded as giving rise to property rights. Rather, the state has normally considered itself the owner of indigenous peoples' traditional territories.

In recent years, however, both domestically and internationally, courts and other institutions have started to question what was previously taken for granted: that the state owns indigenous peoples' traditional territories.<sup>6</sup> Gradually, the world community has come to acknowledge that a domestic legal order whereby the law recognizes that use of land by the non-indigenous population gave rise to property rights, and indigenous land use did not, violates the fundamental right to non-discrimination. International law has developed such that if domestic law recognizes that occupation gives rise to property rights to land that law must apply equally to indigenous peoples. Moreover, under international law, it is discriminatory to design a domestic legal system in such a way that stationary land use common to the non-indigenous population results in rights to LTRs whereas more fluctuating use of land, common in many indigenous cultures, does not. In other words, it is not enough that the legal system is formally non-discriminatory. It must also guarantee equal treatment in substance.

## **The implementation gap**

It is uncontested that, under international law, indigenous peoples hold both cultural and property rights to LTRs they have traditionally occupied and used. In addition, most states acknowledge some responsibility for past injustices committed against these indigenous peoples and generally accept that these injustices are negatively impacting on indigenous peoples today. Further, most states recognize that they are obliged to rectify injustices of the past by recognizing rights that continue today. In addition, most states presumably nurture an aspiration to improve the situation of indigenous peoples. However, this has rarely been reflected in state legislation, policies or practices. What, then, is the reason for this implementation gap?

Of course, the major reason is, as usual, money. Respecting human rights is often associated with certain "burdens" for states. But, it is probably safe to conclude that this characteristic of indigenous peoples' human rights is one of the most controversial. This is a result of indigenous peoples having been subject to structural discrimination for as long as the modern human rights system has existed, and beyond. Indigenous peoples have been denied rights recognised for other peoples, allowing the colonizing peoples to build their societal structures over and across indigenous societies. Further, non-indigenous laws have not necessarily been particularly appropriate for regulating indigenous societies. As a consequence, when, as described above, indigenous peoples call for respect for collective human rights proper, this challenges one of the most fundamental building blocks of international law. Further, respect for indigenous peoples'

right to self-determination demands a sincere editing of the political map of the world.<sup>7</sup> Still, the application of cost-benefit analyses to the decision to respect human rights has particularly detrimental effects on the implementation of indigenous peoples' rights to LTRs.

Most states simply hold that implementing indigenous peoples' rights to their LTRs, to the extent the right to non-discrimination demands, would simply be too costly for them, in both political and financial terms. Indigenous peoples' rights to LTRs – if fully implemented – would bring about fundamental structural and economical changes in most states in which indigenous peoples today find themselves residing. Not insignificant parts of the colonizing society's social structures would have to be fully or partly removed from indigenous territories. In addition, natural resources – often generating core incomes for the state as a whole – would have to be returned to the indigenous peoples, or at least the incomes shared. Hence, given that the structural discrimination of indigenous peoples has gone on for such a long time, and on such a scale, it is no wonder that, for practical reasons, many states today find it very difficult to “turn back the clock” and acknowledge indigenous peoples' rights to their LTRs, even if genuinely acknowledging responsibility for past injustices.

It was against this background that the negotiations on the LTR provisions in the Declaration commenced.

### **The setting for the negotiations on the LTR provisions in the declaration**

In line with the above, states participating in the negotiations on the Declaration surely acknowledged that, even in the absence of a Declaration, indigenous peoples hold rights to the LTRs they have traditionally inhabited, occupied and used. And, obviously, it would not have been possible to adopt a Declaration on the rights of indigenous peoples without addressing these keystone rights. As further described above, most states surely generally accepted, or were at least aware, that indigenous peoples' rights to LTRs under international law are fairly far reaching. Indeed, many states were, or at least during the negotiations process gradually became, ready to agree to a Declaration confirming that indigenous peoples hold rights to LTRs that go beyond what had, by then, been implemented on a domestic level.

That said, most state representatives entered into the negotiations on the Declaration with a cautious attitude towards the LTR provisions. They were – particularly at the outset of the deliberations – not ready to allow the Declaration to enshrine all rights that indigenous peoples hold to their LTRs. In other words, most states were simply not prepared to pay the price – in financial and political terms – for a complete recognition of indigenous peoples' rights to LTRs in the

Declaration. Instead, state representatives' message to indigenous peoples at the outset of the negotiations was essentially; "We are ready to acknowledge your rights to LTRs to a greater extent than we do today. But let's be realistic and find a compromise partly based on law but that also takes political realities into account."

Indigenous peoples' representatives, on the other hand, entered into the negotiations with a rather different approach. They were determined not to agree to any continued discrimination. Indigenous peoples set out to achieve a declaration that would fully confirm their rights to use and own all their traditional territories, both as a pre-requisite for exercising, maintaining and developing their respective cultures and as a result of a non-discriminatory application of the right to property. Indigenous peoples were firm that international law should be the only guiding light for the negotiations, and that political considerations should be kept out of the process. Indigenous representatives were, in short, not interested in the compromise the state representatives offered them.

### **The negotiations on the LTR provisions in the declaration**

Naturally, these very different points of departure among state and indigenous representatives laid the groundwork for extremely complicated negotiations in the WGDD. It soon became evident that the LTR provisions would be most difficult on which to reach an agreement. And this was particularly problematic given that, for most of the WGDD process, it was impossible to make any tangible progress on any of the provisions in the declaration. At least other parts of the declaration offered greater promise for potential progress. Given this difficult negotiating environment, participants in the WGDD informally agreed that it made little sense to spend too much time on the fruitless task of finding common ground on the most complicated articles in the Declaration. As a result, for most of its final sessions, the WGDD focused on so-called easy articles or soft issues and, also, on collective rights and the right to self-determination - the WGDD set aside the LTR issue for the time being. On the few occasions when the WGDD did touch on the LTR provisions, it merely read through the LTR articles to conclude that participants' positions on these provisions still differed considerably. The gap between states' and indigenous peoples' positions was wide.

As a consequence, the WGDD did not end up seriously addressing LTRs until the final week of the WGDD's eleventh and final session. By that time, the Declaration process had gained tangible and considerable momentum. Agreements on self-determination and collective rights had been reached in principle. Importantly for indigenous peoples, but also for the negotiations on LTRs, the negotiations on self-determination and collective rights had, broadly speaking, ended in a way indigenous peoples' thought they should. Indigenous representatives had managed



to convince states that indigenous peoples should not have to compromise on such important rights. For instance, the Declaration's Article 3 underscores the fact that indigenous peoples – like other peoples – enjoy the right to self-determination. Furthermore, agreement had been reached among state and indigenous representatives on most of the less contentious articles in the Declaration. By the end of 2005, all of a sudden, the only major outstanding issue was the LTR provisions.

Inspired by the progress made on the remainder of the declaration, most state and indigenous representatives were working closely together to achieve an agreement on the LTR provisions. Intense and constructive discussions on the LTR chapter ensued. These negotiations rapidly brought the participants' positions closer to each other. Suddenly, the gap between indigenous and state positions was not so insurmountable. In the final stages of the negotiations, state delegations agreed that the declaration should acknowledge what already follows from international law, i.e., that indigenous peoples hold rights to LTRs as both cultural and property rights. States acknowledged that, in line with what has been outlined above, it is not meaningful to talk about indigenous peoples' rights to LTRs if not recognizing that continued access to land is a pre-requisite for indigenous peoples to be able to exercise, preserve and develop their cultures. Furthermore, states admitted that a reasonable understanding of the fundamental right to non-discrimination demands that indigenous peoples' land use gives rise to ownership rights thereto, to the same extent as for the rest of the population.

With this general recognition in mind, during the final week of the WGDD, both state and indigenous representatives crafted and tabled proposed language for the LTR provisions. Due to the urgency, they sometimes perhaps did so in a "too inspired" and disorganized fashion. It was at times not easy to keep track of who had tabled exactly what proposal and how it had been amended by whom. Nonetheless, some general agreements emerged. There was agreement that the Declaration should recognize the spiritual relationship that indigenous peoples enjoy with their lands as well as the importance of LTRs for their being able to exercise and develop their distinct cultures. Participants further agreed that the Declaration had to acknowledge indigenous peoples' right to own their traditional lands in a manner that does not discriminate against nomadic peoples or indigenous peoples that otherwise utilize lands and waters in less stationary manners. But most of the debate was on the definition of the LTRs. Some states still insisted that the Declaration should refer to indigenous peoples' LTRs as "their" lands, territories and resources. Such a vague reference to "their" could of course result in the Declaration being interpreted to apply only to LTRs to which indigenous peoples hold formal title, or to which the state otherwise officially acknowledges that the indigenous people has rights. Indigenous representatives categorically rejected all proposals suggesting such a limited scope of the LTR provisions, and gradually convinced state representatives to withdraw such language. Instead, it was agreed that the factor determining whether indigenous

peoples hold rights should not be recognition by the state but, instead, utilization, in practice, by indigenous peoples. In other words, it was agreed that the Declaration should recognize rights of indigenous peoples to “lands, territories and resources traditionally used”. Finally, there was no objection to the right to restitution in general.

Such was the general agreement reached at the end of the WGDD’s final session.<sup>8</sup> It might appear that states made some major concessions in the final hour of the WGDD process and, measured against their starting positions for negotiations, they did. But one should recall that the only thing the state representatives did was to permit the Declaration to, in general terms, express what already follows from international law. But given how politicized the discussions on indigenous peoples’ rights to LTRs were, states should be commended for stretching out their hand to indigenous peoples, thereby saving the entire declaration process. Indigenous peoples, for their part, had to give up their aspirations that the Declaration should elaborate in greater detail on their rights to LTRs, for instance on sub-surface resources. In order to reach an agreement, however, they settled for a more general LTR segment but which is still specific enough on the most fundamental elements of their rights to LTRs.

While the WGDD finished with agreements in principle on some of the most important issues pertaining to indigenous peoples’ rights to LTRs, this did not change the fact that the WGDD ended without agreed language on *exactly* how these rights were to be expressed in the Declaration. This was of course not optimal but neither was it perceived to constitute a major concern. Even at the beginning of the final session of the WGDD, the Chairperson had indicated that he did not expect the WGDD to reach agreement on all outstanding issues. Rather, his aspiration was that the WGDD should reach agreements on most provisions and, on the few outstanding issues, the participants’ positions would be close enough to give him sufficient guidance on how to fill in the blanks in a Chair’s text. On that basis, he could then submit a Chair’s text through the UN Human Rights Council to the UNGA for adoption. As described above, the Chairperson’s plans and aspirations materialized. At the end of WGDD 11, the Chairperson announced that he would finalize the Declaration and pass it on to the UN system for adoption.<sup>9</sup> Virtually all participants – state and indigenous delegations alike – agreed that the WGDD had come as far as it possibly could. The general sentiment was that continued negotiations would not result in the WGDD making significant further progress. True, an additional WGDD session would likely have resulted in even broader, perhaps complete, agreement among indigenous peoples and *most* states. But it was equally evident that this would still not generate consensus. Australia, New Zealand and the United States had made it blatantly clear that they would not join agreement on any Declaration acceptable to indigenous peoples. Therefore, there was little value to be added by holding one more session. In addition, and more importantly, for reasons beyond the control

of the WGDD, as well as the scope of this article, there were also considerable risks associated with continuing the WGDD process.<sup>10</sup> On 22 March 2006, the Chairperson of the WGDD presented his Chair's text.<sup>11</sup> In line with the above, it contained few surprises, at least as far as the LTR provisions were concerned. The LTR articles essentially contained the elements coming out of the negotiations at the 11<sup>th</sup> session of the WGDD, even if the Chairperson had had to use a few words of his own to flesh out this agreement. Consequently, the states party to the informal agreement at the end of the WGDD accepted the LTR provisions in the Declaration,<sup>12</sup> and voted in favour of the adoption of the Declaration at the UNGA.<sup>13</sup>

### **The content of the LTR provisions in the declaration**

Article 25 recognises that the intrinsic connection between indigenous peoples' cultures and the LTRs they have traditionally used results in indigenous peoples holding rights to such LTRs. The provision confirms that indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their LTRs. Article 25 may not add much to the provisions that follow it in terms of concrete and implementable rights. The article almost has the character of a preambular paragraph. Nonetheless, the provision warrants its place in the Declaration, underscoring one of the important bases for indigenous peoples' rights to LTRs and, as such, also offers guidance for the interpretation and implementation of the following provisions.

The most central LTR provisions are Articles 26 and 28. These provisions specify the rights indigenous peoples have to LTRs they have traditionally used and continuously occupy as well as to lands traditionally used but which have fallen out of indigenous peoples' possession.

Article 26(1) proclaims that: "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." The provision thus speaks generically about "rights", without qualifying the nature of these rights. One must therefore assume that the provision pertains to LTRs both as cultural and property rights. With regard to cultural rights, this is made clear by reading Article 26(1) in conjunction with Article 25. Article 26(2) then moves on to affirm that indigenous peoples also hold rights to LTRs as property rights.

Article 26(2), in its most pertinent part, proclaims that: "Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of ... traditional occupation or use...". Clearly, the key word in this provision is "own". To a large extent, an ownership right can be expected to consume rights to "use", "develop" and "control". Hence, pursuant to Article 26(2), indigenous peoples have the right to own the LTRs they have traditionally occupied and used, provided, however, that they continuously

“possess” these territories. The extent of indigenous peoples’ ownership rights to land pursuant to Article 26(2) is consequently largely contingent upon how one understands the term “possess” in the provision.

There is no universally applicable definition of the concept “possess”. The term can have various meanings in different jurisdictions. Black’s Law Dictionary’s broad definition of “possess” probably describes fairly accurately the general understanding of “possess” in most jurisdictions. According to Black’s, “possess” is “to have in one’s actual control; to have possession of”. Further, “possession” is: i) The fact of having or holding property in one’s power, the exercise of dominion over property; and ii) the right under which one may exercise control over something to the exclusion of others. Some might argue that Black’s definitions of “possess” and “possession” suggest that indigenous land utilization is not sufficiently exclusive and intense to qualify as possession. But that is not necessarily correct.

The chapters above outlined the recent evolution of international law on indigenous peoples’ property rights to LTRs, describing the clear trend in international law to reject as discriminatory an interpretation of domestic law that recognizes that non-indigenous land use gives rise to property rights when indigenous peoples’ land use does not. The term “possess” in the Declaration must be understood against this background. It would be a contradiction in terms to first, in principle, recognise indigenous peoples’ ownership rights to land only to immediately thereafter render such rights contingent on a domestic, and discriminatory, understanding of the term “possess”. That would be akin to rendering indigenous peoples’ rights to LTRs subject to national legislation. The abovementioned developments in international law prohibit the use of a conventional and domestic understanding of the concept “possess” in the indigenous rights discourse at the international level. Rather, the term has to be customized to an indigenous peoples’ rights context. In other words, one cannot necessarily expect and demand the same level of intensity and exclusivity with regard to land utilization in indigenous cultures compared to non-indigenous cultures. An example is nomadic or semi-nomadic indigenous peoples; their particular way of life often results in their utilizing vast areas over time-cycles that stretch over a year, or even longer, where most land patches are used for a fairly limited period of time. Moreover, in present day society, most indigenous peoples – following colonization imposed on them - find themselves sharing all or substantial parts of their territories with the colonizing population. Under such circumstances, it is inevitable that in most instances indigenous land use is not completely exclusive, due to reasons beyond the indigenous people’s control. The fact that the non-indigenous population today use the indigenous people’s traditional territories for competing activities should not result in the indigenous people being deemed not to possess the area in question, particularly since the competing activity is often carried out without the consent of the indigenous people in question.

The conclusions above also follow from a careful text analysis of Article 26(2), which proclaims that the “possession” referred to is precisely such that follows from “traditional occupation or use”. “Traditional use” in this context must be understood to include the ways in which respective indigenous peoples utilize their land, in accordance with their distinct cultural practices, regardless of whether the land use is not particularly intense compared to conventional non-indigenous land utilization. Such an interpretation is further in line with legal doctrine and jurisprudence. For instance, Kent McNeil, eminent Canadian professor, has underlined that “possession”, in the context of indigenous peoples, must be understood to mean “possession in fact”, in turn giving rise to a presumption that the indigenous people also has “possession in law”.<sup>14</sup> And in the *Delgamuukw* Case, the court affirmed that physical occupation by an indigenous people was evidence of possession in law.<sup>15</sup> This presumption must reasonably be particularly strong with regard to such parts of an indigenous people’s traditional territory to which no other title exists. Lack of private ownership indicates that competing activities have been limited and that, consequently, the indigenous people in question has utilized the area with a large degree of exclusivity. The fact that the state might today regard itself as owner of the same land does not then prevent the indigenous people from “possessing” the same.

Article 26(2) thus affirms that indigenous peoples hold ownership rights to LTRs they have traditionally, and continuously, use. But the Declaration goes further. Article 28(1) stipulates that “Indigenous peoples have the right to ... restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally ... occupied or used, and which have been ... taken ... without their free, prior and informed consent”. Analyzing Article 28(1), one notes that, like Article 26, Article 28(1) recognises indigenous peoples’ rights to areas they have traditionally used or otherwise occupied. Again, the criterion is hence traditional use. The state need not have acknowledged the rights. And, as with Article 26, “traditional use” must be understood in the cultural context of the particular indigenous people.

Unlike Article 26, read in the context of Article 25, Article 28(1) does not specify whether the LTR rights constitute cultural or property rights. However, Article 28(1) must reasonably be interpreted to encompass both categories of rights. It would not make sense for Articles 26 and 28(1) to differ in scope. Rather, the presumption must be that the two provisions apply to the same set of rights. Both apply to LTRs that an indigenous people has traditionally used. The only difference is that Article 26(2) pertains to LTRs that the indigenous people continuously use. Article 28(1) then goes on to address LTRs the indigenous people has historically used but has subsequently been lost against its will. Article 28(1) proclaims that such LTRs shall be returned.

## **A brief comparison with the LTR provisions of ILO Convention 169**

A comparison between the Declaration and the ILO Convention 169 illustrates that the Declaration simply codifies existing international law.<sup>16</sup>

Like the Declaration, ILO Convention 169 Article 13 affirms indigenous peoples' special relationship with their traditional territories and underlines that respect for this relationship constitutes a prerequisite for the preservation and development of their distinct cultures. And, like Article 26(2) of the Declaration, ILO Convention 169 Article 14 proclaims that indigenous peoples hold property rights to LTRs they have traditionally and continuously occupied. Thus, the Declaration – when it comes to land areas that indigenous peoples still use – simply confirms existing international law. It may be that other LTR provisions in the Declaration stretch somewhat beyond the equivalent provisions of ILO Convention 169, especially in relation to LTRs that indigenous people do not continue to occupy.<sup>17</sup> But that is unsurprising. The Declaration was adopted almost 20 years after ILO Convention 169 and the development within international law on indigenous peoples' rights has been rapid in the last few decades.

The situation is somewhat different with regard to the right to restitution. As outlined above, Article 28 of the Declaration proclaims a right of restitution in relation to LTRs taken without an indigenous people's consent. ILO Convention 169 does not include any corresponding provision. Still, the ILO Secretariat has, in its guide to ILO Convention 169, asserted that the LTR provisions in ILO Convention 169 should be understood to entail at least a limited right to restitution, provided that there is some connection to the present. Such a connection could be established, for instance, in cases of recent expulsion from the land areas in question.<sup>18</sup> Still, the right to restitution that the ILO Secretariat reads into ILO Convention 169 is not the general right to restitution the Declaration proclaims. But, as will be elaborated on immediately below, this is not the same thing as saying that the Declaration's Article 28 is a novelty in international law.

## **The legal status of the rights contained in the declaration**

Following the adoption of the Declaration, some states have been quick to downplay its importance by pointing to the Declaration's non-legally binding character. That, however, oversimplifies things. To determine the legal status of the rights enshrined in the Declaration, one must analyze every single provision of the Declaration against the background of existing and established international law. The conclusion of such an exercise would probably be that, to a significant extent, the Declaration clarifies and confirms rights that are already formally legally binding and applicable to indigenous peoples.<sup>19</sup> As explained above, inter-

national law already recognised robust indigenous peoples' rights to LTRs under the rubric of the right to culture and the right to non-discrimination.

Even the right to restitution in Article 28 is enshrined in various international legal sources, for instance in the African Charter of Human and Peoples' Rights,<sup>20</sup> and the International Covenant on Civil and Political Rights (CCPR), as interpreted by the UN Human Rights Committee in the context of indigenous peoples.<sup>21</sup> But, perhaps most noteworthy, the UN Committee on the Elimination of Racial Discrimination (the CERD Committee) has elaborated upon indigenous peoples' rights to LTRs as a part of the right to non-discrimination under the UN International Convention on the Elimination of All Forms of Racial Discrimination.<sup>22</sup> In doing so, the CERD Committee has called on states "where [indigenous peoples] have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories". Further, when restitution is not feasible, compensation should be awarded, if at all possible in the form of lands and territories.<sup>23</sup> Therefore, in this aspect, the Declaration is simply underlining existing international law.

## Conclusion

In sum, this article has explained that the WGDD process did not end with agreed detailed language on the LTR provisions in the Declaration. However, even though no formal consensus was reached, the LTR provisions express a general understanding among both states and indigenous representatives within the WGDD on the appropriate content of LTR rights. This general agreement included, for example, that: i) indigenous peoples hold rights to those LTRs traditionally occupied and used, regardless of whether the state has formally recognized these rights in domestic legislation or otherwise; ii) the Declaration should affirm that indigenous peoples hold rights to LTRs both as cultural and property rights; and iii) the Declaration should recognise rights to LTRs that indigenous peoples traditionally occupied and used, but that have subsequently been lost against their will. Finally, the article has explained that there is a substantial implementation gap between indigenous peoples' rights to LTRs under international law, on the one hand, and domestic legislation and policies, on the other. Hopefully, by voting for the Declaration, states have demonstrated a genuine will to bridge this implementation gap. ○

## Notes

1 General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).



- 2 As explained above, it is essentially this characteristic that distinguishes indigenous peoples from minorities. In addition, indigenous peoples have normally preserved their own societal institutions to a higher degree than minorities.
- 3 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976.
- 4 See **Martin Scheinin**. 2000. "The Right to Self-Determination under the Covenant on Civil and Political Rights" (ed) In Pekka Aikio and Martin Scheinin (eds) *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku: Åbo: Institute for Human Rights / Akademi University), 179.
- 5 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991. See **International Labour Office**. 2003. "ILO Convention on Indigenous and Tribal Peoples, 1989 [No. 169]: A Manual" (Geneva: ILO).
- 6 See the rulings by e.g. the Inter-American Commission on Human Rights in *Mayan Indigenous Communities of the Toledo District Toledo v Belize* (Merits), I/A CHR, Report No. 40/04, Case 12.053 (12 October 2004) and *Vid. Marie and Carrie Dann v United States* (Merits), I/A CHR, Report No 75/02, Case 11.140 (27 December 2002), para 131 (2002), by the Inter-American Court of Human Rights in the *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 Arizona J Int'l and Comp Law 395) and in *Moiwana community v. Suriname*, I/A CHR (Ser. C) No. 124 (2005), by the Belize Supreme Court in Claims No. 171 and 172 of 2007, *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct) and by the High Court in Botswana, Misca. No. 52 of 2002, of 13 December 2006. Compare also the ruling by the Supreme Court of Norway in the so-called *Svartskog Case* (Rt 2001 side 1229).
- 7 Respect for rights of other non-state forming peoples of course also raises similar challenges. But, as mentioned above, the debate on whether international law recognizes collective human rights proper as well as on the extent to which the right to self-determination applies to non-state forming peoples has so far been held essentially in an indigenous peoples' context.
- 8 The agreement did not include every participant at the WGDD. A few states were not ready to abandon their traditional position that the LTR provisions should be based on a political compromise, and not international law. These states – Australia, New Zealand and the United States – were hence not party to the negotiations and informal agreements described above. The reader will note that these are three of the four states that ended up voting against the adoption of the Declaration in the UNGA, with Canada casting the additional negative vote.
- 9 See "Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/23" UN Doc E/CN.4/2006/ (22 March 2006), paras 28 and 30.
- 10 Regarding these risks, see further **Mattias Ahren**. 2007. "The United Nations Declaration on the Rights of Indigenous Peoples: How was it Adopted and Why is it Significant?" (4) *Galdu Journal of Indigenous Peoples' Rights* 84.
- 11 See above n 9.
- 12 Again, the one exception was Canada.
- 13 As the reader knows, the Chair's text was adopted by the HRC but would subsequently be slightly revised by the UNGA's 3<sup>rd</sup> Committee. But these amendments did not affect the LTR provisions.
- 14 See **Kent McNeil**. 2001. "Emerging Justice?" in *Essays on Indigenous Rights in Canada and Australia*. (Saskatoon: University of Saskatchewan Native Law Centre), 141.
- 15 See *Delgamuukw v British Columbia* [1997] 153 D.L.R. (4<sup>th</sup>) (Can.) at 1101. *Delgamuukw v. British Columbia* is a famous leading decision of the Supreme Court of Canada where the Court made its most definitive statement on the nature of Aboriginal title in Canada.
- 16 Above n 5.
- 17 Unlike the Declaration, ILO Convention 169 distinguishes between lands an indigenous people still use fairly exclusively, and lands that the indigenous people today share with the colonizing population. Under ILO Convention 169, indigenous peoples hold ownership rights only to the

first category of lands, whereas they have usufruct rights to lands they today share with others. This distinction could lead to an interpretation that the ownership right awarded by ILO Convention 169 apply to a lesser part of the indigenous peoples' traditional territory, compared to the Declaration. (In other words, under the Declaration, an indigenous people hold ownership rights to certain land areas to which they "only" have usufruct right under ILO Convention 169.) But again, an exact analysis of the LTR provisions in ILO Convention 169 is beyond the scope of this article. The point is that, regardless of its exact scope, ILO 169 confirms the trends in international law leading up to the Declaration.

- 18 Above n 5. In addition, pursuant to ILO Convention 169 Article 16(3), indigenous peoples shall have the right to return to lands taken without their consent, and Article 16(4) declares that when this is not possible, indigenous peoples should – if at all feasible - be provided with lands equal in size and quality as a compensation for their loss. Notably, the language in ILO Convention 169 Article 16(4) presents a striking resemblance to the Declaration's Article 28(2). But it appears, however, that ILO Convention 169 Articles 16(3)-(4) are limited to applying only to a situation when indigenous peoples have been forcefully removed from their traditional territories pursuant to Article 16(2), as an exception to the general prohibition of forceful reallocation put forward in Article 16(1). In other words, the right to restitution enshrined in Article 16(4) kicks in, it appears, only to regulate a situation when lands that an indigenous people continuously occupy have been taken subsequent to a ratification of the Convention, and in accordance with the provisions of ILO Convention 169 (Articles 16(1)-(2)). Thus understood, the provision lacks retrospective effect.
- 19 For a further elaboration on the legal status of the Declaration, and the rights contained therein, see above n 10, 127-128.
- 20 See African [Banjul] Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force Oct. 21, 1986, Article 21 (2).
- 21 See Human Rights Committee "Concluding Observations of the Human Rights Committee: Guatemala" UN Doc CCPR/CO/72/GTM (27 August 2001) para. 29.
- 22 International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, entered into force 4 January 1969.
- 23 See the Committee on the Elimination of Racial Discrimination "General Recommendation XXIII (51) concerning Indigenous Peoples" UN Doc CERD/C/51/Misc.13/Rev.4 (18 August, 1997), para 5.

# INDIGENOUS PEOPLES IN ASIA: RIGHTS AND DEVELOPMENT CHALLENGES

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Chandra K Roy\*

## Introduction

The adoption of the UN Declaration on the Rights of Indigenous Peoples (the Declaration) on 13 September 2007 by a majority of member states of the UN General Assembly serves as a reminder of the historic injustices suffered by indigenous peoples around the world.<sup>1</sup> It heralds a new beginning – one that is premised on the recognition of the rights of indigenous peoples, and the need for a more equitable and just global society where respect and tolerance for differences is the norm, not the exception.

Asia has been described as a region of relatively new states populated by old peoples. This has deeper resonance when you consider that nearly two-thirds of the world's 300-370 million indigenous peoples live in Asia.<sup>2</sup> Indigenous peoples are also the stewards of the world's rich bio-cultural diversity, with over 5,000 different groups speaking 4,000 different languages spread across more than 70 countries on six continents.<sup>3</sup> Ironically, despite this rich cultural diversity, indigenous peoples are among the most vulnerable and impoverished groups, constituting approximately 5% of the total world population yet 15% of the world's poor.<sup>4</sup> They face severe problems in access to health, education and other basic services and often live in fragile eco-systems that are threatened by increasing commercialization and over-exploitation.

This is also the situation for indigenous peoples in Asia. Different terms are often used to identify them, including "indigenous peoples", "ethnic minorities", "tribes", "tribal groups", "indigenous communities", "hill tribes", *Adivasis*, *Jana-jatis*, Scheduled Tribes etc. Some of these terms are used in a derogatory manner, including describing indigenous peoples as "backward" and "primitive", indi-

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cating that the last vestiges of colonial legacies remain. No one category can fully capture the full diversity of these peoples, and the UN has refrained from a definitional classification, preferring to use the criteria of historical continuity, ancestral territories, positions of non-dominance, priority in time and determination to maintain their distinct ethnic identity as elements in identifying these peoples. Self-identification as indigenous is a fundamental criterion and this is the practice also followed by the UN system, including UN Development Programme (UNDP).<sup>5</sup> The Declaration itself was adopted without defining indigenous peoples and Article 33 reiterates that it is the right of indigenous peoples to decide their own identities. UNDP follows this practice and uses the term “indigenous peoples” to be more responsive to demands from indigenous peoples themselves as this is their preferred term to describe themselves.

Increasingly, the term indigenous peoples is gaining popularity as the most appropriate generic term to describe indigenous groups, including among policy makers, academics, development workers and civil society. This shift in perception has come about as a result of the indigenous movement and growing solidarity and awareness among indigenous peoples themselves that this is how they wish to be identified, as it most fully captures the socio-economic, cultural and political dimensions of their history and existence.

Challenges remain in ensuring indigenous peoples around the world, and in Asia, are recognized and included as full partners in national development policies and outcomes with the right to define their own parameters and priorities for development, according to their needs and realities. Indigenous peoples are dynamic, thus responses and interventions must respond to the present situation, and not further entrench historic injustices and discrimination. As stated in the preamble to the Declaration:

*Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs*

(Preamble, para 10)

## **UN Development Policy Framework**

The Declaration was adopted after more than 20 years of intense – and often acrimonious – discussion involving a diverse range of players, from powerful governments to community-based organizations. It covers a range of critical issues, including the right to self-determination, land and resource rights, political participation, economic empowerment, and provides a framework to address these in a comprehensive manner. The leitmotif of the Declaration is a reiteration of the

recognition of the identity and rights of indigenous peoples. As clarified in Article 43, the Declaration establishes **minimum standards** for the survival, dignity and well-being of the indigenous peoples of the world. It is a reinforcement of rights already recognized in international law.

In 2001, building on its experience of working with indigenous peoples around the world, and realizing the need for specific guidelines to ensure it was addressing the development needs of the most vulnerable and marginalized, as required by its mandate, the UNDP adopted the Policy of Engagement with Indigenous Peoples. This Policy is the result of a series of consultations with representatives of indigenous peoples' organizations worldwide, UN agencies, as well as UNDP staff, and benefits from evaluations and lessons learned from UNDP's bilateral and multilateral activities. The aim of the Policy is to provide UNDP with a framework to guide its work in building sustainable partnerships with indigenous peoples. The policy is premised on findings that projects and programmes based on a development strategy formulated by indigenous peoples and responsive to their traditions, customs and values have a higher success rate. Following up on this, UNDP initiatives involving indigenous peoples have focused on building regional, national and local networks for exchange of experiences and information, awareness-raising and advocacy on critical issues affecting indigenous peoples, policy dialogue and support for innovative projects.

The Declaration provides UNDP with an additional pillar on which to base its support for indigenous peoples. As the UN's lead agency for development, Article 23 of the Declaration is of special importance for UNDP:

*Article 23*

*Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.*

As part of the UN system, with the distinction of having adopted a comprehensive policy on indigenous peoples, the UNDP is significantly influenced by Articles 41 and 42 of the Declaration:

*Article 41:*

*The organs and specialized agencies of the United Nations system and other inter-governmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.*

*Article 42:*

*The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.*

Thus the UN system, including its different bodies and agencies, is responsible for implementing the Declaration through financial and technical support, at all levels, including at the country level where the outcomes and realities are the most critical. The Declaration provides UNDP with an added impetus to continue its support and involvement with indigenous peoples. This is strengthened by guidelines adopted by the UN Development Group in February 2008 outlining modalities for inclusion of indigenous peoples into the work of the UN country teams. The purpose of the Guidelines is to assist the UN system to mainstream and integrate indigenous peoples' issues in processes for operational activities and programmes at the country level:

*The aim is to ensure the programmatic interventions of United Nations Country Teams (UNCTs) recognize the specificity of indigenous peoples' situations and cultures in implementing the rights-based approach to programming taking into consideration the special needs of indigenous women, children and youth. In particular, the proposals of indigenous communities to integrate their social, political, cultural and economic rights and their aspirations into future development strategies must be considered so that that the challenges they are facing are fully addressed, respect for their rights and cultures is ensured, and their survival and well-being is protected. In this context, participation of indigenous peoples, including indigenous women, must be an over-arching principle. It is expected that UNCTs will rise to the challenge of integrating and being open and respectful to these world views and understandings of wellbeing, including the significance of the natural world and the need to be in harmony with it.<sup>6</sup>*

The Guidelines are an important advocacy tool for bringing indigenous peoples' issues into the work of the UN system at the country level.

## **The Asian experience**

The situation of indigenous peoples in Asia varies from country to country. Yet, whichever country they may live in, indigenous peoples are among the most marginalized and disadvantaged of any population group, with high incidences of poverty, malnutrition, illiteracy and infant and maternal mortality, and low levels of education, employment and general well-being. Studies conducted by

the World Bank and Asian Development Bank confirm that indigenous areas often coincide with poverty maps. This is also the case in those countries that are described as “middle income countries” such as Malaysia, as well as developing countries, for example, Bangladesh, India and Indonesia.

In response to the specific situation of indigenous peoples in Asia, UNDP initiated a new programme, the Regional Initiative on Indigenous Peoples’ Rights and Development (UNDP-RIPP), in September 2004. The Programme aims to provide a regional forum for dialogue and cooperation on indigenous peoples’ issues in Asia, and is a direct response to demands from indigenous peoples for a UNDP programme that is specific to their needs and rights. UNDP-RIPP was designed in a participatory manner with the involvement of indigenous peoples, including during the process of evaluation of previous projects, lessons learned, formulation and design.

Established at the regional level, the UNDP-RIPP provides an opportunity to raise issues that are sensitive at the country level, to draw out the best/good practices from country experiences for dissemination and replication, and help to identify emerging trends in the region. UNDP-RIPP also has the comparative advantage of being in a position to facilitate and foster a neutral platform for governments and indigenous peoples to directly discuss and agree frameworks and actions for cooperation. Since its establishment, UNDP-RIPP has gained distinction as a unique programme within the UN system, and the Programme of Action of the 2<sup>nd</sup> International Decade of the World’s Indigenous Peoples (2005-2014) has recommended its replication in other regions.<sup>7</sup> The UNDP-RIPP is part of UNDP’s regional cooperation for Asia and the Pacific for 2008-2011 and seeks to address indigenous issues at the regional level to ensure better integration in national development processes and outcomes.

A major factor in the success of the UNDP-RIPP has been the inclusion and involvement of indigenous peoples in carrying out the Programme, on the steering committee, as thematic experts and in implementing activities, as has the participation of the governments in the countries concerned. The involvement and engagement of the relevant country offices in ensuring activities are conducted in an effective manner through national counterparts has also been critical. Another key element has been the institutional support of UNDP in engaging on indigenous issues to address the pressing challenge of more inclusive and equitable globalization that allows vulnerable people to participate as full partners in the global economy. In this context, the achievement of the Millennium Development Goals and the Millennium Declaration has helped place a renewed focus on indigenous peoples in the international development debate.<sup>8</sup>

Using UNDP-RIPP as a case study, the following are some examples to illustrate the practical application of the Declaration in Asia.



## Human rights and development

The justifications for human development and human rights are compatible and congruous yet they are sufficiently different in design and strategy to fruitfully supplement each other.<sup>9</sup> The Universal Declaration of Human Rights recognizes human rights as the foundation of freedom, justice and peace.<sup>10</sup> This is strengthened by the adoption in 1993 of the Vienna Declaration and Programme of Action stating that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.<sup>11</sup> The UN Programme for Reform, launched in 1997, calls on the UN system to mainstream human rights into its various activities and programmes. Based on this, and in an effort to streamline its activities and approaches, the UN adopted a common understanding of a Human Rights Based Approach to Development Cooperation (HRBA to Development),<sup>12</sup> founded on the following core principles:

1. All programmes of development cooperation, policies and technical assistance should further the realization of human rights as laid down in the Universal Declaration of Human Rights and other international human rights instruments.
2. Human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights and other international human rights instruments guide all development cooperation and programming in all sectors and in all phases of the programming process.
3. Development cooperation contributes to the development of the capacities of “duty-bearers” to meet their obligations and of “rights-holders” to claim their rights.

A human rights-based approach is a conceptual framework for human development that is normatively based on international human rights standards and operationally directed at promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.<sup>13</sup> It is both a policy and a programming tool based on the following key principles:

- P – Participation
- A – Accountability
- N – Non-discrimination and attention to vulnerable groups
- E – Empowerment and
- L – Linkage to Human Rights standards

In response to the development challenges facing indigenous peoples in Asia-Pacific, and the need to link human rights and development as this has significant consequences for indigenous peoples, UNDP-RIPP has initiated a project on the Human Rights-Based Approach to Development (HRBA) and Indigenous Peoples. The aim is to build greater awareness of the principles of the HRBA and its value as an advocacy and implementation tool to strengthen indigenous peoples' rights and development.

Training has been conducted in Asia – in Nepal and in the Philippines – so that indigenous representatives can gain a better perspective on rights and development. The Declaration provides the overarching framework for a more comprehensive and detailed understanding of the modalities, implications and impact of the application of the HRBA to Development from the indigenous peoples' perspective. The aim is to enable indigenous peoples to actively promote their rights and advocate for culturally appropriate development that is in accordance with their needs and priorities. This will be expanded and developed further to ensure that the capacity of both indigenous peoples to demand their rights and governments to be able to respond to such demands is further strengthened. A toolkit for the training courses and other capacity development activities is part of this initiative.

A complementary activity has been that of assessing the impact of the development policies and programmes on indigenous peoples. Conceptualized during a planning workshop in October 2005, in close partnership with the Asian Development Bank (the ADB) and indigenous peoples' organisations, a series of analytical studies to identify the gaps and opportunities of the major financial institutions were completed in 2006: *Engaging in Dialogue: The Human Rights Based Approach to Development and Indigenous Peoples*. This was followed by a series of analytical studies on existing projects funded partly or fully by the ADB. The case studies, carried out in five countries, Bangladesh, India, Indonesia, Nepal and the Philippines, review the use and enforcement of the ADB's safeguard policies, and establish recommendations for further action and follow-up. The studies informed an ADB safeguard review process, with consultations undertaken in November 2007, and are a part of UNDP-RIPP's ongoing cooperation with the ADB.

## **Inclusive governance**

As mentioned above, in Asia, the recognition of indigenous peoples ranges from defining them as minorities and backward to the adoption of a specific law on indigenous peoples: The Philippines Indigenous Peoples' Rights Act of 1997. As described by the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people:

*Indigenous issues are increasingly the object of specific attention by several Asian States in key areas such as land rights, cultural protection, autonomy and self-government and development policies, thus signalling an important change of mentality regarding the recognition of cultural difference and its human rights implications. However, there is still an important implementation gap with regard to existing constitutional and legal provisions, and much remains to be done in order to mainstream indigenous rights in policies and the institutional machinery at the national level.<sup>14</sup>*

Laws and policies recognizing indigenous governance systems are generally absent in Asia with some exceptions, for example, the Indigenous Peoples' Rights Act as mentioned above, and Indonesian forestry laws. This has to be seen in relation to the implementation of obligations under international human rights instruments. For many indigenous peoples, there are few opportunities for genuine partnerships with states as, in many cases, states are not always accountable to them and/or indigenous peoples lack adequate political weight and representation to influence policy outcomes. Indigenous peoples' participation in civil society is further overlooked because of their marginalization, their cultural and linguistic diversity and the reluctance of some states to acknowledge the ethnic diversity of their national population, or that indigenous groups exist within their borders and territories.<sup>15</sup>

UNDP's efforts are aimed at bringing indigenous peoples into governance processes so that the voices of the marginalized can also be taken into account. This is consistent with the Declaration: to facilitate participation of indigenous peoples in decision-making processes (Article 18), as well as consultation and free, prior and informed consent (Article 19). Indonesia provides a concrete example, where the UNDP carried out an analytical review of the laws and policies impacting on indigenous peoples to identify future law and policy options. This was done in close cooperation with the government ministries, the National Commission on Human Rights and Aliansi Masyarakat Adat Nusantara (AMAN), the Indigenous Peoples' Alliance of the Archipelago, with UNDP support. This was the first time that these three institutions had worked together, and there are ongoing efforts to ensure greater linkages and cooperation in relation to law and policy development.

In Cambodia, the government has been engaged in a process of developing a framework for its work with highland peoples/indigenous peoples. UNDP helped provide the space and the opportunity for indigenous peoples to be involved in the policy formulation process to ensure that the policy, when adopted, was responsive to their needs and aspirations. This was done by disseminating the draft policy to indigenous peoples, facilitating interpretation into local languages and providing support for consultations and round tables with relevant ministries and indigenous peoples. The policy is currently under consideration,

and is in the final stages of adoption. This work was carried out in close cooperation with the International Labour Organisation and the Office of the UN High Commissioner for Human Rights and local organizations.

Law and policy remains an urgent issue and further work in this field will be undertaken in the region.

## **Juridical pluralism**

The issue of access to justice and the interface between formal and customary law is critical to good governance and poverty reduction. This is also recognized in the UN Declaration when it calls for due recognition of indigenous peoples' laws, traditions, customs and land tenure systems (Article 27), the right to promote, develop and maintain institutional structures and juridical systems or customs (Article 34) and the right to access justice and dispute resolution, giving due recognition to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights (Article 40).

Analytical case studies, providing data on juridical pluralism and the extent to which indigenous peoples' laws, traditions and customs are taken into account in national laws and judicial processes, provide an example of the application of the Declaration rights in development. Legal analyses and assessments conducted in Bangladesh, Cambodia, India, the Philippines and Thailand formed part of a regional series entitled *Inclusive Governance for Disadvantaged Groups*, including indigenous peoples.<sup>16</sup> The analyses focused on identifying the gaps and challenges that exist in the region with reference to the recognition and inclusion of indigenous peoples' customary law and practices within the rubric of access to justice. The reports were carried out by experts and practitioners with theoretical and practical experience on the issue, with a view to identifying solutions, ways forward and drawing out the regional dimensions of the issue. They were conducted in a participatory and empowering manner, highlighting the root causes of the legal marginalization of indigenous peoples, and involving discussions, interviews and consultations with indigenous communities in the selected countries. Land has emerged as the central issue. The studies emphasize the need for greater recognition of customary rights and juridical pluralism as an effective means of providing equitable and easy access to justice for marginalized groups, and provide important input and guidance to UNDP programming at the country and regional level.

## **Indigenous women<sup>17</sup>**

Indigenous women are often described as the custodians of tradition and culture. They bear the prime responsibility of ensuring the cultures and traditions of their

peoples are passed on to future generations, and are the most noticeable expressions of their peoples' distinct culture. Yet, as in any society, indigenous women too share the same burden of institutionalized gender bias as their non-indigenous sisters, yet they often have a heavier load. Indigenous women are the most vulnerable of indigenous peoples, and face double discrimination - on the basis of their gender and their ethnicity. In some parts of the world there is a triple burden to bear as indigenous women are also poor.<sup>18</sup>

*Indigenous women do not see themselves as victims. Faced with discrimination and prejudice, indigenous women have been forced to develop skills and strategies for survival – for themselves, their peoples and their cultures. They have learnt to survive oppression and marginalization, discrimination and violence, without losing the wisdom and patience to build on and to share these experiences. Yet often their contribution to the struggle of indigenous peoples is not recognized or acknowledged.<sup>19</sup>*

This is often from both outside and inside the community.

In cooperation with the Asia Indigenous Peoples Pact Foundation (AIPP) and local partners, UNDP-RIPP is conducting training for Indigenous Women on Decision Making (IWDM).<sup>20</sup> The main emphasis of the IWDM training is to address the power dynamics that characterize the daily lives and relationships of indigenous women in their communities. Given the generally low status occupied by women in general and indigenous women in particular, training to enable indigenous women to be better informed of their rights strengthens their capacity to demand and enjoy those rights. This is also an excellent building block towards empowerment and capacity development.

The main activities under the IWDM initiative include the training of trainers, community-based training and the development of a manual which is shaped and adapted to the training. The training of trainers provided indigenous women with knowledge about national and international laws relevant to their lives and also served as a venue for participants to share experiences and concerns with each other. For example, participants expressed anxiety about the impact of development on indigenous women and also noted that building capacity and confidence hinges on access to information. Within this environment, women were able to effectively network with one another and build relationships to support each other in decision-making. The training courses have been held in Bangladesh, Malaysia, Nepal, India and Indonesia. The IWDM Project Completion Report notes,

*It is a rare experience for women to be given a space to gather and identify issues relevant to their own decision-making. Moreover, discussing resolution to such issues is much more important as it provides space to facilitate actual decision-making. In general, providing such moments empowers women, as well as men, to*

*look deeper into the changing social and cultural relations as indigenous societies develop in the context of a broader sphere. This process allows co-accountability of both women and men in decision-making while considering transformation of structures within the dynamics of an advancing society.*<sup>21</sup>

It is expected that the group of indigenous women who have been trained to carry out the training will be able to contribute to and support their work of their sisters in their communities and in other countries in the region. Building on the knowledge and experience gained, work in this area will continue with expansion into other critical areas such as violence and conflict prevention, identified by the participants as an area deserving greater focus and support. The IWDM initiative has been identified as a “best practice” by the UN Inter-Agency Task Force on Indigenous Women, and is included in a compilation launched during the sixth session of the UN Permanent Forum on 24 May 2007.

## **Land, resources and territories**

Two centuries ago indigenous people lived in most of the earth’s ecosystems. Today, they “have the legal right to use only around 6% of the planet’s land and, in many cases, their rights are partial or qualified.”<sup>22</sup> Land and land rights are some of the most important issues for indigenous peoples. This is recognized in the Declaration, which includes references to lands, territories and resources in a number of articles, including Articles 25-30 and 32. Of these, Articles 25 and 26 are central, highlighting the spiritual relationship that indigenous peoples have with their lands, and reiterating their right to the lands, territories and resources they have traditionally owned, occupied or otherwise used or acquired. This includes the right to own, use, develop and control their traditional lands, territories and resources. The Declaration imposes an obligation on states to give legal recognition and protection to these rights, with due respect to the customs, traditions and land tenure systems of the peoples concerned (Article 26(2)).

For indigenous peoples, land is not only a means of production and survival but is central to how they define their identity. In many instances, indigenous peoples and their natural habitats are inextricably linked. For example, the Maa-sai herding grounds in Kenya/Tanzania, the Inuit with their kayaks in Greenland, the Maya in the Andean mountain range, the Ifugao in the multi-tiered rice terraces of the Cordilleras (Philippines), the Saami with their reindeer in the Arctic reaches of northern Norway (also Sweden, Finland and Russia) and Jumma farmers in the jhum (swidden fields) of the Chittagong Hill Tracts, Bangladesh. Indigenous lands have long been threatened by colonialism, settlement, encroachment and exploitation, however, and land dispossession continues to this day:

*For far too long, indigenous peoples' lands have been taken away, their cultures denigrated or directly attacked, their languages and customs suppressed, their wisdom and traditional knowledge overlooked or exploited, and their sustainable ways of developing natural resources dismissed. Some have even faced the threat of extinction.<sup>23</sup>*

Control, management and access to land and resources are critical concerns shared by indigenous peoples throughout Asia and around the world. Through local, regional and national consultations, UNDP-RIPP and its partners are evaluating the relationship between government policies and indigenous peoples' practices on land, territories and resources. Consultations with indigenous peoples and with local and national governments reveal common themes or points of potential conflict and possible cooperation. These include the following:

- the importance of local governance systems in mitigating conflict;
- the presence and effectiveness of indigenous peoples' support structures for land and natural resources; and
- the need for coordination and cooperation on indigenous rights and resource management between different government agencies, and with indigenous peoples.

Needs assessments, conducted by UNDP-RIPP from 2005-2006, document the fact that access to land and natural resources remains a primary concern amongst indigenous peoples. Analysis of current indigenous practices and government policies on land, natural resource management and biodiversity conservation identifies ways to mitigate conflict amongst the actors and stakeholders involved. Findings from Bangladesh, Cambodia, Malaysia and Thailand highlight the key areas requiring assistance in strategy formulation for future work in the region, with a regional synthesis report drawing out the main challenges and opportunities. Community consultations and focus-group discussions provided the practical dimensions of how indigenous peoples have continued to manage and adapt their natural resource strategies.

UNDP work in relation to indigenous peoples' land rights is part of the implementation strategy to follow up on Article 32 of the Declaration, which states that indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources. UNDP analytical reports informed a regional dialogue on natural resource management held in November 2007 with participants from 13 countries in Asia, including: government representatives; indigenous leaders, elders and youth; researchers and community workers; and UNDP country offices. The objective was to share information on challenges and opportunities implicit in lands, natural resource management and cultural sustainability. The negative and positive in-



fluences on the lives and resources of indigenous peoples wrought through development, globalization and environmental degradation were assessed with a view to identifying good/best practices and deciding what could be done on a regional level to address these challenges in an indigenous-sensitive manner. The dialogue was held in Chiang Mai, Thailand, in close partnership with the Asia Indigenous Peoples' Pact, the International Alliance for Indigenous and Tribal Peoples of the Tropical Forests, the Inter-Mountain Peoples' Association for Education and Culture in Thailand and the International Work Group for Indigenous Affairs (IWGIA), with support from the Christensen Fund. It provided the space and opportunity to highlight policies and practices of indigenous sustainable development, and victories and challenges faced by indigenous community-led action in protecting and promoting their cultural diversity. Participants agreed and adopted a Regional Action Plan for further work in this area, and are currently engaged in networking and partnering on different initiatives.

### **Community dialogues on climate change**

An interlinked multi-dimensional strategy on land and natural resources includes an ongoing series of community dialogues focusing on fragile eco-systems. Indigenous peoples are adept at adaptation, and in responding to new challenges while retaining their specific culture and identity. This is the key to their continuing existence. Indigenous peoples have much to share with the world at large on how they have managed to survive through the centuries, facing diverse threats to their natural habitats. Many of the indigenous areas are home to most of the world's bio-diversity. This is recognized in Article 31 of the Declaration, which specifically mentions indigenous traditional knowledge systems and their knowledge of the properties of flora and fauna.

The contribution and success stories from the Asia region in adapting and enriching bio-cultural diversity effectively demonstrates the linkages between different peoples, places, cultures and ecology that share a common focus in surviving today's world of increasing erosion. Increased efforts to link vertically with ongoing global and national sustainable development efforts, and horizontally between a broad array of stakeholders and partners, are essential. Neutral spaces for cross-sectoral dialogue are critical for achieving multi-stakeholder partnerships, of particular importance in ensuring that indigenous peoples have clear, leading voices in the path of their own development and the use and conservation of their lands and resources.

UNDP-RIPP, with support from the Christensen Fund, is engaged in a process of bringing different stakeholders together, including government and indigenous peoples, to discuss collaborative strategies aimed at bringing about improved policies and practices of natural resource management and cultural pres-

ervation through the lens of bio-culturalism. The aim is to enable local stewards from areas with well-known biological and cultural diversity to exchange stories and ideas with policy makers and members of the local civil society organizations on how the challenges of climate change and unprecedented bio-cultural erosion are to be met. The selected areas are: Chittagong Hill Tracts, Bangladesh; Ifugao, the Philippines; North Lombok, Indonesia; Northeast India; and Sabah, Malaysia.

The community dialogues provide an opportunity for communities to discuss the ongoing phenomenon of climate change and how it is affecting them. Some illustrations:

- The community dialogue in Indonesia drew out the issue of unpredictable seasonal patterns that have caused serious damage to agriculture and livelihoods through severe flooding in the wet season and water shortages during the dry months. The extreme fluctuations in climate, most marked since 1999, have impacted negatively on human development, and contributed to higher levels of poverty amongst indigenous communities.
- In the Chittagong Hill Tracts, the community dialogue focused on the traditional system of jhum cultivation, and how it is being affected, not only in terms of intensity and crop diversity but also in terms of fallow management. A majority of the indigenous peoples in the Chittagong Hill Tracts depend upon jhum for rice production and for meeting their subsistence needs. For them, jhum is more than a farming method, it is a source of knowledge and means to protect culture and identity. They have many practices, taboos, beliefs and folklores passed down from generation to generation through oral traditions. However, this knowledge is little inventoried and documented. By drawing on indigenous knowledge and technologies, they maintain biodiversity in the CHT region. It is important that this continues and is supported.
- In Sabah, Malaysia the indigenous system of Tagal is used to conserve and manage fish resources. A prohibition or curse is used in an innovative manner to determine how and when the resources will be used by the community. This system has been so successful that the government is currently replicating it in other areas.
- Ifugao in the northern Philippines is home to the famous rice terraces that are on UNESCO's World Heritage List. However, consistent deterioration also caused them to be listed on the World Heritage List in Danger in 2001. A major threat to the rice terraces is the invasion of giant worms. The community dialogues helped different indigenous communities share tech-

niques and strategies to combat these pests. The traditional methods, with innovations, used in some areas have been successful and these innovations are currently being shared with other areas.

The community dialogues are continuing, complemented by demonstration projects that are being implemented by indigenous peoples' organisations in Asia, linking land and resources with sustainable livelihoods that strengthen indigenous culture.

## Conclusion

The Declaration provides us with a tremendous source of inspiration and of substance. It articulates indigenous peoples' aspirations in a comprehensive manner, and touches on the core elements of indigenous culture and identity. The adoption of the Declaration is a step towards the realization of a just and equitable world, one that is founded on principles of equality and justice. The importance of the Declaration was unambiguously articulated by UNDP Administrator Kemal Dervish, in his message to commemorate Indigenous Peoples' Day on 9 August 2008:

*Last year the UN General Assembly adopted a historic Declaration on the Rights of Indigenous Peoples. UNDP is working with national governments, the UN System and all other development partners to make this Declaration a living reality. For instance, across Asia, UNDP is helping to bolster the capacity of government officials and representatives of indigenous peoples' organizations to integrate these rights into national policy...*

*UNDP will continue to support efforts to ensure that indigenous voices are heard loudly and clearly and that they contribute to local, national and global development processes. We can all benefit from their knowledge on a wide range of issues, from the promotion of human development to climate change and environmental sustainability.*

*Working together let us move ahead in achieving sustainable human development for all.* ○

## Notes

- 1 General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).

- 2 See, for example, UN Habitat *Secure Land Rights for All* (2008).
- 3 **UNESCO. May 2006.** *UNESCO and Indigenous Peoples: Partnership to Promote Cultural Diversity*; **IFAD.** *Statistics and key facts about indigenous peoples* (Internet edition) <http://www.ifad.org/english/indigenous/index.htm>.
- 4 IFAD, *ibid.*
- 5 For more information, see **Martinez Cobo. 1981-1983.** “Study of the Problem of Discrimination Against Indigenous Peoples” UN Docs E/CN.4/Sub.2/476; E/CN.4/Sub.2/1982/2; E/CN.4/Sub.2/1983/21; and **Erica-Irene A Daes. 1996.** Working Paper of the UN Working Group on Indigenous Populations by the Chairperson-Rapporteur, *On the concept of “indigenous people”* UN Doc /CN.4/Sub.2/AC.4/1996/2.
- 6 **UNDP. 2008.** *UN Development Group Guidelines on Indigenous Peoples’ Issues*, available at <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf>.
- 7 UNDP is currently initiating a similar programme in Latin America.
- 8 **UNDP. 2001.** *UNDP and Indigenous Peoples: A Policy of Engagement*, 1.
- 9 **UNDP. 2000.** *Human Development Report 2000: Human rights and human development*. New York, p. 19, available at <http://hdr.undp.org/reports>.
- 10 UNGA “Resolution 217 (III): Universal Declaration of Human Rights” UN Doc A/810 (1948), 71.
- 11 UNGA World Conference on Human Rights “Vienna Declaration and Programme of Action” UN Doc A/CONF.157/22 (25 June 1993).
- 12 *Towards a Common Understanding among the United Nations Agencies* (Second Inter-Agency Workshop, Stamford, United States Of America, May 2003) and available at [http://www.unescobkk.org/fileadmin/template2/appeal/human\\_rights/UN\\_Common\\_understanding\\_RBA.pdf](http://www.unescobkk.org/fileadmin/template2/appeal/human_rights/UN_Common_understanding_RBA.pdf).
- 13 **UN Office of the High Commissioner for Human Rights. 2006.** *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (New York and Geneva), 16
- 14 UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people “Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the Situation of Human Rights And Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen - Addendum: General Considerations on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples in Asia” UN Doc A/HRC/6/15/Add.3 (November 2007), 16.
- 15 **DESA, Division for Social Policy and Development, Secretariat of the Permanent Forum on Indigenous Issues.** “Background Paper for International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance” New York (11-13 January 2006).
- 16 For more information, consult <http://regionalcentrebangkok.undp.or.th/practices/governance/ripp> to download the studies.
- 17 The Declaration refers to indigenous women in Articles 18 & 22.
- 18 **Chandra K Roy 2004.** *Indigenous Women: A Gender Perspective* (Guovdageaidnu: Resource Centre for the Rights of Indigenous Peoples).
- 19 *Ibid.*
- 20 This is also in close cooperation with UNDP’s Asia Pacific Gender Mainstreaming Programme and relevant country offices in Asia.
- 21 **UNDP. 2006.** “Indigenous Women and the UN Development Program” (February 2006), available at <http://www.un.org/esa/socdev/publications/Indigenous/Chapter%207.pdf>
- 22 *IFAD Rural Poverty Portal* available at <http://www.ruralpovertyportal.org/web/guest/topic/statistics/tags/indigenous%20peoples>.
- 23 UN Secretary General Kofi Annan on Indigenous Peoples Day, 9 August 2004.

# CULTURAL RIGHTS IN GREENLAND

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Henriette Rasmussen\*

## Introduction

It was emotional to watch the film about the adoption of the Declaration on the Rights of Indigenous Peoples (the Declaration).<sup>1</sup> It was indeed a breeze of history: illustrating how much we could achieve and how we could make the UN listen to our aspirations, our situation and convince them of what we want and need to say about our future. In Greenland, too, many people were happy to learn that the Declaration had been adopted by the UN in New York. In this article, I describe examples of how the Declaration's Articles 12 to 17, on culture and education, are practised by the Inuit in Greenland Home Rule.

Meeting other indigenous peoples was a highly inspiring experience for us Inuit in the 1970s. It happened at a time when we ourselves had just formed the Inuit Circumpolar Conference in June 1977 with the purpose of manifesting our common culture and furthering our rights.

The meeting with other Inuit from Canada and Alaska was highly inspiring. We were making history. We decided to meet, from then on, every four years in one of our four countries. The next meeting took place in Greenland in 1980, the next in Canada in 1983, the next again in Alaska but, thus far, we had only dreamed about one in Russia.

It was in one of these meetings that a young activist, later trained in law, Ms Dalee Sambo Dorough, convinced us that something serious was going on in the UN, something that demanded our attention and active participation. She became one of the people instrumental in the adoption of the Declaration.

Much later, when I was working at the International Labour Organisation (the ILO) in Geneva from 1996 until 2000, we established many interesting relations with indigenous peoples from all over the world. The ILO attended and arranged meetings and discussions, travelling to their local communities, meeting with

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their local authorities and governments to inform them about their rights and learn about their situations. We acquired different materials from Central and South America, South East Asia and Africa. We published reports on the topic of cultural rights and indigenous education.

One report of particular note was that produced by Dr Nigel Crawhall on the situation of the San people in Southern Africa (the Crawhall Report);<sup>2</sup> it examined economic development and cultural survival and offered important perspectives on cultural questions. The Report discussed the impact that economic demands and development have on culture and heritage and the importance of the distinction between arts and crafts. The San people had achieved some land rights but, like other indigenous peoples, they were poor and needed economic development. The research revealed that most of the local Naamas (indigenous peoples inhabiting Northern Cape Province of South Africa) wanted to see economic development and cultural survival. However, some of the solutions to poverty that were being considered or implemented by indigenous peoples could, in fact, weaken indigenous cultures. While acknowledging this risk, it is necessary to recognize that all cultures are dynamic and that changes in culture can be a sign of vitality. *Cultural survival* should not mean stopping history, where cultural content is measured against an idealized lifestyle of a previous era.

The first part of Crawhall's Report discusses whether certain economic strategies marginalize or enhance cultural systems. The second part looks at the exploitation of culture and whether this enhances cultural institutions, so that they remain dynamic, or whether it reduces them to a commodity without social meaning. I think this is an important discussion for indigenous peoples to have because, as guardians of our old cultures, we are the ones who need to be aware of these rights. In other words, once our rights as indigenous peoples have been recognised, we have a new responsibility not to exploit our cultures but to guard them and develop them in a culturally appropriate and acceptable manner.

The same is true of the use of arts and crafts for economic development. It is possible to argue that, where there is greater use of crafts for income generation, poverty alleviation will follow. It may, however, cause the creativity and authenticity of the work to decline. This over-exploitation of culture can lead to a decline in respect for, and the value of, traditional technology. This is evident with the low quality mass production of crafts by dominant cultural groups in various places; too much emphasis on mass production can take out the culture of the products and take away self-respect from the producers. As poverty alleviation is also a serious concern, the challenge will be to market authentic, culturally significant arts and craft to an elite consumer group while choosing other projects for mass production.

I think these points, made in relation to Africa, will be valid for all indigenous peoples when the time comes for us to be able to practice and revitalize our cultural traditions and customs. We indigenous peoples are now responsible for

how we maintain, protect and develop the past, present and future manifestations of our cultures, such as archaeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature. This needs our attention and reflection, along with good decision-making processes.

## **The cultural politics of collective rights**

In a globalized world, even with the insecurity of climate change, I think it is crucial that we stick to our heritage when seeking answers to future challenges. The rich countries are threatened by their consumerism, and resources are limited. Indigenous peoples have lived marginalized in poverty, lacking commodities and social goods that the states in which they live would never deny themselves: education, economic development, freedom of religion, access to health and sufficient food. Indigenous peoples have, in many places, lost their lands and resources, or have been displaced to arid lands or reservations. And yet they have kept their dignity, their pride and their generosity. We have our own languages, histories, oral traditions, philosophies and literature. Now is the time to manifest these for the future. The world must learn from us; they may need our knowledge of sharing, respect for nature, and the care and security of the extended family and collective rights. It is now time for us to put our mark on the history of mankind.

## **Who are the Inuit? What is Greenland Home Rule and greater self-government?**

The Inuit are 60,000 people living on the biggest island on the planet. Greenland, 2.1 million sq. km, situated in the Arctic, remote and isolated, expensive and fascinating, has been our homeland for more than 4,000 years. Historically and geographically, we belong to the North American culture of the Inuit. But we are also very influenced by more than 250 years of penetration, contact and colonization on the part of European countries.

Greenland left behind its "assimilationist" relationship with Denmark in 1979 when the Home Rule Government was introduced, with responsibility for politics and jurisdiction over many areas. Since then, we have had a parliament and a government of our own, with responsibility for all social, cultural, educational, economic, tax and fiscal policies. Only foreign policy, the currency, and the courts remain under Danish jurisdiction. The question of mineral resources (land rights) was resolved during this period by establishing a joint council consisting of members of the Greenlandic and Danish Parliaments. In 2008, a new step towards



more self-government was negotiated and successfully put to referendum that November.

Indigenous Greenlanders have always formed the majority population in Greenland despite a long relationship with Europe and in particular with Denmark. It is the Greenlandic cultural heritage that has been a strong force, in my opinion, that always challenged Denmark. After introduction of the Home Rule, withdrawal from the EU in 1985, the final achievement is the self-government model introduced in 2009.

The political development of the 2008 self-government package began with the establishment of a special committee under the Parliament and Government of the Greenland Home Rule in 1999-2000. A small specialised workforce was established to provide support to the self-government initiative resulting in the publication of a report endorsed by the Greenlandic Home Rule Parliament, also for the establishment of joint self-government commission consisting of Greenlandic and Danish politicians in 2004.

These joined efforts by Denmark and Greenland resulted in the introduction of a new law, No. 473 of June 12, 2009 of the Danish Parliament, the Folketing, *The Act on Greenland Self-Government*. It recognizes the Greenlandic people's right to self-determination under international law, with the Greenlandic language as the official language of the country. It gives Greenland permission to assume tasks that remained under Danish responsibility, including to claim a declaration of independence when a majority of the population in Greenland so desires. Economically, it provides Greenland with an annual subsidy of 3,4 billion DKK (in 2009 price levels), until she can sustain herself from her own sources of income. The new Government, called Naalakkersuisut of Greenland, has expressed the desire to take the responsibility for Greenland's mineral resources and, also, jurisdiction over citizenship and employment of foreigners.<sup>3</sup>

In domestic politics, I have had the privilege and honor of holding ministerial office twice; my last portfolio was as minister responsible for our cultural and educational policies. This article is mainly concerned with the experiences of the Kalaallit/Inuit in Greenland. How do we manifest, practice and develop our cultural heritage? I have included an overview of how we established and now run an acceptable, if not perfect, educational system. We run schools in our own language but have to struggle in other languages when the higher education system requires that subjects be taught in those languages.

The goal and substance of cultural policy is that the population should be aware of its own history, well-informed, living in the present with visions and hopes for the future. We develop our spiritual and mental values and attach great importance to strengthening ourselves spiritually as a nation on its way to greater self-government.

Many indigenous peoples live in extended families and this traditional network is very valuable. We must not lose it. The relationship between the genera-

tions and respect for our elders should be maintained since the older generation can pass on traditional values and norms to the younger generation.

Culture is the way we are together, and we all contribute actively in creating it. Culture is memory and the reminiscences of old and new traditions. Culture is also the memories that our forefathers have left behind of the landscape and which we find in the museums and in our myths and legends. Culture is experiences, ideas, performances and belief. To cherish our culture is the duty of all society.

An important aspect of our culture, and one that gives perspective beyond the boundaries of our country, is the concept of sustainability. If our culture is based on sustainability, this will be a positive signal to the outside world. This new cultural policy must be expressed in terms of a spirit of sustainability and must seek support from the arts and sciences to attain a sustainable future for our society.

The recognition and preservation of indigenous peoples' cultures, traditional knowledge and spiritual wisdom contributes to the protection of the environment and the welfare of mankind. The culture of the hunter, with its rules for the utilization of nature and its resources, must be documented in literature. The culture of the hunter keeps alive good traditions, not least when there is a question over the just distribution of the natural resources.

## Language

Kalaallisut belongs to the Eskimo group of languages and is spoken by approximately 44,000 individuals in Greenland. If we include Greenlanders living in Denmark then there are around 55,000 individuals speaking the Greenlandic Inuit language. The structure of this language group is very different from that of Indo-European languages, including the Nordic languages.

*Oqaasileriffik*, the Language Secretariat under Greenland Home Rule, was founded in 1998 out of a desire to optimize work within the field of language. The Language Secretariat works closely with *Oqaasiliortut*, the Language Advisory Committee, founded in 1982. The Language Secretariat's most essential assignments are to register and document the Greenlandic language.

In July 2000, the Greenland Home Rule Government set up a committee to evaluate the current status, distribution and development of the Greenlandic language. It was also asked to formulate a proposal for a clear and long-term language policy in Greenland. In November 2000, a mid-term report was published. The recommended initiatives requiring funding included vocabulary lists and dictionaries, databases and the collecting of words for linguistic surveys, linguistic guidance and information about Greenlandic. The initiatives not requiring funding included giving priority over a period of time to experimental work in

the Greenlandic language. Our greatest cultural challenge today lies in a domestic future-oriented culture that is in competition with international culture. Priority is given to the culture of children and young people rather than to that of adults. The teaching of Greenlandic as a first language is being modernized and made more result-oriented so that its status amongst pupils is raised. Within the sphere of language technology, attempts have been made to write programs for transliteration between the old and the new orthographic systems. Spellchecks, syntax checks and word divisions have been introduced.

## Cultural institutions

The Greenland National Museum and Archives has a mandate to preserve and pass on Greenland's history and culture and to document Greenland's cultural development from the past to the present. The activity of the museum includes archaeological and ethnographic surveys, collecting contemporary data, research and communication. The Greenland National Museum and Archives carries out archaeological excavations throughout the whole of Greenland and is also the authority that gives permission for such excavations. Furthermore, the Greenland National Museum and Archives carries out reconnaissance in order to locate ancient monuments *in situ*. The Sermermiut area, in Disco Bay West Greenland, was declared a World Cultural Heritage area by UNESCO in 2004.

Literacy came to Greenland in the 19<sup>th</sup> century, thus making it possible to build a system of education based on Kalaallisut. Nonetheless, Danish remained the language of the administration and of most workplaces and, from the 1950s on, school education became more and more influenced by Danish norms and traditions. Danish was pushed forward as the language of instruction in primary school, the assumption being that educational achievements would be reached more quickly, especially during the development boom years of 1960-80. Kalaallisut was even seen by some as redundant.

The first newspaper in Greenlandic, *Atuagagdliutit*, was published in 1861. It still exists, but now as a weekly bi-lingual newspaper. Publishing different translations and articles written by Greenlanders, it soon became very popular throughout the country. In 1893, a translation of the Bible, as well as of some Greenlandic teaching books, was published and, at the beginning of the 1900s, poetry and fiction books as well as new local newspapers followed suit. Greenlandic had become a literary language.

Greenland has a unique oral heritage in the form of myths, legends and drum songs. Fortunately, many of these rich cultural expressions were collected and written down in the 1850s, thanks to the efforts of the Danish Royal Inspector for Greenland, H.J. Rink. Rink encouraged hunters, catechists and trade posts to submit their stories. Many responded to his call and the material they sent him was

later compiled and published in Nuuk in four books, with old legends, between 1859 to 1863.

Dictionaries of the Greenlandic language have been published since the mid 19<sup>th</sup> century, and the latest dates from 2003.

In the early 20<sup>th</sup> century, the famous polar explorer Knud Rasmussen, whose mother tongue was Kalaallisut, collected stories and poetry that were later published in two books - *Myths and Legends from Greenland* (1925) and *Songs of the Snow Hut* (1930) - in Danish. From 1921 to 1924, Knud Rasmussen travelled on dog sledges from Greenland to Eastern Siberia, crossing Canada and Alaska. He had Greenlandic hunters with him, and their meetings with other Inuit in Canada, Alaska and Chukotka was later described in a book, this time in Greenlandic too, "*Across Arctic America, Narrative of the 5<sup>th</sup> Thule Expedition*", printed in New York in 1927. It was reprinted by the University of Alaska Press in 1999.

## Developing education

### Traditional and school education

School education was introduced with colonialism. Traditionally, education had taken place within the family. Mothers were probably the most important teacher of all, as she was the one bringing up the new generations within a sustainable hunting society. Fathers taught the boys hunting skills, how to make and use tools for hunting, and other skills such as building shelters, homes and skin boats like the kayak and the umiak. The women elders were the ones who taught the important preparation of many different kinds of skins for clothing, big tents, and selecting and sewing the skins for the boats. Grandmothers would teach their granddaughters about womanhood, menstruation, child rearing and so on. This is how it was in the past and in our parents' generation, but also during my own childhood in the 1950s in north-western Greenland.

One of the purposes of the Danish colonization was to Christianize the Inuit. First the Lutheran Protestant, and later the Moravian, missionaries were concerned that the population should be able to read the Bible and other religious works, so schools were established. The Danish missionaries and catechists, who as a rule lacked both training and language skills, usually did the teaching. To remedy the situation, a catechists' college - *Ilinniarfissuaq*, i.e., the "big place for learning" - for Greenlanders was established in 1840.

Public schools were introduced in Greenland in 1905 and the Church and School Act became the framework by which the whole Greenlandic population, including the remote villages, was to be given a basic education. The curricula included religion, Greenlandic and mathematics, and trained catechists did the teaching. These catechists also had Church duties to perform.

In 1925, the Act on Administration introduced compulsory education for children aged 7 to 14 and taught the Danish language, culture and history. At the time, the young generation of educators and writers welcomed this development as an eye opener and way of accessing the outside world. This Act led to innovative trends in Greenlandic literature, interpreting Greenlandic with new literary tools such as the theatre and poetry, and this also stimulated curiosity in political trends outside of Greenland.

Until World War II, the income base for the majority of the population was still traditional hunting and fishing. For those few who wanted to continue their education for another two years, there were three “continuation schools” on the west coast of Greenland. After that, the only place for higher education in Greenland was the Teacher Training College. It was also possible to choose on-the-job training at the Royal Greenland Trade Company (*Kongelige Grønlandske Handel*). Finally, a few Greenlanders had the possibility of attending school in Denmark, provided they were given the permission to travel.

### **Appropriate teaching and learning**

As stated in the Declaration, indigenous peoples have the right to establish and control their educational systems and provide education in their own language. This has improved during the Greenland Home Rule era. There has been a reaction against all the years of “Danification”. Now, all efforts are concentrated on a “nation-building” process, to develop the country according to its own conditions and available resources. The “Greenlandisation” policy was aimed at making Greenland more Greenlandic and creating a sense of national Greenlandic identity.

The new school law of 1980 had as its key objective “to strengthen the position of the Greenlandic language” by making it the language of instruction, while Danish would be taught from Grade 4 as a first foreign language. The other important objective was to ensure that the content of the school subjects was more appropriately adapted to the needs of Greenlandic society. Once more, attainment of these objectives was dependent on the availability of Greenlandic teachers and teaching materials in Greenlandic; often these conditions could not be met, and Danish teachers would be in charge of teaching, at the expense of teaching in Greenlandic. Throughout the 1980s, efforts were made to increase the number of Greenlandic teachers by creating two more teacher training colleges and improving the training.

In 1997, the school administration was decentralized. While the responsibility for the overall legislative framework remains with the central authority, the *Landsting* (parliament) and *Landsstyre* (government), the municipal councils now have the responsibility of defining the administrative and pedagogic goals for their

schools in accordance with the local situation. In order to support the local authorities with their pedagogical responsibilities, pedagogical/psychological resource centres were established in three different locations in western Greenland.

### **New initiatives**

The latest significant changes to school legislation are as recent as 2002. They were introduced after thorough preparation, with both national and international participation, and a broad public debate on the future of the school system. Several conferences were held with the participation of schoolteachers from all levels, parents and local politicians. A special conference was organized for schoolchildren.

The objectives have been to build a flexible school system shaped on Greenlandic premises and needs, while at the same time making it possible for students to pursue a higher education outside of Greenland. The "Good School" is a ten-year school where the first nine years are compulsory. It has three levels: primary level from Grade 1 to 3 for the youngest children; a middle level from Grade 4 to 7; and a level for elder children (lower secondary) from Grade 8 to 10. Classes can be organized with pupils of the same age or not. The pupils are taught in subject-specific groups, as well as in cross-cutting subject groups, and the groups consist of pupils from one or several classes determined by the individual pupil's needs and interests and in line with the agreed learning objectives. The languages of instruction are Greenlandic and Danish. English can also be used as an instruction language, as part of the pupils' language learning. Teaching at all levels includes the following subjects:

- Languages: Greenlandic, Danish, English and a third foreign language;
- Culture and society: social science, religion and philosophy;
- Mathematics and nature, and in the highest grades, separate classes in physics/chemistry, biology and geography;
- Personal development: teaching in health, social and emotional issues, educational and professional information and other psychological and social topics.

Vocational training is very important for providing society with all kinds of necessary skills, and it has been in development since the first years of Home Rule. Today, Greenland has several vocational training schools as well as business and other specialist schools.

## Higher education and research

The Home Rule Government has chosen to establish a number of research institutions in Greenland. To name just a few:

- **The University of Greenland**, Ilimmarfik, is an institution where research into Greenlandic language and literature and Arctic cultures and societies is conducted.
- **The Greenland Institute on Natural Resources** provides scientific data that can contribute to the sustainable development of Greenland's natural resources and safeguard the environment and its biological diversity.
- **The Greenland National Museum and Archives** examines the country's archaeological and cultural, as well as its recent, history.
- **Statistics Greenland**, which, as well as gathering statistical data, is handling the international joint research project "The Survey of Living Conditions in the Arctic: Inuit, Sámi and the Indigenous Peoples of Chukotka (Russia)".
- **Inerisaavik** (the Centre for Pedagogical Development and In-service Teacher Training) also conducts research.
- In 2000, the **Arctic Technology Centre** was established in Sisimiut as a result of cooperation between the Technical University of Denmark and the Construction School.

Home Rule politicians argued that investing in the areas of education and research was necessary to understand and shape the society of tomorrow in line with its needs. Language, culture, history, pedagogy, administration, social conditions and media communication were all too important for a country's development to be moved to another country.

Furthermore, there was a political demand to establish a coherent educational system. The idea was to create a wider learning and research environment and to use professional educators more efficiently. As in the international debate on education, there was a quest for more flexibility and mobility in the education system. This led to the creation of a new university and research centre in Nuuk, thereby establishing a learning and research environment to benefit the students and make it possible to use the teachers' skills more efficiently.

Ilimmarfik opened at the end of 2007. It groups together all the current institutions of higher learning, including the University of Greenland and its four institutes, Statistics Greenland, the National Archives, the National Library, the School of Social Work, the School of Journalism, and the Language Secretariat. There will also be a new research center dealing with the social sciences and humanities in the Arctic that will be of use to the entire community of Arctic researchers. Fur-



thermore, new areas of research, including media and communication, social research, pedagogy and theory of education, will complement the existing research areas at the University. Ilimmarfik also includes student residences and lodgings for guest professors or researchers.

Ilimmarfik will, without doubt, give Greenlandic research new and exiting possibilities. Research will provide a basis for the decisions to be taken by the politicians and by people in the business and industrial sector, and thus be to the benefit of the wider society and contribute to the development of the goals formulated since Home Rule was introduced.

## **Art in Greenland**

The tradition of the visual arts in Greenlandic history dates back to persons such as Aron, who lived in the mid-19th century, a hunter who, after getting tuberculosis, had to change his livelihood and started woodcuttings and water-colour paintings featuring daily life. Since then, a number of artists have made their mark, inspired by Greenlandic and Danish artists. Developments over the last few years clearly show that the younger generation of artists is aiming to make its mark in the international art arena. It is definitely a positive sign that today's artists are capable of creating works with universal appeal.

To obtain an income, both artists and designers are dependent on promoting their works and products. Unfortunately, the channels for this are not the most effective in Greenland today. There are, however, some groups of artists working and experimenting with various new forms of art, for example, traditional crafts, installation art, video art, performance art and concept art. In the world of design, the main focus is on clothing, in Greenland as well as abroad. Abroad, the main interest is in the use of sealskin and other ethnic materials. This is certainly an exciting development from which our society will benefit, now and in the future.

The School of Art in Nuuk contributes to stimulating an interest in art within our society. It is a stepping stone for other creative and artistic forms of education outside Greenland.

Vocal and instrumental music are of great importance to all ages. There is a rich musical tradition in Greenland. Traditional drums, drum songs and dances have been revitalized in modern times. Old and new recordings of these have been released. A characteristic of our music generally is that singing is mainly in Greenlandic. Our musical tradition therefore plays an important role in preserving Greenlandic as a living language.

Music on CDs as well as live music is of great importance to cultural life, both for entertainment and for dancing. Pop and rock music are the most widespread genres today and large numbers of CDs are released in relation to the size of our

population, although the overall numbers sold have declined in recent years. There are two or three major record companies and several smaller ones.

There is a growing tendency to hold music festivals and there is no doubt that these festivals are of great importance to the musicians, as the number of music venues and arrangements held in Greenland is limited. There are municipal music schools and it is possible to study music at university level or at an academy of music.

The experimental theatre group “Silamiut” has played a predominant role in dramatic art in Greenland over the almost 20 years that the group has existed. Silamiut has been on tour in Greenland and abroad, and the group has been mentioned many times by politicians as being a fine ambassador for Greenland.

Several Greenlandic actors have also produced their own plays and performing shows over the last 8-10 years. It was in this way that the amateur theatre group, “Pakkutat”, made its mark over a period of time. There is currently an educational stream in the Silamiut Theatre through which young and new actors can receive basic training. The Actors’ Federation (KAISKA) takes care of actors’ interests. Since its inception in 1960, the Federation has emphasised the interests of professional Greenlandic actors through its associated membership in the Danish Actors’ Federation (DSF). KAISKA and Silamiut have been responsible for training Greenlandic actors.

Motion pictures are the medium of our time for information, documentation and fascination. Filmmaking is an activity that demands a great deal of equipment. The need for expensive and delicate electronic equipment is demanding on organizations, the infrastructure and the economy. Film production is, above all, the product of co-operation, often across national boundaries. The world of film is the most commercial of the traditional art forms. It is expensive to make films - it is an area that necessitates risk - but with a good product it is possible to achieve public attention and benefits, for example in the form of public relations’ advantages for a country and its culture. It can occasionally even lead to financial profit. The film “Palos Wedding” made in 1934 by Knud Rasmussen, was the first film to be made only in Greenlandic. Our film industry has developed its own style in short films, documentaries and short features over the last 30, and especially 10, years. Against all odds, Inuit filmmakers are successful. Canadian, Alaskan and Greenlandic filmmakers have received significant awards at different international festivals.

*Assilissat* is an association of Greenlandic filmmakers with various qualifications, as well as people without formal education but with film experience. The association was established in 1999 in connection with the first Greenlandic film festival held in Katuaq, Greenland’s Cultural Centre in Nuuk. This was done to strengthen communication between the active areas of the film industry and to promote Greenlandic films abroad.

The Greenland Home Rule Government can provide grants for film production. In 2003, a special film and theatre fund was established. It is not easy to build up a proper film environment in Greenland because professional training, operating partners, actors, equipment, funding and professional inspiration are all found mainly outside Greenland. People involved in Greenlandic film production have to spend longer or shorter periods of time outside Greenland. The people who seriously want to advance within the film world tend to settle abroad. A well-established film environment in Greenland is, however, an important condition for making Greenlandic film activities visible. This will inspire new talent in Greenland and also reduce the movement of already talented and qualified people out of the country, known as the brain drain.

Activities within the film industry create work, income and awareness and ensure that a large part of the funding is spent in Greenland. In addition, film production in Greenland will ensure the development of films with a special Greenlandic element. But there is an inter-connection of elements -- there will be no film environment whilst there are no, or very few, people involved in the making of films. If Greenlandic film is to be developed, there is a need for financial backing, and there is not enough funding from the Greenland Home Rule Government to fully develop the film industry. A contemporary film called *Nuummioq* is nonetheless currently being shot in the Nuuk area, with an entirely Greenlandic crew and actors.

## Literature

There are still few authors writing in Greenlandic. The first novel was released in 1910. Literary productions include novels, plays and poetry inspired by the old culture and clashes with Western civilization. The national publishing house established in 1957 with the support of the Landsraad has now been privatized and this has made it more difficult for writers to get published.

Public libraries are a feature in many towns and communities. The National Library in Nuuk and local libraries are important places for our literature and culture. The writers are remunerated an amount of money collected by the libraries from the loans of their books. There are also book clubs. However, in general, book reading is no longer as widespread as it used to be in previous times and it is now being challenged by the electronic media. Listening to book CDs, on the other hand, appears to be popular.

One thing characterizing the Kalaallit is the pleasure they take in story telling and, even in Nuuk, people will swarm to the main library for story-telling evenings. They are good listeners and an unmistakable characteristic is their sense of humor and disposition to laughter.

Language is of utmost importance to cultural identity. The Greenlandic language *per se* is not endangered today. However, there is a strong political wish to strengthen the language in administration as well as in education and, to a larger extent, as a culture bearer via literature.

There is often an outcry for more books for children and young people within certain genres. But it is not clear what will stimulate the production of more literature in Greenlandic. The Greenland Home Rule collaborates with the Greenland Writers' Union on improving the conditions for writers. The aim is to provide better conditions for stimulating the production of Greenlandic literature and it also provides funding for two Greenlandic language magazines on art and culture.

There is a Sports Council and sports organizations, and a large amount of voluntary work is being carried out locally to advance Greenlandic sporting endeavours. There is great interest on the part of the population; sports are well supported in Greenland - not least among the young - because they are good for a healthy lifestyle (weight, nutrition, non-smoking and so on), for the condition of children and young people in society, quality of life in old age, the disabled and women. Our youth compete in the Arctic Winter Games, the International Island Games and Pan-American competitions in football and European handball.

## Media

### Newspapers in Kalaallisut

Besides *Atuagagdliutit*, the first Greenlandic news periodical, another popular weekly newspaper in Greenlandic, *Sermitsiaq*, is also available online in a bilingual version, now also including English. *Sermitsiaq* is a very popular online paper in which there is a great deal of political debate. Besides these publications of national coverage, there are a number of smaller publications such as *Kalaaleq* (The Greenlander), published in Greenlandic only by the Greenlandic Writers' Association, and *Arnanut*, a bilingual magazine for women published by *Sermitsiaq*.

### Radio and TV

In a region as vast as Greenland, with a widespread population living at great distances, radio has been significant as a source of news and enlightenment. But it has also been important for the development of a new form of journalism and a creative way of using the local language. Greenland's first broadcasting radio developed after World War II with the support of experienced Danish radio jour-

nalists and Radio Denmark, where young Greenlanders went for training as technicians and journalists. The cultural impact was enormous. News, reporting, debates, personal stories, radio theatre, European (mostly classical) music as well as North American modern music reached Greenlandic homes.

Today, the national Kalaallit Nunaata Radiua, (Radio of Kalaallit Nunaat) KNR, is digitized. It also runs a public TV channel and a bilingual online news service. It is an independent institution with 100 employees and its own board of directors. TV and radio programs can be received throughout Greenland but some towns also have their own local radio and TV stations with local news, music and entertainment. They, too, get some financial support from the government and their productions are sometimes bought by KNR and used in national programming.

In 2005, 8,243 hours of radio and TV broadcasting included 60% art and culture, 33% news and current issues, and 7% children and youth programs, produced with their participation. KNR Radio broadcasts about 5,400 hours of material each year, comprising 2,500 hours in Greenlandic, 900 hours in Danish and 2,200 hours of music. KNR TV broadcasts about 300 hours of Greenlandic and around 2,000 hours of Danish programs per year. Television programs (and DVDs) are almost always in Danish or English and have a strong impact on Greenlandic culture.

Radio, in particular, has been perfect for the modern Greenlandic society, and it is still today the most influential media in the local language as it can be heard in all local communities. One of the obvious differences with other Inuit in North America is that when you visit Inuit homes in Alaska and Canada you'll find a TV set broadcasting all kinds of programmes in English while in Greenland it is much more often the radio that will be turned on, playing in Kalaallisut.

### **Electronic media**

Most people have access to the Internet, and all the larger institutions, private as well as public, have their own Web sites. These are usually bilingual, although some of them try to have pages in English too. There are several chat sites in Kalaallisut specifically targeting young people. Lively interactive debates prevail in both Kalaallisut and Danish on the Web sites of Radio KNR and *Sermitsiaq*.

### **Future challenges**

All indigenous peoples have their own history, culture and heritage. Ours, Inuit including Greenlanders, is very different from all the others. However, in modern times, we have managed to collaborate with indigenous peoples around the

world. It has been greatly rewarding for our self-understanding and self-esteem. It is obvious that the situation of many indigenous peoples is very difficult. Self-government was endorsed in November 2008 with a 76% yes vote and it was inaugurated on Greenland's national day June 21, 2009. This will undoubtedly be a challenge for Greenland but Greenlanders seem to be very aware of this.

A door has now been opened by which to improve the situation, with the adoption of the Declaration. The states we live in have to take effective measures to combat prejudice and eliminate discrimination. They also have to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society. Now that the 60<sup>th</sup> anniversary of human rights has been celebrated globally, it is worth looking at the Declaration on the Rights of Indigenous Peoples. Based on collective rights, it has introduced a new and necessary step for humankind. The UN has agencies dealing with culture and education. UN Education, Science and Cultural Organisation and its declarations on cultural diversity and intangible cultural heritage and its different programs are other tools available to us. The challenge is now for us, and for the states in which we live, to create a better and a richer world to live in. ○

## Notes

- 1 **Rebecca Sommer. 2007.** *Adoption of the U.N. Declaration on the Rights of Indigenous Peoples.* News Reel Video, 7 minutes.
- 2 **International Labour Office. 1999.** *Indigenous Peoples of South Africa: Current Trends. Project for the Rights of Indigenous and Tribal Peoples* (Geneva) (Research, text and photographs provided by Nigel Crawhall.
- 3 Available at [www.nanoq.gl](http://www.nanoq.gl).

## STATEMENT BY MR. KUUPIK KLEIST, PREMIER OF GREENLAND, 2ND SESSION OF THE EXPERT MECHANISM ON THE RIGHTS OF INDIGENOUS PEOPLES, GENEVA, 10-14 AUGUST, 2009\*

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Geneva, 11 August, 2009

Madam Chairperson, Distinguished Members of the Expert Mechanism, Indigenous Experts and State Representatives, Ladies and Gentlemen.

It is a great honour for me to address this (the 2<sup>nd</sup>) Session of the Expert Mechanism on the Rights of Indigenous Peoples - yet another important body to represent the interests of indigenous peoples at the international arena. Congratulations to all of you on your appointment as Experts to this Mechanism.

It is, indeed, a pleasure to register the huge development and rapid affirmation of indigenous rights throughout the UN system and, in particular, to experience an increasing number of indigenous experts in influential positions. The hard work and dedication finally seem to gradually bring about the results that we all have been striving for.

I have been looking forward to seeing you all again and found this an excellent opportunity to demonstrate our continued support.

Many of you will know that Greenland recently entered a new era after some years of internal deliberations followed by negotiations with Denmark. In a national referendum in Greenland on November 25, 2008, 75% of the Greenland people voted in favour of taking our self-government a step further. On June 2,

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\* Mr. Kuupik Kleist, of the left-wing Inuit Ataqatigiit party, became Premier of Greenland in June 2009, just prior to the transformation from Home Rule to Self-Government in Greenland. He has a degree in social studies from the University of Roskilde. His long career spans administration and private business as well as politics. Kuupik Kleist is a former Minister for Public Works and Traffic and has been a Member of the Greenland Parliament since the early 1990s. He was also a Member of the Danish Parliament from 2001 to 2007 and a Member of the Greenland-Danish Self-Government Commission from 2004 to 2008. He has worked extensively on indigenous rights issues both as Deputy Minister for Foreign Affairs of the Greenland Home Rule Government and as Board Member of indigenous peoples' organizations such as the Inuit Circumpolar Council, ICC and the Training Centre for Indigenous Peoples, ITCIP.



2009 in national parliamentary elections, the Greenland people voted to move forward with a new leadership, which I am proud to represent here.

All together we celebrated our new partnership with Denmark on our national day June 21, 2009. A partnership which is shaped by our historic relationship and further developed upon principles laid out in the UN Declaration on the Rights of Indigenous Peoples.

Inspired and informed by internal needs and international processes, not least on indigenous rights, an all Greenland Commission on Self-Government in 2003 submitted a proposal for a renewed partnership with Denmark. On the basis of this work, the Premier of Greenland and the Danish Prime Minister on June 21, 2004 signed the terms of reference for a joint Greenland-Danish Commission on Self-Government. I had the honour to be a member of the Greenland-Danish Commission, which concluded its work on April 17, 2008.

Further details on historical background, content and results of this process have already been reported to the 8<sup>th</sup> Session of the Permanent Forum in May of this year.

My main message today is the fact that this new development in Greenland and in the relationship between Denmark and Greenland should be seen as a de facto implementation of the Declaration and, in this regard, hopefully an inspiration to others.

At the national level or at the level of the realm, the Act on Greenland Self-Government indeed operationalizes the rights affirmed in the Declaration as called for by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Professor James Anaya, in his excellent report to the (9<sup>th</sup> session of the) Human Rights Council last year.

I have studied the report with great interest, and can very well subscribe to Professor Anaya's excellent overall analysis and conclusion, in particular, on the importance of pursuing positive engagement and partnerships.

The new relationship between Denmark and Greenland primarily entails a further devolution of powers to Greenland. It is based on a partnership, which now includes recognition of the Greenland people as a people under international law and thereby confirms our right to self-determination.

At the inauguration of Greenland Self-Government in Nuuk a few weeks ago, the Danish Prime Minister addressed this – to us - very important recognition in a most pragmatic and sober way stating that it would indeed be a natural thing for the government to inform the United Nations of Greenland's new status.

A status which, in addition to our recognition as a people under international law, also includes the recognition of Greenlandic as the official language and Greenland's ownership and control of all natural resources.

My own response to the overwhelmingly positive reaction from both Denmark and abroad, these past few weeks, is that - naturally - neither the transformation from Home Rule to Self-Government nor the full implementation of the Declaration will happen overnight. This is only the beginning and we are acutely

aware that our new status also brings with it huge obligations and challenges - financially and politically - for Greenland. However, we are ready to take on greater responsibility, which always comes with rights.

“There are simply no free lunches”, as they say. Rather, hard work lies ahead in order for us to fully exercise our additional powers and to ensure economic sustainability. First and foremost, we have to promote and ensure the education and training of our people.

I am therefore pleased that the right of indigenous peoples to education is an important theme at this session under the umbrella of implementation of the Declaration, even though education is also one of the mandated areas of the Permanent Forum and, indeed, falls under the broad mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people.

The rights aspect is an important one. How do we ensure that our peoples are able to exercise their right to education?

In Greenland, we control our own educational system and have done so for some time. Our educational system is free and open to all. We have education and training in our own language. Yet we still struggle to increase the level of education at a sufficient pace to cover our need for educated people.

We have created several institutions of higher education to allow our students to study in Greenland instead of having to move abroad. We have made several educational reforms to adjust the educational system to our special needs and to ensure teaching in Greenlandic. However, we have also listened to our students wanting their education to be compatible with similar education in Denmark, the Nordic countries and elsewhere to give them the necessary flexibility in their lives. My government shares the need for a global outlook.

We have a huge obligation to ensure that our children and youth are provided the necessary educational and occupational opportunities in a socially and culturally sensible and sound environment which will allow them to prosper and take on responsibilities for the future of our country.

We will continue to invest heavily in education to maximize the benefit in terms of output. It is a challenge and a balancing act, in our educational system, to sustain our indigenous language and cultural heritage and at the same time ensure that our students obtain the professional skills and capacities of the world surrounding us. Our small number of people dispersed in a huge territory with a rather difficult infrastructure makes it extremely hard to reach out to everyone.

We know that we must succeed and we are very interested to learn from others in this area as to how we can best implement this right and ensure the best results for all parties.

Turning back to the implementation issue in the broader perspective, my old friend and colleague, Aqqaluk Lynge, President of ICC-Greenland, has pointed to the fact that we need to start implementing the Declaration internally in Greenland. I agree with him on that point. The Declaration has been endorsed by both Govern-

ment and Parliament of Greenland and it has raised expectations of citizens and interest groups. We need to take a closer look at our own compliance with this important (human) rights instrument. To guide and monitor our efficiency in this regard, our Parliament last year made an agreement in principle to establish a national centre for human rights in Greenland, a goal which I hope we will soon be able to fulfil.

When we take over jurisdiction from Denmark - such as over natural resources - we must carefully examine the potential impact on our local communities, hunters, fishermen and the environment. We do need to take advantage of opportunities for economic development, also based on non-renewable resources, to sustain ourselves in the future, but not at any cost.

Together with Denmark, Greenland took active part in the long and difficult negotiations leading to the adoption of the Declaration both to protect our own rights and in support of indigenous peoples around the world. Greenland also helped pave the way for the establishment of the Permanent Forum and this mechanism, which together with the important mandate of the Special Rapporteur form an impressive body of expertise and powers to contribute to the strengthening of the world order based on solidarity between all peoples.

It would appear that relationships and issues ripen with time and effort - and the more we share our experiences the further we are able to take the results.

We celebrate our new status and new partnership with Denmark with the clear understanding that the transformation was neither happening in isolation from our joint international struggle for the recognition of the rights of indigenous peoples. Nor will our experience automatically work with respect to solving problems elsewhere.

We do believe, however, that sharing positive examples and best practices is important. Together with the ongoing work of various UN forums and international and regional and local organisations, it contributes to the forging of new relationships between states and indigenous peoples. In the Arctic Council context, for example, we were able to use the positive momentum during a ministerial meeting in Nuuk, some years back, to achieve Permanent Participant status and seats at the table for our Arctic indigenous organizations.

In this regard, we applaud Denmark and like-minded countries for being at the forefront of the global community as promoters of the protection of human rights and indigenous peoples' right to political recognition.

I can also assure you of Greenland's continued commitment to supporting the constructive cooperation between various parties, be it in the UN or elsewhere. We pledge to work jointly with all parties towards the implementation of the Declaration on the Rights of Indigenous Peoples and the Programme of Action for the Second International Decade of the World's Indigenous People - with its highly relevant title - "Partnership for Action and Dignity".

Qujanaq - Thank you for your attention

# THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES IN THE AFRICAN CONTEXT

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Naomi Kipuri\*

*“Do not attack or judge me before you have spoken to me.”*  
A Maasai saying.

## Introduction

The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) was negotiated in the halls of the UN in Geneva for 25 years and, in September 2007, the United Nations General Assembly (UNGA) passed it by a vote of 144 to 4.<sup>1</sup> Not only does the Declaration finally recognize the inherent rights of indigenous peoples, but it is a profound and conceptually daring statement of great positive implication for all peoples. Yet at the critical stages of its negotiation, it became apparent that many countries had not been fully informed of the meaning, content or implications of the declaration. This was clearly the case in Africa, both on the part of the states and the indigenous and non-indigenous communities. For the declaration to make an impact, its provisions need to be applied as widely as possible. This chapter discusses the position of some African states individually and collectively vis-à-vis the declaration, the challenges they faced in supporting the declaration, the reasons behind the decisions taken by African states and their likely impact on the implementation of the Declaration.<sup>2</sup>

## Africa was not fully informed

Although the declaration was in the public arena for twenty-odd years, the conditions had not always been conducive for all states to hear, comprehend, deliberate and make informed decisions on whether or not to vote for or against the

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declaration when it reached the UNGA in 2006/2007. During the years of debate, only a handful of African countries had participated in the process and some had paid little attention to it prior to its adoption by the Human Rights Council in June 2006. The invisibility of Africa had been noted time and again by the indigenous representatives (myself included) who attended meetings of the Working Group on the Draft Declaration (WGDD) in Geneva. It was no wonder, then, that Africa felt it was in the dark with regard to the declaration. One therefore needs to ask what factors contributed to the failure of Africa to be informed on declaration matters while other states were fully aware.

First, few African states have representative missions in Geneva where the main discussions took place. This is for the simple reason that maintaining a permanent mission in Geneva (not a cheap city by any standards) is an expensive undertaking that many poor countries cannot afford. To get around the issue of expense, a number of African states have one or two missions in the whole of Europe to handle all matters pertaining to Europe.

Secondly, those African states that have permanent missions in Geneva can only afford a few staff members, who are charged with the responsibility of performing all tasks demanded by all UN institutions, as well as public social functions on behalf of the respective missions. One staff member in one of the missions in New York in 2007 explained that the tasks were quite daunting: they were simply overwhelmed by the numerous tasks they were required to attend to on a daily basis inside and outside Geneva. With so many demands on their time, the mission staff were simply unable to commit time to all of the activities. It is in the process of prioritizing that some matters, including those relating to the declaration, seem to have been simply pushed aside. As a result, Africa was not informed.

Thirdly, and this is an elaboration of the second point, to many African countries, matters relating to the declaration were a low priority, for both positive and negative reasons. First, I will examine the positive reasons.

### **“Indigenizing” African economies and the Declaration**

To many Africans, the common interpretation of the word “indigenous” is “home grown”, or “ours” and “not foreigners”. Leaders particularly recall the word in common usage during and after independence, when one of the major challenges for development was how to “indigenize” the economy, that is, remove it from the control of foreigners and hand it over to Africans themselves.<sup>3</sup> African countries could only welcome such a declaration, indeed they would be eager to vote for its adoption.

From this perspective therefore, and in the context of too many demands competing for time and attention, the issue of the declaration was pushed aside and

attention was focused on more pressing concerns. The perception of the African states was that, when a decision had to be made on the declaration, it would be voted for positively.

The group of African countries that held this view, and who are referred to as “the positive countries”, gave no time at all to the declaration, not even enough time to understand it fully. Indeed, a few months before the vote on the declaration in New York, one African delegate was reported to have asked for a copy of the declaration since he had never seen it. Yet he was expected to be the principal advisor to his government on declaration matters! This nonchalant attitude towards the declaration was largely influenced by the word “indigenous”, the meaning of which was taken as its literal translation, as understood in Africa.

### **Positions of different African states on the declaration**

The countries that declaration lobbyists dubbed “negative countries” were those whose perception of the declaration remained unchanged throughout the discussion and debate. This group of countries seemed to have decided their position on the declaration long before it was subjected to a vote. They were not going to support it, and they largely remained absent from debates in Geneva and gave little attention to it when they were lobbied in New York by indigenous peoples’ representatives. This group had only a few, albeit vocal, members, such as Kenya and Nigeria, both of whom also happened to have other common features. One is that they both have precious resources upon which they depend heavily for a major source of foreign exchange. For Nigeria it is petroleum and, for Kenya, wildlife-based tourism. Secondly, the relevant resources are located in indigenous peoples’ territories. In Nigeria, the oil is located on lands belonging to indigenous Ogoni (and because of the centralized governance structure it is the government that decides how the revenue is to be spent, although a small portion of it is given to the Ogoni).

It is perhaps on account of this that both these countries also happen to have indigenous communities who are visible and vocal in articulating rights to their resources and to development. They have been demanding that there must be free, prior and informed consent before any development project affecting them is implemented. Some of these demands have been met with the full force of the law, sometimes resulting in deaths,<sup>4</sup> persistent conflicts and frustration. Against this backdrop, the negative countries maintained a hard stance in opposing the Declaration throughout the negotiations. Their position was encouraged by the Canadian, Australian, New Zealand and United States (CANZUS) group, which also held meetings to ensure that this position remained firm. During the lobbying by indigenous experts and professionals during the months of April and May 2007, one officer at the Kenya mission in New York let the cat out of the bag

when, after listening intently to what seemed to her a convincing argument in support of the declaration, said to the author: “You see, we had a meeting with Canada and...”. That was all that needed to be said to convince the listener that Kenya’s rigid position on the declaration was really that of the CANZUS group.

Kenya’s negative position was further exacerbated by the fact that an indigent community (the Ilchamus) took a case to court claiming that their rights to political representation were being violated. When determining the case, the presiding judge used the declaration in its draft form to determine the case in favour of the claimants, ruling that they deserved an electoral political constituency. From this perspective, Kenya’s eventual abstention from the vote on the Declaration, instead of voting against it, can be considered a positive step forward.

### **Deliberation on the Declaration and the fallacy of the “African position”**

To educate their members on the meaning and content of the declaration, the African states made a decision to initiate dialogue and consultation between and among members to bring all to the same level of understanding. During this three-month period from May to July 2007, it was agreed that decisions on the declaration would be postponed until all the members were fully informed of the meaning and content of the declaration. To achieve this, meetings were organized by the African Union (AU) in Addis Ababa and Accra, taking advantage of other scheduled meetings of the AU. Informal meetings were also held between members for the same purpose.

During this period of consultation, it was also agreed that no state would divulge its position, if it had one, until the consultation was over, in July 2007. As a result, African states stuck together as a bloc and did not try to pre-empt any decision that might emerge after consultations had taken place. An inaccurate perception emerged, then, that Africa already had a position on the declaration as early as April 2007, fueled by the fact that very little of what was going on among African states was known outside its membership circles. To the lobbyists, if African states had already agreed to a collective position, the strategy would have been to influence individual members to abandon that position, the so-called “divide and rule” tactic.

At one time, it was rumored that African solidarity was a tactic on the part of those states that were unfriendly to the declaration in order to make it seem that they were in a majority and that they had succeeded in influencing the whole continent to come up with a strong position against the declaration. Whatever its origins, the rumor had the effect of creating fear among supporters of the declaration that the “dark continent” also had dark secrets that might spring up and destroy the whole declaration! After all, if Africa were to vote as a bloc, it



would indeed have the effect of tilting the scales against the declaration, given that Africa has so many votes in the UNGA.

One friendly Mission insinuated that if there were going to be an African position, it would emerge well after all the consultations had been completed. As it transpired, in actual fact, there had never been an “African position” at any one time. The AU Summit of Heads of States and Governments took place in May 2007 in Accra and the next summit was held in July 2007 in Addis Ababa, just two months prior to the vote in September. No position was ever taken as a continent, although the Aide Memoire of the African Union might be interpreted as advice in support of the declaration.<sup>5</sup> During the consultation period, concerns were raised by some member states that were somewhat similar to those of the CAN-ZUS group.

### **Concerns of the African Group regarding the declaration**

Some members of the African group had essentially four concerns with regard to the declaration. Firstly, they highlighted the fact that reference to the word “indigenous” in the case of Africa was confusing and misleading. African states would have preferred to restrict the application of the declaration to America and Australia because, from their perspective, either all people were indigenous to Africa or none. Concern was also raised regarding the requirement of indigenous peoples’ free, prior and informed consent and how development could be achieved if indigenous peoples were to veto decisions made by governments. It was felt that this would impede development.

Self-determination was another concern raised.<sup>6</sup> African states assumed that, if indigenous peoples were to be granted self-determination, they could seek to dismember the boundaries of existing states. These concerns were articulated more strongly by some states (particularly Kenya and Nigeria) while the bulk of the others simply wanted to understand what the terms stood for in the context of the declaration. It is delightfully noted that the explanations given through the response note (see below)<sup>7</sup> were convincing enough to bring about overwhelming support of the declaration by Africa.

### **Response to the concerns and lobbying for the declaration**

Once it became clear that the process of adopting the declaration had reached a critical stage, international NGOs and other indigenous peoples’ organisations concerned about indigenous rights began to lobby states to support the Declaration. In Africa, the International Work Group for Indigenous Affairs (IWGIA) initiated a process in order to respond to the concerns raised by the African group.

A number of individuals were identified to draft a response, which was circulated to a number of experts to comment and sign up to. The product of this consultation was dubbed a “response note”<sup>8</sup> and was used to inform governments about the declaration and allay their fears. The response note expounded the meaning and intent of each of the articles with which some African states had concerns. Putting together the response note constituted a main component of the lobbying process.

A number of African professionals were then identified to travel to New York to lobby as many missions as possible. New York was identified as the place to focus the lobbying exercise because it was assumed to be the seat of the most influential ambassadors (those with most influence over their heads of state), given that they are at the political centre of the UN. It logically followed that if they could be persuaded with accurate information about the declaration, their respective head of state would, in turn, be informed and persuaded and the respective state would vote in favor of the declaration. Some of these assumptions proved wrong, however, as explained below.

Once in New York, the African professionals or activists organized themselves into two groups, Francophone and Anglophone for purposes of communication, and prepared schedules and appointments to visit the respective consulates and missions located in the city. The main focus of the visit was to find out about the position of the respective missions vis-à-vis the declaration. If the position were negative, the intention was to persuade them to shift their position and vote for the declaration. And, if they had issues that needed clarification, then the visitors would provide the necessary information and clarification. The response note was hand delivered to every mission visited.

As stated earlier, there were two underlying assumptions behind the choice of New York as the place to carry out the lobbying exercise. As mentioned, one was that it was the seat of the most important ambassadors, who are listened to by the heads of state. Secondly, that information about the declaration was all that was lacking for it to receive the necessary support. Both assumptions were fallacious because, given the geopolitical situation of America vis-à-vis Africa, and although the New York missions may indeed be the most important and powerful, their importance lies not in advising the head of state on foreign policy but rather in promoting the country’s image abroad. In the case of some countries, including Kenya, promoting tourism and demonstrating that the country was safe despite threats from terrorism were primary objectives. Lifting the travel advisories recommending that people should not visit the country became a major preoccupation of missions whose countries are dependent on tourism, Kenya included.

The advice and expert opinion of the Minister whose portfolio included international instruments such as the declaration might have had a more weighty overall impact on a state’s final position. This may have happened in the case of Kenya where the then Minister for Justice and Constitutional Affairs was openly

opposed to the declaration and, even if Kenya had voted in favour, its implementation would still be made difficult.

## **Challenges to implementation of the Declaration in the African context**

As stated above, the African states' lack of information about the declaration was a major hindrance to their consideration of it during the last stages of negotiations before its adoption by the UNGA. To get over this hurdle, African missions themselves succeeded (and for this they deserve credit) in informing their heads of states about the declaration prior to the vote. Other regional structures such as the African Commission on Human and Peoples' Rights, through its Working Group on Indigenous Populations/Communities (ACWGIP), contributed to the dissemination of information relevant to the declaration and will be able to play such a role at the regional and sub-regional levels in the future. The African Commission's Advisory Opinion will also continue to be used for clarification of issues that may not be clear about indigenous peoples in Africa.<sup>9</sup> Other human rights mechanisms will also be useful in promoting the declaration.

## **Regional-level action**

As noted above, the decision by some African states to abstain from voting on the declaration largely reflected the internal governance structures of the respective states, their human rights records and their levels of democracy. Burundi was, however, an exception in that it is quite progressive in human rights matters, it has indigenous members of parliament, yet it abstained from the vote on the declaration.<sup>10</sup> What this means is that there is a need not only for a clear understanding of the internal governance structure of the respective states but also of each one's subtle local substructures. These are issues that indigenous peoples themselves in each country are knowledgeable about, underscoring the need for their active involvement in implementing the Declaration.<sup>11</sup>

One shortcoming is that large populations of indigenous communities in Africa also know little about the Declaration. It is critical that indigenous peoples themselves understand the Declaration if progress is to be made in its implementation. To bridge this gap, there is a need to disseminate information about the Declaration as widely as possible. This can be done through training seminars at the local and national levels. An important part of informing people about the Declaration is to translate it into local indigenous peoples' languages and dialects. Once informed, indigenous peoples, in collaboration with civil society organizations, can organize seminars, campaigns and programs to achieve the full implementation of the Declaration.

In Africa, and perhaps on other continents as well, there are many cases relating to violations of indigenous peoples' rights that have exhausted all local legal remedy and therefore need to be taken to higher-level courts. For lack of funds, however, this has not happened. As part of implementing the Declaration, it is suggested that a few such cases in each region be selected and supported financially for referral to regional international courts. This would make it possible to test the local as well as regional legal AU and other instruments vis-à-vis the rights of indigenous peoples and also to set precedents in terms of states respecting the rights of indigenous peoples, as part of implementing the Declaration. Unless such practical measures are taken, there is a possibility that the Declaration will remain a theoretical tool of little practical relevance. This process requires closer collaboration and stronger ties between the UN mechanisms and indigenous peoples' organizations and communities. Good and bad practices could also emerge in the process and states will have a chance to learn the dos and don'ts of rights.

### **International-level action**

At the international level, the UN Permanent Forum on Indigenous issues (PFII), in collaboration with the relevant UN agencies and indigenous peoples' organizations, should organize sensitization seminars and training workshops at the sub-regional levels to create awareness of the Declaration. This can be achieved through fundraising should the relevant agencies not have adequate finances.

Working with the relevant agencies, the PFII could also use the media to transmit simplified versions of the Declaration to the public to raise awareness and recognition of the rights of indigenous peoples. They should also lobby states to recognize indigenous peoples according to the term as understood internationally, and make appropriate legislative provision in this respect.

The PFII can also influence other international and UN agencies to design their programs to include the basic principles of the Declaration. The UN Development Program, for example, could work with relevant government agencies to implement adequate measures to ensure that indigenous communities, including children, are provided with information regarding birth-registration procedures, access to healthcare facilities and education. They could also influence states to ensure that indigenous peoples are included when policies are designed and to institute effective and culturally-sensitive programs in indigenous peoples' areas. Declaration issues should be included in all discussions and debates locally, nationally, regionally and internationally.

The PFII should also conduct missions to state parties in order to deepen dialogue with the government on various human rights issues affecting indigenous peoples. In the process, it should disseminate positive experiences developed

elsewhere on indigenous peoples so that they can be replicated wherever possible.

Indigenous people should be made aware of other mechanisms such as the proposed UN Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries so that they can take advantage of the opportunities it contains and make the issues affecting them more visible. To achieve this, a working group or special rapporteur mechanism on local adaptation and mitigation measures of indigenous peoples in local communities should be established.

Since the International Union for the Conservation of Nature (IUCN) has also adopted the Declaration as its operational framework, indigenous as well as non-indigenous peoples, activists and human rights institutions should be made aware of this so they can further inform the process of implementing the Declaration. The action by the IUCN could also be promoted by other organizations as an example of good practice.

Other UN Human Rights mechanisms such as the UN Special Rapporteur on the situation of the rights and fundamental freedoms of indigenous people and the UN Expert Mechanism on the Rights of Indigenous Peoples should also raise their visibility level by inviting relevant regional human rights mechanisms to their meetings and conferences. The purpose of this would be to disseminate information on the Declaration at the regional level and bridge the information gap. Other existing committees and instruments, such as the Committee on the Elimination of Racial Discrimination and the Committee on Discrimination against Women, can all help in implementing the Declaration.

There is a need for coordination of activities among the various institutions that are undertaking similar work on the Declaration to effectively implement the instrument. With such coordination, the Declaration would become widely known and there would be consolidation of information and less replication of activities.

A list of international human rights lawyers should also be established who could offer their services on a pro bono basis to represent indigenous people in selected high-profile cases, as a practical way of applying the Declaration. The case of the Ilchamus in Kenya, which was determined and won on the basis of the Declaration in its draft form, was in the end ignored by the electoral commission, citing the judgement as “an abuse of court process”<sup>12</sup>. If such a case were to be taken to a higher regional court, it could set a precedent and establish the Declaration as an effective instrument of litigation.

Many other ways of applying the Declaration could be explored in order to create accountability and increase social responsibility, for example in terms of protecting the environment against irresponsible acts such as over-exploitation and dumping of harmful waste products, ensuring fair trade is observed, and so on.

## Conclusion

In conclusion, the Declaration has been adopted as a unique and special instrument which, if put to proper use, has the potential to address and protect the rights of indigenous peoples. Africa deserves to be commended for joining the community of nations and voting almost en masse for the Declaration and the principles it stands for, to uphold the rights of indigenous peoples the world over. What remains is the hard part, and that is its implementation. But, with the will, enthusiasm and coordination of all relevant stakeholders, it will be possible to finally achieve the principles contained in the Declaration and realize the much desired dignity for indigenous peoples. ○

## Notes

- 1 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 2 Information in this paper was obtained during May and April 2007 in New York when the author was part of an indigenous peoples’ mission from Anglophone countries lobbying for the adoption of the declaration. The mission was supported by the International Work Group for Indigenous Affairs (IWGIA) first to give comments on the Advisory Opinion and later to lobby individual permanent African missions resident in New York.
- 3 Usually the “indigenizing” process was simply removing the economy from European colonists and placing it into the hands of the African ruling class. Indigenous peoples who are still denied productive natural resources in their own areas are seeking more self-determination and free, prior and informed consent. In this way, the process of “indigenization” was at variance with the core principles of the Declaration.
- 4 The CANZUS Group comprises Australia, Canada, New Zealand and the USA and is touted to be against the declaration.
- 5 African Group “Aide Memoire on the United Nations Declaration on the Rights of Indigenous Peoples” New York (9 November 2007).
- 6 According to a head of state of one of the countries that abstained during the vote on the declaration, “the term can only mean one thing, self governance ... during the struggle for independence we were fighting the colonial masters so that we can be free to rule ourselves as an independent entity, there can be no other meaning for the term.” (an African president).
- 7 African Group of Experts “Response Note to the Draft Aide Memoire of the African Group on the Declaration on the Rights of Indigenous Peoples” (21 March 2007). See on IWGIA’s website: [http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/Draft-Declaration/ResponseNoteToAideMemoire\\_EN.pdf](http://www.iwgia.org/graphics/Synkron-Library/Documents/InternationalProcesses/Draft-Declaration/ResponseNoteToAideMemoire_EN.pdf).
- 8 Ibid.
- 9 African Commission on Human and Peoples’ Rights “Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples” Banjul – Gambia (2007). See: [http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf).
- 10 Discussions doing the rounds in Africa and elsewhere suggest it is possible that Burundi might have simply made the wrong mark or pressed the wrong button by mistake when voting in the UNGA. However, it is also possible that there was some disconnection between New York and Bujumbura when the Declaration was being considered.

- 11 In Africa, only three countries abstained from voting on the declaration. These are Nigeria, Kenya and Burundi. No African country voted against the declaration.
- 12 Ilchamus are a small pastoralist and fishing community in Kenya living on the shores of lake Baringo. Since they are a minority, they realized that, because politics are decided on the basis of numbers, they will never be able to elect their representatives into parliament meaning their own issues and concerns would never be addressed. This is why they took to court seeking a political constituency so that they can elect their representative into parliament. The case was determined in their favor but the Electoral Commission decided that it is not courts that grant constituencies, it is the Electoral Commission. By going to court, they were in effect abusing the court process. Yet the Electoral Commission did not grant the constituency as granted by the court.



# IMPLEMENTING THE DECLARATION

**PART FOUR**

# THE SIGNIFICANCE OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES AND ITS FUTURE IMPLEMENTATION

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Dalee Sambo Dorough\*

## Introduction

There is no doubt that the celebrated adoption of the UN Declaration on the Rights of Indigenous Peoples (Declaration) by the UN General Assembly on 13 September 2007 marks a significant turning point for present and future generations of indigenous peoples around the globe.<sup>1</sup> Imagine the indigenous world as it was, for a moment. Then think of the conditions that indigenous peoples currently face: encroachment, colonization, subjugation, exploitation, domination, leaving many of us in disarray. Now read the Declaration through from beginning to end and dream of a world that “might someday be”.<sup>2</sup>

For indigenous peoples, the Declaration language talks of “rights” and “status” and, indeed, that is as it should be for an international instrument. Those of us who have handled “the language of law” for over two decades are not as likely to be awestruck by its meaning or magnitude.<sup>3</sup> However, when one begins to consider the import of the language, the challenges ahead for breathing life into every provision, and the potential for operationalizing them, one begins to understand the Declaration’s full weight and meaning. This brief article intends to highlight the significance of the Declaration and to focus on the need to bring its provisions to life through indigenous, state and UN action, coupled with human rights education.

The Declaration holds a special place within the UN system. Much of this has to do with the way the Declaration was negotiated, with its primary beneficiaries - indigenous peoples - directly engaged in every stage of the standard-setting process. In this way, as direct participants, indigenous peoples have succeeded in their efforts to “re-define the terms of their survival in international law”.<sup>4</sup> Even

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though the Declaration does not create any new rights in international law, it is the most comprehensive of the instruments dealing with indigenous peoples.

Prior to the adoption of the Declaration, one could make the plausible argument that indigenous peoples, as well as our respective treaties, were subjects of international law. However, now there is no question that we are no longer merely objects, but rather subjects, of international law. There will be those who will attempt to downplay the import of the Declaration due to its non-binding, aspirational nature. Yet, at the same time, very sound arguments can be leveled to support the fact that specific provisions of the Declaration be considered as customary international law, even binding on those states that opposed its adoption.<sup>5</sup>

Another important dimension of the Declaration, and one that confirms its comprehensive nature, is that it affirms a number of collective human rights specific to indigenous peoples, ranging from the right to self-determination and to lands, territories and resources, to recognition of treaties and the right not to be subjected to forced assimilation, destruction of culture, genocide or any other act of violence, to rights affirming indigenous spirituality, culture, education and social welfare.

In regard to the *significance* of the Declaration, other authors have gone into greater depth regarding a number of key provisions of the Declaration. However, they warrant brief attention here. The right of self-determination is explicitly outlined in Article 3. A number of states caused some controversy over the language through unsubstantiated positions that simply and unnecessarily prolonged the debate. Ultimately, I believe that indigenous peoples prevailed in their efforts to ensure that our right of self-determination was recognized without qualification, limitation or discrimination. The final language of the Declaration simply restates existing international law concerning the right of self-determination. As indigenous peoples have argued, the right of self-determination is a pre-requisite to the exercise of all other human rights. Furthermore, Article 4 (dealing with autonomy and self-government) simply sets out ways in which we will internally further our social, economic and cultural development.

The right to the lands, territories and resources that we have traditionally owned, occupied or otherwise used or acquired has been affirmed in the Declaration, as well as recognition of the profound relationship that indigenous peoples have with their environment. Furthermore, the Declaration includes language concerning protection of the environment and its productive capacity, redress for lands, territories and resources that have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent, recognition of indigenous land tenure systems and the right to determine and develop our own priorities and strategies for development or use of our lands, territories and resources.

In the light of the history of indigenous peoples and contemporary violence and armed struggles, especially for those who possess resource rich territories, the matter of genocide and ethnocide is critical. Though the original language of the UN Working Group on Indigenous Populations' (WGIP) text was far wider

reaching,<sup>6</sup> Article 8 of the Declaration is significant. It includes important provisions directed at preventing the assimilation of indigenous peoples or the destruction of their culture.

Like other international instruments, the universal nature of the Declaration is equally significant. The debates concerning specific language made it clear that the universality of the Declaration does require homogeneous application of its provisions. It reflects unified views of international human rights law that embrace cultural diversity and allow for a multiplicity of cultural contexts. This international agreement on fundamental individual and collective human rights provides the world community with the *minimum standards* for the survival of indigenous peoples. We now have an “expected range of functioning” or “a required level of achievement” by which to measure the exercise and enjoyment of our fundamental human rights. Each provision provides a benchmark or baseline as to how the rights should manifest themselves in the lives of indigenous individuals and groups.

With the adoption of the Declaration, it is clear that the UN nation-state members have the capacity to accommodate indigenous peoples. These standards provide the necessary framework for a human rights-based approach and for a new conceptualization of indigenous and state relations. As such, the Declaration should be regarded as the new “manifesto” for positive international and domestic political, legal, social and economic action. Now the challenge is to compel states to act, to induce them to take their duties and obligations seriously, and to share our sense of urgency in implementing the Declaration.

Unfortunately, there are many hotspots in the world where implementation is, in fact, urgent. Recent events in Bolivia, Brazil, Paraguay and the Central Kalahari demand immediate state, UN and world community attention. Once appropriate action has been taken to quell any violence, there will be a real opportunity to use the Declaration in attempts to resolve these situations. For example, issues facing President Evo Morales and the citizens of Bolivia provide an *opportunity* to address the competing rights and interests of indigenous peoples, the sovereignty of the state and the rights and interests of non-indigenous peoples domestically. With the adoption of the Declaration as a framework, the broad contours of the right of self-determination, as well as the specific exercise of the right by indigenous communities in Bolivia, create an opportunity for resolving, through analysis and dialogue, the dynamics and operationalising of these crucial rights. I believe that the Declaration provides a way forward in this respect.

## **Indigenous action: the international plane**

With the exception of a few geographically remote and un-contacted communities, indigenous peoples worldwide have had to contend with colonizers, some-

times involving violence such as that visited upon communities in Bolivia. There is no question that indigenous peoples have been, and continue to be, victims of subjugation, domination and exploitation. Alongside the struggle to attain the all-important language concerning our right to self-determination, there will be persistent nation-state denial of its applicability to indigenous peoples. The challenge for indigenous nations and communities is to actually “operationalise” this right, along with all the others expressed in the Declaration.

A significant spin-off effect of the Declaration proceedings was that indigenous peoples gained first-hand training in international relations and demonstrated the highest level of diplomacy in foreign affairs. They were able to effectively engage states in dialogue in a setting unmatched on domestic fronts. All of the relationships that were initiated, especially those cultivated with friendly states such as Mexico and Denmark, can be regarded as confidence-building measures which, in the long run, will help to ensure that the Declaration’s standards are operationalised. Maintaining those relationships will assist indigenous peoples both domestically and internationally. For example, there will be an important opportunity to implement the Declaration through the Human Rights Council’s Universal Periodic Review process.

The UN Expert Mechanism on the Rights of Indigenous Peoples (the EMRIP) can play a major role in ensuring that indigenous issues remain current, and in using the framework of the Declaration as the basis of their future work within the Human Rights Council and UN structure, despite the limitations to its mandate. In addition, the ongoing work of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, especially country-specific reports, will surely contribute to an increased understanding of the remedial and positive aspects of the Declaration. Furthermore, given the relevance of the Declaration to the actors engaged in the Permanent Forum on Indigenous Issues, there is potential to saturate the UN system with more informed and sensitive perspectives on the rights and status of indigenous peoples.

In relation to the legal effect of the Declaration, despite the observations and voting explanations given by Canada, Australia, New Zealand and the United States, the Declaration is clearly buttressed by the existing human rights instruments, including some that are associated with UN human rights treaty bodies. As noted above and elsewhere, various provisions of the Declaration are on the path toward crystallization, or can now be arguably considered as customary international law. This alone creates an intellectual space within which to explore the full and positive implications of the Declaration’s provisions.

Given the level of the UN bodies engaged in indigenous peoples’ human rights, in particular the EMRIP, there is a possibility that a UN institution may seek an International Court of Justice (ICJ) Advisory Opinion on an issue pertaining to indigenous peoples in the future. Even raising the possibility in this chapter will likely cause some states to take action immediately to ensure that those

bodies entitled to seek advisory opinions exclude any UN body composed of indigenous persons as key or equal actors. It is not inconceivable that the rule of law will be applied equally to the indigenous context in the future. Indeed, consider the ICJ's 1975 Advisory Opinion on the Western Sahara, which decided issues relating to tribal peoples, land rights and *terra nullius*.<sup>7</sup> It was relied upon by the High Court of Australia in *Mabo v. State of Queensland (No.2)* to reject the application of the concept of *terra nullius* under common law.<sup>8</sup> The possibility of an ICJ Advisory Opinion is clearly worth exploring to ensure that the concerns, status and rights of indigenous peoples are treated equally and as relevantly and legitimately as those of states or other international actors.

### Existing human rights mechanisms and comprehensive strategies

It is worth remembering past indigenous actions that have underscored the potential for the Declaration's language to be operationalised in order to curb human rights violations. For example, in the case of the *Mabo v. State of Queensland (No. 2)*,<sup>9</sup> five Torres Strait Islander individuals successfully argued that their land rights were not subject to state land rights initiatives or Queensland Parliament decisions. In June 1992, the High Court of Australia affirmed the native title rights of Aboriginal and Torres Strait Islander people, and denounced the concept of *terra nullius* as inapplicable to Australia, thus forming no basis for British sovereignty. This case was followed by that of *Wik Peoples v. The State of Queensland*,<sup>10</sup> where the High Court affirmed that pastoral leases did not necessarily "extinguish" the rights of the Aboriginal peoples but rather that such rights and interests co-existed.

It should come as no surprise that the federal government, non-indigenous landowners and pastoral leaseholders moved swiftly and decisively to legislatively unravel the Court's decision through amendments to the Native Title Act. These politically charged developments were further exacerbated by the media fanning the flames on all sides. In response, Australian Aboriginal and Torres Strait Islander peoples used a human rights treaty body, the Committee on the Elimination of Racial Discrimination (CERD), invoking the Early Warning Urgent Action procedure to draw attention to the discriminatory actions of the government. The indigenous peoples concerned relied upon the Australian Racial Discrimination Act of 1975 and, also, the human rights standards of the (then draft) Declaration and the International Convention on the Elimination of All Forms of Racial Discrimination (amongst others) to advance their arguments.<sup>11</sup>

## Human rights complaints and domestic litigation

A number of recent regional and domestic developments are also indicative of the reach of the international indigenous human rights standards, beyond the scope of the UN.

The decision of the Inter-American Court of Human Rights in the *Case of the Mayagna (Sumo) Awas Tingni Community vs. Nicaragua*, affirming the rights of the indigenous peoples in Nicaragua, is significant.<sup>12</sup> The Court's attention was drawn not only to the relevant provisions of the American Convention on Human Rights and the American Declaration of the Rights and Duties of Man but also to the provisions of the International Labour Organization's Convention 169 on Indigenous and Tribal Peoples (ILO Convention 169),<sup>13</sup> the OAS Proposed American Declaration on the Rights of Indigenous Peoples,<sup>14</sup> as well as the then draft Declaration. Reliance on draft and emerging declarations to inform the Court about the distinct relationship and rights of indigenous peoples in relation to their lands, territories and resources sets a good precedent. With the Declaration now adopted, its potential to influence the outcome of the OAS processes has been improved, meaning that there is now good reason to focus energies on the resolution of indigenous peoples' claims.

Such cases illustrate the importance of the international human rights framework. This international work has resulted in the creation of important tools and mechanisms by which indigenous peoples can advance their rights and, more importantly, their worldviews and perspectives. The possibilities for using the standards in judicial institutions, legislation, negotiation, public policy and law reform cannot be underestimated.

Possibly more important than these formalistic developments, however, is the work that indigenous peoples are doing within their own communities, amongst their own peoples. This grassroots work is a reflection of the synergy that is needed to breathe life into the Declaration and other documents that are emerging internationally, such as the OAS Proposed American Declaration and the standards being developed at the World Intellectual Property Organization.

Other examples of domestic litigation where legal counsel has invoked international indigenous human rights standards have emerged in Canada. For example, in the Gitksan-Wet'suwet'en case in north-west British Columbia, indigenous parties invoked international law and referred to ILO Convention 169 and the then draft Declaration in support of their claims to ownership and jurisdiction of their traditional territories.<sup>15</sup> *Mitchell v. M.N.R.*<sup>16</sup> also examined whether Akwesasne Mohawks had the right to bring goods into Canada from the U.S. without being subject to customs duties, based upon the cross- or trans-boundary language of the international instruments. Another recent example was the *R. v. Powley* case,<sup>17</sup> which involved the hunting and fishing rights of two Metis indi-



viduals in Ontario. Here, again, the indigenous peoples applied the relevant text of the original draft Declaration concerning Metis as a distinct people. In addition, the Grand Council of the Cree, in both its submissions to the Court on the Quebec Secession Reference,<sup>18</sup> also extensively invoked international indigenous human rights standards.

## **Indigenous community-based work**

There are clearly numerous examples of indigenous community-based work being undertaken worldwide. However the specific examples highlighted here include a number of important, “bottom up” initiatives in Alaska.

The first example is that of the Yukon River Inter-Tribal Watershed Council (YRITWC). The YRITWC is an initiative that emerged in 1996 involving over 42 Athabaskan, Yupik and Tlingit indigenous communities living from the headwaters of the Yukon River (in Yukon Territory, Canada) up to the mouth of the river in south-west Alaska, a 2,300 mile watershed, with the objective of protecting the watershed. An important distinction regarding this indigenous-led initiative is that it was conceived of by and for indigenous peoples themselves and was not in response to a real or perceived threat. The Tribes and First Nations of the watershed began with a conference that brought all the indigenous peoples and leaders from the river together to meet one another and discuss their visions for watershed protection. It was determined that an international treaty would be the first step, in order to define the objectives of the Council and goals of the Tribes and First Nations. The Inter-Tribal Treaty was adopted in 2001,<sup>19</sup> and both the treaty and the work of the Council incorporate many of the important principles that emerged in the Declaration. The YRITWC is currently focusing on water pollution and toxic products and they began a water sampling and analysis program last year. They intend to consider long-term management and assertion of control and ownership issues in the future, however. Due to the threat of mining on the Canadian side of the border and its impact on the U.S. side, the YRITWC has also been involved in the International Joint Commission (on waterways).

Similar to the YRITWC, a number of Tribes (in Alaska) and First Nations (in Canada) have signed an agreement to establish an Inter-Tribal Pipeline Commission. This initiative stems from the unsuccessful efforts of the traditional government of Stevens Village in the Yukon River Flats to gain the ear of oil industry with regard to their concerns about the Trans-Alaska Pipeline encroaching onto their ancestral territory. The Athabaskan peoples are not only concerned about the potential for oil pollution but also the fact that they are receiving no compensation for the intrusion that the pipeline is causing. The Inter-Tribal Pipeline Commission intends to monitor developments related to the existing pipeline and a proposed gas pipeline which may also cut across their territories. Here,

again, the Agreement draws upon international standards concerning land rights, environmental protection, the right to determine development priorities and just compensation in the event of environmental degradation.

With regard to indigenous justice systems, a number of promising and unprecedented initiatives have been led by three distinct Tribal Courts in the southwest, south-eastern and Arctic slope regions of Alaska. The first is that of the Orutsararmiut Native Council (ONC), the traditional indigenous government in the village of Bethel, Alaska. The ONC has developed the Mikilgnurnun Alirkutait or Tribal Children's Code to safeguard the most vulnerable sector of their society: their children. The ONC took on the task of developing the code by first establishing their long-standing Yupik values, customs and practices, or Yupik customary law, as the foundation for the Code. They followed by reviewing domestic laws and regulations, including the Indian Child Welfare Act, and borrowed what they deemed useful from this text. They also found out about the international indigenous human rights movement and chose to incorporate not only provisions from the then draft Declaration but also from the United Nations Convention on the Rights of the Child (CRC).<sup>20</sup> The final code was adopted by the Council and completely translated into the Yupik dialect. It is now used on a daily basis by the ONC Tribal Court.<sup>21</sup>

The project in south-east Alaska involves the Sitka Tribe of Alaska (STA) and their Tribal Court, which initiated a series of interviews with tribal elders about child custody practices and traditions with the aim of producing a code that would assist children at high risk of drug and alcohol abuse. Like the ONC, the Tribal Court coordinator used the values, practices, customs and traditions of the Tlingit peoples to establish the foundations for the remaining work, which incorporated the international standards contained in both the draft Declaration and the CRC. The project in Barrow, on Alaska's Arctic slope, is similar to the above two initiatives. The Barrow Tribal Court is, however, developing an appellate court based upon the traditions of its whaling culture. Other tribes have considered the development of tribal codes that deal with intellectual property in an effort to safeguard themselves from exploitation by outside developers and pharmaceutical companies, also using international instruments as a reference point.

Tribal governments have taken on some of the outstanding issues of the Alaska Native Claims Settlement Act of 1971 (ANCSA). In 1993, the Alaska Inter-Tribal Council (AITC) was organized and modeled along the lines of the Arizona Inter-Tribal Council. This state-wide organization has been engaged in a number of initiatives to resolve any uncertainties in the State of Alaska's recognition of tribes. For example, in the area of policy development, tribal leaders infused the government-to-government dialogue that followed the Venetie decision with the language of the Declaration, which resulted in the adoption of Administrative Order No. 186 acknowledging the existence of Tribes in Alaska and their distinct

legal and political authority,<sup>22</sup> and also the adoption of the *Millennium Agreement* in April 2001 by both tribal governments and the State Executive branch.<sup>23</sup>

Prior to the year-long dialogue with the State of Alaska, tribal governments discussed their strategy and approach for gaining an agreement that would have genuine meaning within their communities and for their relations with the State of Alaska. One of the first actions was the adoption of a Declaration of Fundamental Principles to guide the work and also to put the State on notice as to the principles that the indigenous peoples of Alaska felt were fundamental to their continued existence as distinct collectivities. This Declaration of Fundamental Principles provided essential procedural, as well as substantive, guidelines for the dialogue with the State. As a result of the tribal leaders' actions, the final *Millennium Agreement* echoes some of the language of the then draft Declaration, albeit adapted to this specific context. Part III entitled "Guiding Principles" states specifically:

*The following guiding principles shall facilitate the development of government-to-government relationships between the Tribes and the State of Alaska:*

- a. *The Tribes have the right to self-governance and self-determination. The Tribes have the right to determine their own political structures and to select their Tribal representatives in accordance with their respective Tribal constitutions, customs, traditions, and laws.*
- b. *The government-to-government relationships between the State of Alaska and the Tribes shall be predicated on equal dignity, mutual respect, and free and informed consent.*
- c. *As a matter of courtesy between governments, the State of Alaska and the Tribes agree to inform one another, at the earliest opportunity, of matters or proposed actions that may significantly affect the other.*
- d. *The parties have the right to determine their own relationships in a spirit of peaceful co-existence, mutual respect, and understanding.*
- e. *In the exercise of their respective political authority, the parties will respect fundamental human rights and freedoms.<sup>24</sup>*

In addition, tribal government councils have voted to abolish the state-chartered city governments. They have also transferred assets from the village corporations created by ANCSA to the tribal governments. Furthermore, they have found creative ways to pool resources without triggering "dissenters' rights".

The ANCSA needs to be addressed comprehensively and in a manner that is consistent with international human rights law. A careful analysis of ANCSA against international human rights standards would immediately bring out inconsistencies between domestic United States' policy and international norms. A primary example is the purported "extinguishment" of the hunting and fishing

rights of Alaska Native peoples. Here, even though Article 1(2) of the International Covenants,<sup>25</sup> adopted in 1966, states that “[i]n no case may a people be deprived of its own means of subsistence”, the United States Congress, in 1971, “extinguished” these specific rights. The fundamental right to participate in decision-making, consent, inter-generational rights, development and a wide range of other rights has been violated by the terms of ANCSA. However, the denial of the paramount right to self-determination and self-government has been most destructive to the indigenous communities of Alaska. The Declaration therefore stands as an important document for Alaska Native peoples, including my people. Through the Declaration, we can begin to right the wrongs of ANCSA and other destructive laws, regulations and policies.

Too often, indigenous leaders are consumed with the day-to-day and more urgent issues facing their communities and have little time to consider activities taking place far away in Geneva. Some, too, ask, quite legitimately, what is the point of this work, especially in the light of over 20 years of annual meetings discussing language that still remains “indigestible” to some state government representatives. This has also been asked by indigenous peoples who have been exercising, and continue to exercise, the right to self-determination and who view themselves as independent despite states having grown up around them and attempted to assimilate and subsume them. These are important questions for those who have been intimately involved in the process. In some instances, indigenous representatives have been able to respond in a direct, proactive and concrete fashion by utilizing and giving greater meaning to the Declaration in order to safeguard and advance the political right to self-determination, as well as other economic, social, cultural and spiritual rights.

In terms of policy development, the use of the Declaration’s provisions by Alaska Native tribal governments in their government-to-government negotiations with the state is an example of how the Declaration has been used to re-define political and legal relationships between local governments and indigenous governments. Certainly, other policy development examples abound in other regions of the world.

Each of these projects reflects the development of new regimes based upon indigenous values and the adaptation of the human rights framework and standards of the UN to their particular cultural context. Another approach is that of First Nations and Tribal Governments, as legitimate political institutions, adopting the Declaration and various other international human rights instruments within their own communities, making them applicable to their own members. So, not only are indigenous peoples incorporating such standards, they are moving to ratify them in the way that nation states ratify the various conventions that emerge from the human rights framework.

More often than not, indigenous peoples have had to make adjustments to UN human rights standards so that they adequately respond to their particular

cultural context. For example, within indigenous justice systems, there is more of an emphasis upon duties, obligations and responsibilities within these collectivities rather than rights. Kinship, moiety and relationships are emphasized as distinct from a model where people deal with one another as strangers. Another distinct dimension is the direct and intimate linkage between the natural world, spirituality and collective relations, which stands in contrast to the separation of religion and governance. Other inconsistencies can arise in the area of equal protection or equal application of the rule of law, such as the duties and responsibilities of women and men, which do not neatly translate for indigenous communities.

Finally, it is important to mention the impact that indigenous peoples have had on the international processes themselves. As noted previously, indigenous peoples' methods for dialogue and decision-making have had a direct influence on the procedures of the WGIP, the Commission on Human Rights Working Group and the Human Rights Council. In the early days, indigenous peoples were gaveled for speaking in their own languages, singing, offering prayers to the Creator, or any other demonstration of their cultural heritage. In contrast, it is now much more common for such events and ceremonies to form part of the agenda of a United Nations gathering involving indigenous peoples. Even the most recent session of the EMRIP was opened by a Navajo who uttered a prayer in Navajo at the request of the indigenous Chairperson.

Indigenous peoples are constructively turning the tables, at home, nationally and internationally. Generally speaking, the rights of indigenous peoples have been repeatedly violated, challenged or opposed, despite the fiduciary and other obligations of states. In the North and elsewhere, we have faced a constant state-driven agenda seemingly designed to diminish the status and rights of indigenous peoples. The courts, as well as government policy and decision-makers, demand that indigenous peoples prove every right against much more powerful political, legal and economic forces. Indigenous peoples are immediately at a disadvantage in their efforts to meet such burden of proof, whether it is because of the attitudes we face or the lack of access and resources with which to make our case. In contrast, the constitutional and human rights of others are safeguarded and upheld, and even advanced, allowing individuals to do a wide range of things that are regarded as luxuries to those of us fighting for our basic survival.

The burden of proof should therefore be upon those who question the legitimacy of indigenous societies and indigenous perceptions, perspectives and understandings of legal order, which have pre-existed and have been adapted to fit the various circumstances, conditions, contact with others and periods of time.<sup>26</sup>

Furthermore, without the inclusion of indigenous peoples' distinct perspectives, it will remain difficult for indigenous peoples to achieve lasting, peaceful relationships with other peoples –relationships based upon equality, mutual understanding and the genuine exercise of self-determination. Indigenous legal

perspectives have always existed.<sup>27</sup> In the past, indigenous peoples' thoughts focused more on relationships; their relationships with each other and to all other beings and things.<sup>28</sup> However, since the time of contact, indigenous peoples have attempted to articulate their worldviews, perceptions and values, or their legal theory, to ensure their survival. And yet indigenous peoples' views and demands have gone largely unheeded. As stated at the outset, indigenous peoples have succeeded in their efforts to "redefine the terms of their survival in international law".<sup>29</sup> Yet on the domestic level, few opportunities exist for indigenous peoples to actually be listened to, let alone heard by others.

Internationally, indigenous peoples have attempted to elaborate upon, and provide a cultural context in which to gain respect for and recognition of, their indigenous legal perspectives. Scholar Robert A. Williams further cites Vitoria's notion of the "universal character" of the Law of Nations, who believed that it was "clearly capable of conferring rights and creating obligations" through the "consensus of the greater part of the whole world, especially on behalf of the common good of all".<sup>30</sup> Again, if international law is to be universal, it must include indigenous legal perspectives and indigenous cultures.

## Human rights education

The success of the Declaration largely depends on the extent to which human rights concepts are understood by those in a position to right wrongs. Erica Irene A. Daes recently remarked that everyone needs human rights education. In relation to indigenous peoples, do states need to be educated? Would an increase in knowledge of human rights make the powerful more sensitive and responsive to indigenous communities? Is there value in indigenous peoples providing human rights education within their home communities?

For example, there are a number of fundamental questions concerning the right of self-determination. Who constitutes the "self" in self-determination? Who are indigenous peoples? What constitutes an indigenous nation? Who are the beneficiaries of the political, collective right to self-determination? Do indigenous peoples view themselves as one or are they many nations? And, furthermore, who are the members of the indigenous nation or nations and how do they operate within their nation or respective nations and homelands? How do they function in terms of the internal dimension of self-determination? What about external elements, as well as coordination with entities such as the indigenous non-governmental organizations, whose legitimacy of representation has never been critically analyzed or questioned.

Are human rights concepts and the content of the collective and individual human rights known and understood by the people who assert self-determination? Are human rights concepts integrated in the community? Such human

rights education seems important to ensure that the right of self-determination has real meaning or real effect on the ground, at the grass roots level. For example, see Article 29 of the CRC:

*Article 29*

1. States Parties agree that the education of the child shall be directed to:

[...]

(b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;

[...]

Another important example of the need for human rights education can be seen in the recently concluded UN Decade for Human Rights Education (1995-2004):<sup>31</sup>

*The World Conference on Human Rights in the Vienna Declaration and Programme of Action (1993) stated that human rights education, training and public information were essential for the promotion and achievement of stable and harmonious relations among communities and for fostering mutual understanding, tolerance and peace. The Conference recommended that States should strive to eradicate illiteracy and should direct education towards the full development of the human personality and the strengthening of respect for human rights and fundamental freedoms. It called on all States and institutions to include human rights, humanitarian law, democracy and rule of law as subjects in the curricula of all learning institutions in formal and non-formal settings.*

How do we promote human rights education as a tool for capacity building within indigenous communities? I believe that the key is dialogue, both within indigenous communities and with state governments. Even dialogue over whether such human rights education is necessary. In accordance with the Declaration, it is critical to ensure the effective and direct participation of indigenous peoples in any human rights education programs. Such an approach is consistent with human rights standards and, in particular, the right of self-determination. There are a range of models and opportunities through which to promote human rights education. As a minimum, indigenous peoples, at the community level, should take the time to read the Declaration and become familiar with its meaning as it applies to their particular, distinct context and begin to dream of a world that “might some day be”.<sup>32</sup> ○



## Notes

- 1 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 2 **Margaret Wise Brown**. 1950. *The Dream Book: First Comes the Dream*. (Berkeley: Hopscotch Press).
- 3 **S. James Anaya and Siegfried Weissner**. “The UN Declaration on the Rights of Indigenous Peoples: Towards re-empowerment” at <http://www.law.arizona.edu/news/Press/2007/Anaya100307.pdf> (last accessed 28 October 2009).
- 4 **Robert A Williams**. 1990. “Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World” 660 Duke L.J.
- 5 **S. James Anaya and S Weissner**. above n 3.
- 6 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities “Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples” UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 7 *Western Sahara case*, Advisory Opinion ICJ 12 (16 October 1975).
- 8 *Mabo v. State of Queensland*, (No. 2) (1992) 175 CLR 1 FC.
- 9 *Ibid.*
- 10 *The Wik Peoples v. The State of Queensland & Ors* (1996) 134 ALR 637; *Thayorre People v. The State of Queensland & Ors* (1996) 141 ALR. The Wik peoples and the Thayorre people argued that their native title was not extinguished by the granting of the leases but rather coexisted with the interests of the lessees. The High Court held that the granting of the relevant leases did not confer exclusive possession of the land under lease on the lessees. The relevant intention to extinguish all native title rights which subsisted when the grants were made was not present. The granting of the leases did not, therefore, effect the necessary extinguishment of *all* incidences of native title enjoyed by the Wik and Thayorre peoples.
- 11 UN Committee on the Elimination of Racial Discrimination “Decision 1(53): Australia” UN Doc A/53/18 (11 August 1998) para 22; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, 660 UNTS 195, entered into force 4 January 1969.
- 12 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 Arizona J Int’l and Comp Law 395).
- 13 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991.
- 14 The latest version of the draft American Declaration is found in *Registro del estado actual del proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas (Resultados de las Diez Reuniones de Negociación para la Búsqueda de Consensos celebradas por el Grupo de Trabajo)*, OAS Doc. GT/DADIN/doc.301/07 (27 April 2007).
- 15 See **Moana Jackson**. 1995. “Aboriginal Rights in Litigation and International Law: the Gitksan-Wet’suwet’en Case” in *Conference papers, Aboriginal Peoples in the Canadian Constitutional Context: Application of International Law Standards and Comparative Law Models* (Montreal: Canadian Bar Association).
- 16 *Mitchell v. M.N.R.*, [2001] 1 S.C.R. 911, which took into consideration the following relevant articles: *Draft of the Inter-American Declaration on the Rights of Indigenous Peoples*. Inter-American Commission on Human Rights, 18 September 1995, Art. 24; Draft United Nations Declaration on the Rights of Indigenous Peoples, above n 6; and ILO Convention 169 above n 13.
- 17 *R. v. Powley*, [1999] 1 C.N.L.R. 153.
- 18 *Quebec Secession Reference* [1998] 2 S CR 217.
- 19 *Yukon River Watershed Inter-Tribal Accord*, adopted on 9 August 9 2001 by 35 Tribes and First Nations. On file with author.
- 20 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990.

- 21 1 Orutsararmiut Nakmitlait Tsiulekagtailu Mikilgnurnun Alirkutit, [Title 1, Orutsararmiut Native Council Children's Code], 1999.
- 22 Administrative Order No. 186, 29 September 2000, Office of the Governor, State of Alaska.
- 23 *Millennium Agreement between Federally Recognized Tribes of Alaska and the State of Alaska*, 11 April 2001. Subsequently ratified by 63 Alaska Native Tribal Governments.
- 24 *Ibid*, Part III Guiding Principles.
- 25 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976; and International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976.
- 26 With regard to Aboriginal title, see **Kent McNeil**. 1999. "The Onus of Proof of Aboriginal Title" 37 *Osgoode Hall LJ*, 775, where the author argues that indigenous peoples should be able to rely on present or past possession to raise a presumption of Aboriginal title, and so shift the burden onto the Crown to prove its own title.
- 27 **H. Napoleon**. 1991. *Yuuyaraq: the Way of the Human Being* (Fairbanks: University of Alaska Fairbanks Press), 4: "Prior to the arrival of Western people, the Yup'ik were alone in their riverine and Bering Sea homeland—they and the spirit beings that made things the way they were. Within this homeland they were free and secure. They were ruled by the customs, traditions and spiritual beliefs of their people, and shaped by these and their environment: the tundra, the river and the Bering Sea. Their world was complete; it was a very old world. They called it Yuuyaraq, "the way of the being a human being". Although unwritten, this way can be compared to Mosaic law because it governed all aspects of a human being's life. It defined the correct behavior between parents and children, grandparents and grandchildren, mothers-in-law and daughters and sons-in-law. It defined the correct behavior between cousins (there were many cousins living together in a village). It determined which members of the community could talk with each other and which members could tease each other. It defined acceptable behavior for all members of the community. It outlined the protocol for every and any situation that human beings might find themselves in."
- 28 *Ibid*, 5: "Yuuyaraq defined the correct way of thinking and speaking about all living things, especially the great sea and land mammals on which the Yup'ik relied for food, clothing, shelter, tools, kayaks, and other essentials. These great creatures were sensitive; they were able to understand human conversations, and they demanded and received respect."
- 29 **Robert A Williams**. above n 4.
- 30 **Robert A Williams, Jr.** 1990. *The American Indian in Western Legal Thought* (New York: Oxford Publishing).
- 31 "Report of the United Nations High Commissioner for Human Rights on the implementation of the Plan of Action for the United Nations Decade for Human Rights Education" UN Doc A/51/506/Add.1 (12 December 1996), para 1.
- 32 **M. Wise Brown**. *The Dream Book*, above n 2.



# THE LEGITIMACY OF THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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Claire Charters\*

## Introduction

On the 2008 International Day of the World's Indigenous Peoples, the Office of the High Commissioner for Human Rights (OHCHR) and the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR on Indigenous Peoples) commented on the gap between indigenous peoples' rights loftily expressed at international level and indigenous peoples' experiences at the grass-roots level. They stated:

*the adoption of the Declaration [...] – important though it was – will not in itself change the everyday lives of men, women and children whose rights it champions. For this we need the political commitment of states, international cooperation, and the support and goodwill of the public at large, to create and implement a range of intensely political programmes, designed and undertaken in consultation with indigenous peoples themselves.*<sup>1</sup>

This paper suggests that the greater the perception of the Declaration on the Rights of Indigenous Peoples' (the Declaration) legitimacy, the greater the likelihood that states will give effect to its provisions.<sup>2</sup> Drawing on contemporary international relations and international legal scholarship, I argue, in turn, that the degree of an international instrument's legitimacy depends on three primary factors, namely the quality of the *processes* from which it has sprung, the justice inherent in its *content*, and the extent to which international actors, be they individuals, civil society, trans-national corporations, states, indigenous peoples and so on, *engage* with it. Strategies to stimulate implementation of the Declaration should include raising the perception of the legitimacy of the Declaration, by highlighting, for example, the openness of the fora in which it was negotiated,

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the sophistication of those negotiations and the merits of the Declaration's content. On this latter point, it is highly relevant that the Declaration goes some way towards mitigating international law's historical and Euro-centric bias against indigenous peoples and, also, clarifies the content of the body of law that is indigenous peoples' rights. Indigenous peoples can have the greatest impact on the legitimacy of the Declaration by encouraging, and in some cases forcing, engagement with it. For example, simply by framing issues in the legal language of the Declaration, where this is possible and appropriate, can improve its visibility and entrench it in the world's political and legal psyches in the longer term.<sup>3</sup>

This paper does not provide a complete picture of the difficulties involved in implementing the Declaration. Nor does it suggest that legitimacy enhancement is the only vehicle available to enhance implementation of the Declaration. There are other stimuli that can also positively influence states' compliance with the Declaration, such as self-interest. The hope, here, is simply to illustrate that the legitimacy of the Declaration, reflected in the processes leading to the Declaration's adoption, the Declaration's content and engagement with it, will impact on compliance with it and, in the end, indigenous peoples' enjoyment of the rights expressed within it.

## Legitimacy

Legitimacy is defined, for the purposes this paper, as the quality in international norms that leads states to internalise a pull to voluntarily and habitually obey those norms, even when it is not necessarily in their interests to obey and despite the lack of a sovereign or sanction for failure to comply. The essence of legitimacy is the reason why, in Louis Henkin's terms,<sup>4</sup> states obey international law most of the time even when it is not in their direct or obvious self-interest to do so and there are few, if any, hard sanctions or costs associated with disobedience. This definition is akin to that advanced by Thomas Franck,<sup>5</sup> but also draws on other elements such as the need for the "pull" to be internalised – automatic, reflexive – by states, of which Harold H Koh makes much.<sup>6</sup> Internalisation has a subjective quality: that states *believe* they should comply.<sup>7</sup>

As mentioned, I isolate three types of legitimacy that, especially when they are all present together, can produce the quality necessary to lead states to voluntarily and habitually obey international legal norms. First, the legitimacy of norms is increased if the processes leading to their establishment, or to their interpretation, are formalised, transparent, ordered and established. Boyle and Chinkin state, "[p]rocess is an essential element to law-making. It provides limits to arbitrary power."<sup>8</sup> Similarly, the normative pull of law increases if the processes from which it springs are open to those most affected by them.<sup>9</sup> Second, content legitimacy refers to the authority that attaches to a norm because of its

substance. This includes: its fairness; the extent to which it is inspired by a defensible vision of justice; its coherence, also known as its consistency with the principles of the legal system as a whole; and determinacy - the quality that makes a norm's meaning clear and transparent.<sup>10</sup>

Third, legitimacy arises from institutional, state, judicial, non-state actors' and individuals' engagement with norms. As a result of interaction with norms – their persistent application to issues at hand – the norms become “normalised”, like second nature. As mentioned above, this is the most promising of the legitimacy types in the sense that it can justify and, hopefully, galvanise indigenous peoples and others to compel states to engage with the Declaration by framing their arguments in terms of its stated rights and freedoms.

Notably, the theories of legitimacy discussed here are not specifically indigenous in their genesis or their evolution. Indeed, they are more commonly discussed in mainstream international legal literature, and reflect differing perceptions of the law, from positivism to critical and natural law visions.<sup>11</sup> However, in some cases, legitimacy is the only obvious explanation for compliance with customary law, especially where formal sanctions for non-compliance do not exist and where the relevant indigenous group does not have a law-enforcing entity akin to a sovereign.

## **The declaration and procedural legitimacy**

### **Institutionalised, established, transparent and ordered law-making procedure**

The process from which the Declaration sprang was institutionalised, established, transparent and ordered and, as discussed in the next section, also allowed for the inclusion of indigenous peoples. The formality associated with the law-making process lends the Declaration legitimacy; the more structured, transparent, institutionalised and established it is, the less prone it is to political whim, and the greater the attachment of “legal” character to the norms. Further, the time taken to complete the negotiations on the Declaration is also legitimacy-positive – the greater the time for law-making, the more considered and robust the process can be. The Declaration was subjected to in excess of 25 years of law-making process, passing through no less than six UN institutions, and procedures, before it was adopted on 13 September 2007.

The institutional pedigree of the Declaration, and the authorisation for its development are clear. As explained by Daes in her chapter in this book, the initial drafting of the Declaration occurred in the Working Group on Indigenous Populations (WGIP). The WGIP was established by the UN Economic and Social Council (ECOSOC), one of the six principal UN organisations established under the UN Charter, and made up of states.<sup>12</sup> The WGIP was made up of independent

experts from the Sub-Commission on the Promotion and Protection of Human Rights (the Sub-Commission) from the UN's five geo-political regions, ensuring regional balance.<sup>13</sup> Its mandate included the drafting of standards relating to the recognition, promotion and protection of the rights and freedoms of the world's indigenous peoples.<sup>14</sup> It required the ordered participation of both states and indigenous peoples in its drafting of the Declaration, and was highly transparent, with annual reporting and openness to all those with an interest in contributing.<sup>15</sup> The draft Declaration as agreed to in the WGIP was then adopted by the Sub-Commission as a whole,<sup>16</sup> receiving the approval of some of the UN's highest standing and independent human rights experts, thereby furnishing the procedure with even greater institutional and moral legitimacy.

Proceeding up the UN's human rights institutional structures, the Commission on Human Rights, made up of states, then established an ad hoc intersessional working group to elaborate on the draft Declaration (the WGDD).<sup>17</sup> The WGDD provided the most legitimate of procedures for elaborating on the Declaration. Participants met within an institutional structure endorsed and established by the UN's then principal human rights organ. It was transparent in that its proceedings were open to those interested and reported upon by the OHCHR, eventually made available on the Internet. The WGDD procedures were strictly managed by the various chairs of the WGDD, with invaluable OHCHR bureaucratic support. Indeed, the meetings were run like a tight ship. All were invited to speak who attended, providing a sense of fairness; the *modus operandi* of the WGDD was transparent. As will be discussed below, participation was open to all states and indigenous peoples as well as to human rights non-governmental organisations, academics and media. Simultaneous interpretation was provided, ensuring understanding across cultures.<sup>18</sup> In the finish, consensus was reached on the vast majority of the provisions in the version of the Declaration that was submitted, and then adopted, by the Human Rights Council. While consensus was not reached on some articles, it was close, and the then Chair of the WGDD gave his best effort to find the best compromise between the various positions of states and indigenous peoples, as is discussed by Chávez in his chapter in this book.

By the time the draft Declaration, as finalised by the Chair of the WGDD, was ready to proceed to the Commission on Human Rights, the Human Rights Council had replaced the Commission on Human Rights. The draft Declaration was addressed in that forum, and then adopted, albeit not by consensus, during its first session.<sup>19</sup> The Human Rights Council's endorsement of the Declaration was significant for the Declaration's legitimacy not least because: the Human Rights Council is positioned in a higher position than the former Commission on Human Rights within the UN infrastructure (unlike the Commission on Human Rights, which reported to the ECOSOC, the Human Rights Council reports directly to the UN General Assembly (UNGA)); it was only the second human rights instrument adopted by the Human Rights Council; the process was robust, with time for ob-



servations and explanations by states in particular, but also indigenous peoples; and transparency was high, with simultaneous webcasting of the vote.

Some procedural uncertainty attached to the Declaration in its progression from the Human Rights Council to the UNGA. However, this was not because of the Declaration *per se*. Instead, it was a result of there being no clear guidelines, and no precedent, due to the Human Rights Council's recent establishment, as mentioned above, as to whether instruments adopted by the Human Rights Council should be sent directly to the UN General Assembly plenary or first pass via the UN General Assembly's Third Committee on social, cultural and humanitarian issues (the UNGA Third Committee).<sup>20</sup> In the finish, the Declaration passed through the UNGA Third Committee on its way to the UNGA plenary. Ultimately, this step further improved the Declaration's legitimacy as it increased the number of institutions that assessed the Declaration. Further, the UNGA Third Committee comprises all UN member states.

The UNGA's consideration of the Declaration also included some confusion in that many were uncertain, for at least a number of months in late 2006 and early 2007, as to how the UNGA might progress consideration of the Declaration and who had the authority to determine that process (as discussed by De Alba in this book). During that time, there were various ad hoc and un-choreographed attempts to advance the UNGA's consideration of the Declaration, including by those states that had concerns with the Declaration as adopted by the Human Rights Council, such as the African states,<sup>21</sup> Australia, Canada, Colombia, New Zealand, the Russian Federation and the United States of America.<sup>22</sup> In the finish, it was the UNGA's President who seized control by appointing a facilitator to oversee deliberations, thereby inserting, again, order to the UNGA's consideration of the Declaration. Within this process, and under the oversight of the UNGA's Chair, states, with indigenous peoples working alongside, formally, informally and with meetings, came together to iron out most of the remaining issues outstanding on the Declaration and adopt a few, mainly minor, amendments. The path was cleared for the UNGA's adoption of the Declaration by a vast majority of 143 states, only 4 voting against and 11 abstentions.

Despite some procedural opacity and uncertainty during the Declaration's time sitting in the UNGA, the legitimacy attaching to the Declaration as a result of the UNGA's ultimate adoption remains significant. The UNGA is the pinnacle UN institution in which all UN states can and do participate. States from all regions of the world were engaged in the adoption of the Declaration even if some, such as a few African states, arrived late to the table, as discussed by Kipuri in this book. Established procedural rules, such as allowing states the option to provide explanations of their votes before and after the vote, were followed. In addition, the Chair of the UNGA took special action to provide some infrastructure to the political negotiations that occurred in New York.

Other institutions also played a role in the drafting of the Declaration, lending further institutional support to the Declaration. For example, the UN Permanent Forum on Indigenous Issues (PFII), the International Labour Organization (ILO), and the SR on Indigenous Peoples all participated at various points by supporting the Declaration in their own reports or providing input into the WGDD negotiations.

## Open participation

Process legitimacy can also derive from open deliberative participation by all affected parties in law making, law interpretation and law application.<sup>23</sup> International law acquires authority through the inclusion of its subjects in the determination of the content of international law. In this way international law can explain and justify its normative demands. As Habermas has written,

*procedures and presuppositions of justification are themselves now the legitimating grounds on which the validity of legitimation is based. The idea of an agreement that comes to pass among all parties, as free and equal, determines the procedural type of legitimacy in modern times.*<sup>24</sup>

Tennant has stated, “[f]rom the perspective of international institutions of the UN period, it is a fundamental axiom that *the greater the participation by indigenous peoples in an institutional process, the more legitimate are the process and its results.*”<sup>25</sup>

The Declaration was, if anything, the result of processes open to participation of indigenous peoples. The very impetus for the Declaration, and the WGIP from where it originated, came from indigenous peoples, who pushed open the doors of the UN in 1977 and informed the authoritative Martínez Cobo *Study on the Problem of Discrimination Against Indigenous Populations*,<sup>26</sup> mandated in the early 1970s by the Sub-Commission.<sup>27</sup>

The WGIP and then, after some initial remonstrance by indigenous peoples, the WGDD have been the most open fora in the UN in terms of their accessibility to non-state actors.<sup>28</sup> Indigenous peoples received accreditation if they requested it, not requiring ECOSOC accreditation as is usual in other UN human rights institutions, and could then participate in much the same manner as states.<sup>29</sup> Indigenous peoples provided some of the first drafts of the declaration to the WGIP, which were seriously considered and incorporated by the WGIP’s Chair.<sup>30</sup> Some even view the Declaration submitted to the Sub-Commission by the WGIP as an agreement between indigenous peoples and the WGIP experts, not including states, highlighting the degree of influence that indigenous peoples had on the text.<sup>31</sup>

In turn, the Chair of the WGDD, when drafting his version of the Declaration submitted to the Human Rights Council, achieved near-consensus between the

states *and* all indigenous representatives participating. In fact, by the time the Chair's text of the Declaration reached the Human Rights Council, only a few states objected to the text; almost all indigenous peoples' representatives had joined the consensus, despite some earlier reluctance to agree to any changes to the text approved by the Sub-Commission. Thus, indigenous peoples had as much authority as states during the Declaration negotiations.<sup>32</sup>

To ensure an authoritative outcome, one in which even those who disagree can be expected to comply, it was important that competing views could be aired. On the importance of an adversarial process that allows the exchange of views, Habermas, in another article, writes,

*Even though [...] the adversary process of an open-ended exchange of competing arguments does not carry the promissory note of final agreement, the performance as such seems to create a kind of authority that explains why participants accept outcomes with which they disagree.*<sup>33</sup>

Different views were constantly expressed by states and indigenous peoples; states disagreed with other states, and, despite initial unity, some indigenous peoples also disagreed with some other indigenous peoples on the text of particular articles, right up to the end of the WGDD process. The important point was that all were heard and had the opportunity to persuade the other participants of the justice, logic and supremacy of their argument, over a period of eleven years and in a structured, respectful and formal setting in which all knew and followed the rules of the game. The text adopted by the Human Rights Council reflected fair compromises between these opinions.

Another legitimacy-enhancing result of the participation of indigenous peoples in law-making is that it can enhance the democratic value of the resulting instrument, enabling the expression and input of views that are otherwise not reflected in states' foreign policy positions.<sup>34</sup> By providing a space for non-state actors, the international law-making environment at the UN can function to give otherwise ignored or isolated voices a hearing.<sup>35</sup> It is especially important that an instrument addressing the rights of a marginalised group, such as indigenous peoples, should include the voices of that group.

In turn, the expression of views by "outsiders", such as indigenous peoples, can fundamentally shift the language spoken by the international fora and the outcome of the law-making negotiation processes. In the case of the Declaration, the languages spoken in the halls of the UN during its negotiations was not simply one of state-based concerns and prerogatives; they included the objectives and world-views of considerably different peoples, with different cultures. Knop describes the drafting of the Declaration as "responding significantly to the stories told by indigenous peoples about their place in the world and to their arguments about human rights that must be recognized for them to preserve this

place.”<sup>36</sup> The incorporation of outsiders’ views can also encourage far greater steps in the evolution of international law. It is fairly clear that, without the participation of indigenous peoples, the Declaration would have been considerably more conservative in content.<sup>37</sup>

This is not to say that there cannot be any criticism of the role played by indigenous peoples in the drafting of the Declaration, or that it was, as a practical matter, entirely open. First, there was no way to measure or monitor the representativeness of indigenous representatives:<sup>38</sup> their “credentials” were taken at face value; and it was more difficult, logistically and financially, for some indigenous peoples to attend meetings in expensive cities such as Geneva and New York when compared with other indigenous peoples.<sup>39</sup> Secondly, many African states claimed that they were unable to participate actively in the WGIP or the WGDD as their state budgets did not allow them to follow all issues in the same way that richer states could.<sup>40</sup>

Finally, indigenous peoples’ participation was much less, problematically so, when the Declaration was being considered at the UN in New York than when the Declaration was before the WGIP, the WGDD or the Human Rights Council. The UNGA was much less accommodating of indigenous peoples: ECOSOC accreditation was necessary to enter the UN building and indigenous peoples did not have the same working relationships with state delegations as they do in the Geneva setting. At no stage in New York, except perhaps in private meetings, did indigenous peoples have a formal status, or a speaking opportunity, equal to that of the states. What, however, “saved” the Declaration from a complete legitimacy crisis in terms of participation was the decision by some of the states supporting the Human Rights Council’s adopted version of the Declaration not to agree to any amendment to the Human Rights Council’s Declaration text without the endorsement of indigenous peoples. On the one hand, it was difficult for indigenous peoples to fully and freely criticise amendments proposed by supporting states and the African Group – they were told it would be X amendments or a considerably weaker Declaration, and had only a matter of days to consult with their peoples. On the other hand, it is probably true that the majority of indigenous peoples supported the final text as adopted by the UNGA. Further, these final participation difficulties must be assessed against the fact that indigenous peoples had been so active and powerful during the previous 25 years of Declaration drafting.

## **The declaration and substance legitimacy**

### **Fairness**

The idea of fairness in content as a source of legitimacy is especially discussed by Thomas Franck,<sup>41</sup> and is informed by a Rawlsian focus on distributive justice.<sup>42</sup>

Franck writes, “the perception that a rule or system of rules is distributively fair, like the perception of its legitimacy, also encourages voluntary compliance.”<sup>43</sup> The “fairness” ideal relates to concepts of equality and non-discrimination – that the law treats like alike. While the ideas are not incontestable,<sup>44</sup> there is something magnetically attractive about fairness and its legitimacy-enhancing character.

On the macro level, the Declaration enhances the fairness of international law by securing the place of indigenous peoples’ rights in international law, functioning, in turn, to reverse, or at least address, some of the injustice wrought against indigenous peoples under the guise of international law in the past.<sup>45</sup> This is perhaps best illustrated by the clear recognition in the Declaration that indigenous peoples are indeed peoples and, like other peoples, have the right to self-determination. In doing so, international law applies an ordinary interpretation of peoples,<sup>46</sup> and addresses the difficulty that it is logically non-sensical to recognise the right to self-determination for non-self-governing peoples but not indigenous peoples.

To some extent, the recognition of indigenous peoples’ self-determination reverses the discriminatory failure of international law to view indigenous peoples’ forms of political organization and control over their territories as giving rise to sovereignty, or something of equal value to it, under international law. Even if international law had become more inclusive of indigenous peoples prior to 2007, and had accepted legal consequences from occupation of territories occupied by non-European peoples,<sup>47</sup> it had not yet recognised their sovereign authority. Without attempting to address the differences between self-determination and sovereignty, it is clear that recognition of indigenous peoples’ right to self-determination addresses this discrimination to some degree.

Specific provisions in the Declaration seek to ensure that the law respects the human dignity of indigenous peoples as much as it does other individuals and peoples. The Declaration recognises strong indigenous peoples’ rights to their lands, including those traditionally owned, occupied or otherwise used or acquired. This is consistent with a line of jurisprudence at the international level that recognises indigenous peoples’ collectively held rights to land, in particular from the UN Committee on the Elimination of Racial Discrimination and before the Inter-American Human Rights Commission and Court respectively.<sup>48</sup> These cases illustrate that rights to property, rights to equality and rights to culture require equal recognition of indigenous peoples’ land rights.<sup>49</sup> In this way, by recognising indigenous peoples’ rights to land, the Declaration goes some distance towards improving the fairness of international law.

## Coherence

Finnemore writes,

*Normative claims become powerful and prevail by being persuasive; being persuasive means grounding claims in existing norms in ways that emphasize normative congruence and coherence. Persuasiveness and logical coherence of normative claims are important politically, but are essential and must be explicit in law.*<sup>50</sup>

Similarly, Ronald Dworkin makes the case for integrity in the law, a concept analogous to coherence as described above by Finnemore, which, he argues, can source an obligation to obey the law because it promotes the law's "moral authority to assume and deploy a monopoly of coercive force."<sup>51</sup>

Indigenous peoples' rights are not, as a whole, completely coherent in the sense that the conceptual premises on which they rest are varied and, at times, conflicting. This is a point explained by Kingsbury when he illustrates the tensions between justifications for indigenous peoples' claims based on, at various times, minority rights, human rights, self-determination, historical sovereignty and/or *sui generis* claims.<sup>52</sup> He concludes that the use of competing justifications is positive in that it provides an appropriate degree of flexibility to accommodate the various types of indigenous peoples' claims.

Further, there are "internal" tensions *within* the conceptual premises of any one of the Kingsbury categories, such as the portrayal of indigenous peoples' rights as human rights. There are excellent and convincing logical reasons for expanding human rights to cover collective rights also. There are some collective rights that some individuals need to equally experience human dignity and a full protection of their rights. Also, there is, in an indigenous world-view at least, an inherent value in the group that exceeds that of the sum total of the individuals that make it up. However, human rights have been premised, historically, on a Western liberal tradition that prioritises the individual over the group. While human rights have expanded to accommodate group rights, this tension continues to place a strain on any conceptualisation of indigenous peoples' rights as exclusively human rights.

It is not clear that the Declaration resolves the types of incoherence outlined above. In many ways, it may exacerbate them in the sense that the rights contained in it are different in quality and based on various, sometimes competing, justifications. Some of the Declaration's rights are clearly characteristic of human rights, such as an indigenous individual's right to life (article 7(1));<sup>53</sup> some are akin to rights normally associated with minorities' rights, such as rights to participate in the dominant political systems (article 19); some appear to be "*sui generis*", such as the rights to autonomy and self-government (article 4), language

that is uncommon elsewhere in international law; some are based on indigenous peoples' historical sovereignty, which justifies explicit rights to redress (article 28). This conceptual confusion must be seen in the light of the increasing proliferation of indigenous peoples' rights and institutions that apply them under international law generally; more and more institutions, from the World Bank to the World Intellectual Property Office (WIPO), are making and applying indigenous peoples' norms.

Despite all of the above, the Declaration does provide some coherence in that it wraps up indigenous peoples' rights into a group of rights. To the extent that there are differing justifications for indigenous peoples' rights, they are reflected here in an accessible and "tidy" way. It provides a degree of clarity to the question: what are indigenous peoples' rights? And it resolves some lingering questions, for example, that some collective rights are also human rights.

## Determinacy

Determinacy of norms is considered a strong indicator of a norm's legitimacy. Franck writes,

*Indeterminacy [...] has its costs. Indeterminate normative standards make it harder to know what conformity is expected, which in turn makes it easier to justify noncompliance. Conversely, the more determinate the standard, the more difficult it is to resist the pull of the rule towards compliance and to justify noncompliance. Since few persons or states wish to be perceived as acting in obvious violation of a generally recognised rule of conduct, they may try to resolve conflicts between the demands of a rule and their desire not to be fettered by "interpreting" the rule permissively. A less elastic determinate rule is more resistant to such an evasive strategy than an indeterminate one.*<sup>54</sup>

Franck describes determinacy as what makes a rule clear or transparent:

*It is usually achieved by a rule text's explicit statement of a boundary between the permissible and the impermissible, or by the designation of a process for clarifying, in a contested instance, the meaning of a rule. In other words, a rule that is vague may still be seen as quite legitimate if its application in given, contested instances, is open to a process that yields specificity.*<sup>55</sup>

Indeterminacy can also work against the implementation of indigenous peoples' rights. As noted by Falk, "the semantic confusion that is implicit in statist views of self-determination has been used to avoid confronting the actual situations of



either captive nations or even more insistently, the various lamentable situations of indigenous peoples.”<sup>56</sup>

It must be noted, however, that complete determinacy is neither possible nor necessarily desirable as it can stifle the type of evolutionary interpretation of international law that may be appropriate in some circumstances, and especially in the case of human rights.<sup>57</sup> It would also restrict the use of “constructive ambiguity” when international norms are being drafted, which is often necessary to ensure that there can be agreement on international norms.

The Declaration has particularly enhanced the determinacy of some norms as they apply to indigenous peoples, such as the right to self-determination. As Anaya has stated, “[i]n this post-Declaration era fewer questions revolve around the content of indigenous peoples’ rights, as the Declaration has gone a long way toward resolving these questions and stands as a representation of a worldwide consensus on the rights.”<sup>58</sup>

As is well documented, the meaning of self-determination is contested generally.<sup>59</sup> Further, many have commented on the difficulties in interpreting “peoples” as covering “indigenous peoples” and whether indigenous peoples should, or should not, be entitled, as a matter of law, to secede. However, some resolution has been achieved with the adoption of the Declaration. The meaning of an indigenous people’s right to self-determination is clear from the ordinary meaning of the Declaration itself when read in the light of the *travaux préparatoires*, the Declaration’s purpose and its context.<sup>60</sup> Article 3 states boldly that indigenous peoples have the right to self-determination meaning that, when the criteria for exercising a right to secession under international law are met, indigenous peoples have that right as a matter of law. As in other circumstances, this right is to be balanced against states’ right to their territorial integrity, as spelt out in article 46(1) and in states’ explanations of vote on the adoption of the Declaration.<sup>61</sup>

The Declaration continues on to clarify that, as one means to exercise self-determination, indigenous peoples have the “right to autonomy or self-government in matters relating to their internal or local affairs, as well as ways and means for financing their autonomous function” (article 4). The Declaration also makes it clear that there is an institutional component to indigenous peoples’ self-determination providing that they have the right to “maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, in the life of the State” (article 5), including in relation to subsistence and development activities (article 20). Article 23 states that “Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.” In a similar vein, indigenous peoples have the right to participate in matters affecting their rights as well as to “maintain and develop their own indigenous decision-making institu-

tions" (article 18). Importantly, under article 20, indigenous peoples have the right to a strong influence on the dominant political decision-making processes before measures are adopted that may affect them. They are entitled to consultation to obtain their free, prior and informed consent (article 19 and, in relation to lands, territories and other resources, article 32(2)). Similarly, "indigenous peoples have the right to determine their own identity and membership in accordance with their customs and traditions" (article 33).

## The declaration and engagement legitimacy

As explained above, engagement legitimacy describes the increase in a norm's authority deriving from interaction with that norm post its establishment, leading to an internalisation of the norm. Various types of engagement legitimacy are discussed here and considered in the context of the Declaration.

Engagement legitimacy is the most promising of the types of legitimacy in the sense that, of the three, it is the one that can increase over time *post* the adoption of norms, in this case the Declaration. It can also be positively influenced by non-state actors, such as indigenous peoples, who can force state interaction with norms, even when states would rather ignore them, or see them fall into disuse and irrelevance altogether.<sup>62</sup> Torres explains how norms arise in the context of indigenous peoples' rights in the international legal sphere, premised on engagement with them. She writes,

*A norm includes, and is largely determined by, the enunciation and recognition of a given set of standards by international bodies and agencies such as the United Nations. By examining the interactions among nondominant native groups, indigenous advocates, domestic governments, and international agencies, it is possible to discern whether interactions follow a particular pattern. If they do, a norm is emerging or has been established concerning the problems faced by indigenous populations.*<sup>63</sup>

## Knowledge of the norm

Knowledge of a norm can increase interaction with it, and subsequent internalisation. Greater awareness of norms can lead states, civil society, judicial and legal entities and individuals to consider it appropriate to engage with them – to justify and frame their consideration of issues in the light of those norms. Knowledge of a norm's existence can precipitate increasing and subsequent citation of it. Knowledge of the Declaration is, when one considers that it was only adopted recently in September 2007, high. The long process leading to its adoption, the

year-after-year negotiations, coupled with efforts by indigenous peoples to draw attention to it, has led to a relatively high level of consciousness of it, evidenced, for example, in domestic judicial cognisance of it.<sup>64</sup>

### **Socialisation and interaction, interpretation and internalisation**

Some schools of international relations and international law explain obedience with international norms through the impact they can have on socialising states to act in certain ways, such as constructivists. Constructivism holds that states can be socialized into obedience with international norms through their participation in world affairs, often in international institutional settings. Finnemore writes,

*States are embedded in dense networks of transnational and international social relations that shape their perceptions of the world and their role in that world. States are socialized to want certain things by the international society in which they and the people in them live.*<sup>65</sup>

And, “states are socialized to accept new norms, values and perceptions of interest by international organizations”,<sup>66</sup> meaning that international organizations “can change what states *want*”.<sup>67</sup> The process of socialization “is constitutive and generative, creating new interests and values for actors. It changes state action, not by constraining states with a given set of preferences from acting, but by changing their preferences.”<sup>68</sup> Under this approach, “compliance grows more fundamentally from techniques of persuasion resting on the power of norms.”<sup>69</sup> This view of compliance is more consistent with the British school of international society under which,

*Nations thus obey international rules not just because of sophisticated calculations about how compliance and noncompliance will affect their interests, but because repeated habit of obedience within a societal setting socializes them and re-makes their interests so that they come to value rule compliance.*<sup>70</sup>

On the other hand, Koh stresses the process of interaction, interpretation and internalisation of norms in creating incentives for states to obey international law. He highlights the role of both horizontal processes, intergovernmental action, and vertical relationships between domestic and international legal systems, coalescing around norms. He explains:

*One or more transnational actors provokes an interaction (or series of interactions) with another, which forces an interpretation or enunciation of the global*

*norm applicable to the situation. By doing so, the moving party seeks not simply to coerce the other party, but to internalise the new interpretation of the international norm into the other party's internal normative system. [...] The transaction generates a legal rule which will guide future transnational interactions between the parties; future transactions will further internalise the norms, and eventually, repeated participation in the process will help to reconstitute the interests and even the identities of the participants in the process.*<sup>71</sup>

Non-state actors play a central role in Koh's transnational legal process: "[a]s governmental and nongovernmental transnational actors repeatedly interact within the transnational legal process, they generate and interpret international norms and then seek to internalise those norms domestically."<sup>72</sup> Non-state actors can precipitate the interpretation of legal norms by forcing states to engage in the "fora available for norm-enunciation and elaboration".<sup>73</sup>

There are numerous ways in which indigenous peoples can enhance the legitimacy of the Declaration through encouraging and even ensuring that states interact with it, precipitating the process of interpretation and then internalisation. Generally, indigenous peoples can start by framing their issues in terms of the Declaration's rights and freedoms in political and legal initiatives. States will be required to engage with the Declaration when responding. On the international level, there are numerous venues in which to utilise language based on the Declaration. For example, when bringing communications to international human rights treaty bodies or the ILO monitoring mechanisms, or providing them with information to take into account in their reviews of states, indigenous peoples may comment on a state's compliance with the Declaration. While regional and international human rights treaty bodies and the ILO are not required to conform to or apply the Declaration, one could argue that, under the Vienna Convention on the Law of Treaties, it is relevant to their interpretation of human rights or ILO convention rights.<sup>74</sup> Also, international institutions should not, as a matter of good policy, apply standards that fall below those set by the UN's General Assembly. The SR on Indigenous Peoples has the specific mandate to promote the Declaration and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate.<sup>75</sup> Indigenous peoples, when communicating with him in relation to his mandate to hear complaints, to report on thematic issues or on country visits, have, under this Human Rights Council resolution, a sound legal basis on which to seek his commentary on a state's compliance with the Declaration.

Likewise, on the domestic level, indigenous peoples can propel state interaction with the Declaration, as was vividly illustrated in the Mayan case brought to the Supreme Court of Belize in *Cal & Ors v the Attorney General of Belize & Anor*.<sup>76</sup> On the impact of the Declaration, Conteh CJ had this to say:

*where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them. This Declaration [...] was adopted by an overwhelming number of 143 states in favour with only four states against with eleven abstentions. It is of some signal importance, in my view, that Belize voted in favour of this Declaration. And I find its Article 26 of especial resonance and relevance in the context of this case, reflecting, as I think it does, the growing consensus and the general principles of international law on Indigenous peoples and their lands and resources.<sup>77</sup>*

The Chief Justice concluded,

*I am therefore, of the view that this Declaration, embodying as it does, general principles of international law relating to Indigenous peoples and their lands and resources, is of such force that the [...] Government of Belize, will not disregard it.<sup>78</sup>*

Furthermore, indigenous peoples need not be confined to raising the Declaration in legal fora alone. It can become a language with which to express political claims also.

Engagement legitimacy can attach to norms even when states are reluctant to engage with those norms or reject them outright. For example, continuing its opposition to the Declaration, Canada argued forcefully for the inclusion of the words “where appropriate” at the end of the sentence in the resolution setting out the Special Rapporteur’s mandate requiring him to promote the Declaration.<sup>79</sup> Ironically, to achieve the inclusion of these words, Canada was forced to engage with the Declaration and to make a “spectacle” of the Declaration, making it appear to be of real importance. I would argue that Canada’s position here functioned, in the long run, to support the Declaration in that it forced all other states in favour of the Declaration to articulate their reasons for endorsing it once gain, and their attachment to the Declaration may have grown as a result. Further, indigenous peoples in Canada have worked well to lobby the Canadian Parliament to express its support for the Declaration domestically,<sup>80</sup> thus keeping it on the government’s agenda.

### **Institutional infrastructure, including mechanisms for dispute settlement**

The availability of mechanisms to resolve international legal disputes can enhance the legitimacy of norms in two ways: by providing tools to resolve indeterminacies in norms; and supplying venues in which relevant actors can interact on international legal issues. Institutional infrastructure includes mechanisms for dispute settlement and those responsible for policy development and service provision.

There is no dispute settlement mechanism associated with the Declaration, at least not in the same way that the UN human rights treaties also establish committees to monitor states' compliance with the treaties and the ILO has mechanisms to oversee compliance with its conventions. Nonetheless, as discussed by Rodríguez Pinero in this book, the international and regional human rights treaty bodies, and the ILO, should endeavour to interpret their conventions in the light of the Declaration, as they are required to do under the Vienna Convention on the Law of Treaties. The SR on Indigenous Peoples has, as mentioned above, the explicit mandate to promote the Declaration.<sup>81</sup>

States have clear obligations to promote respect for and application of the Declaration's provisions under article 42. In addition, under article 40,

*Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.*

Thus, if indigenous peoples' claims are framed in terms of state failures to comply with the Declaration, then domestic dispute settlement mechanisms have to take the Declaration into account also, at least as a matter of good practice and so as not to jeopardise the state's international political standing.

The Declaration itself provides for international institutional supervision and infrastructure to stimulate compliance with it. It places obligations on "the organs and specialized agencies UN system and other intergovernmental organizations" to contribute to,

*the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established (article 41).*

*The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration (article 42).*

The organs and specialized agencies of the UN, and other intergovernmental organisations, include a vast number of institutions such as the ILO, UNESCO, the WIPO, which is undertaking projects on indigenous peoples' traditional knowledge<sup>82</sup> and so on. By emphasizing and raising awareness of the Declaration when

conducting such activities, UN agencies and organs can influence states to conform to the Declaration when dealing with indigenous peoples' issues. The specialized agencies, such as the United Nations Development Program and the United Nations Development Fund for Women, can be highly instrumental in giving effect to indigenous peoples' rights as they are engaged in activities targeted to assist indigenous peoples on the ground including, for example, implementing policies related to indigenous peoples. This can only continue as the UN Inter-Agency Support Group on Indigenous Peoples continues to promote indigenous peoples' rights,<sup>83</sup> such as the ILO's good practice guide for the implementation of indigenous peoples' rights in the Declaration and ILO Convention No. 169 on Indigenous and Tribal Peoples,<sup>84</sup> and holds special meetings on the Declaration.<sup>85</sup> We also see evidence of expert UN bodies making use of the Declaration: the UN Expert Group on Indigenous Languages recommended that states,

*use the United Nations Declaration on the Rights of Indigenous Peoples and other relevant human rights standards as the basis to develop policies and laws related to the promotion and strengthening of Indigenous languages.*<sup>86</sup>

The Declaration specifies a role for the PFII to promote respect for and full application of the provisions of the Declaration. With that in mind, a PFII report recommends the establishment of a "Forum Committee" on the Declaration,<sup>87</sup> even suggesting that it take on some human rights state monitoring function. It states:

*Based on its experience, the Forum can carry the human rights message to the Governments in a variety of approaches. When the Forum receives an appeal for a specific case of a gross human rights violation, the Forum's Bureau could analyse the situation, in consultation with the Special Rapporteur on the human rights and fundamental freedoms of indigenous people, and, if it deems it appropriate, consider extending its good offices vis-à-vis a government appealing for correction of the situation. Other ways could include a mission to the country at the invitation of a government to ascertain the validity of the information received and to dialogue with the indigenous peoples concerned and with the relevant government bodies and officials. The authority of the Forum as the highest United Nations body in the area of indigenous issues would be well served by such approaches.*<sup>88</sup>

Undoubtedly, the recently-established UN Expert Mechanism on the Rights of Indigenous Peoples will build up jurisprudence related to the Declaration given that its mandate is specifically a human rights one and it reports to the UN's central human rights institution, the Human Rights Council.<sup>89</sup>



## Conclusion

This chapter has attempted to illustrate that, the greater the perception of its legitimacy, the more implementation of the Declaration will improve; legitimacy being defined as the quality in international norms that leads states to internalise a pull to voluntarily and habitually obey such norms, even when it is not necessarily in their interest to obey and despite a lack of sovereign or sanctions for a failure to comply. The concept of legitimacy is particularly important to explain, and galvanise, compliance with a formally non-legally-binding instrument such as the Declaration.

The Declaration is legitimate in three senses: it is a result of procedurally legitimate processes; its content is substantively fair and improves the coherence and determinacy of indigenous peoples' rights; and, finally, there has been substantial engagement with the Declaration. In particular, the 25-year plus negotiations that led to the Declaration, conducted in formal, transparent, established and institutionalised settings lend the Declaration enormous legitimacy, as does the openness of those processes. Indigenous peoples could participate at almost every stage. Substantively, the Declaration functions to address some of the historic bias against indigenous peoples under international law by recognising, in particular, indigenous peoples' rights to self-determination and lands, territories and resources. The unique needs of indigenous peoples are now provided for under international law. The Declaration also provides some greater coherence and determinacy to indigenous peoples' rights. It brings most of these rights together into one instrument outlining and clarifying the content of those rights, such as what is meant by the right to self-determination in the indigenous context. Finally, the Declaration's legitimacy is set to increase as the world, including states, non-state actors, municipal governments, trans-national corporations, individuals, and so on, engages with it. Knowledge of the Declaration is high, and, by framing claims in Declaration terms and bringing these to international and domestic political and legal fora, indigenous peoples can propel and increase the pace of states' internalisation of those norms. As explained above, there are certainly, in this phase of international institutional proliferation of international law, ample stages on which indigenous peoples' can perform this exercise. The expectation, then, is that the challenge cited by the SR on Indigenous Peoples and the OHCHR at the beginning of this article, a positive change in the everyday lives of indigenous peoples, men, women and children,<sup>90</sup> will be realised. ○

## Notes

- 1 UN Office of the High Commissioner for Human Rights and UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Press Release, Geneva, 9 August 2008 and available at [www.un.org/events/indigenous/2008](http://www.un.org/events/indigenous/2008).
- 2 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 3 Expressing the power that advocates, such as indigenous peoples, have in shaping outcomes in disputes and the caché attaching to persuasive and coherent norms, Finnemore writes “it is the arguments of lawyers and international jurists about the ways in which these arguments should be interpreted that shape outcomes in conflicts over international legal norms. The most serious and fundamental normative conflicts will only be settled politically, but much of the lower-level, day-to-day international normative conflict is fought out and settled by lawyers in national and international courts and tribunals. In these legal forums the decision rule is normative consistency as determined through logical argumentation. Normative claims become powerful and prevail by being persuasive; being persuasive means grounding claims in existing norms in ways that emphasize normative congruence and coherence. Persuasiveness and logical coherence of normative claims are important politically, but are essential and must be explicit in law.” **Martha Finnemore**. 1996. *National Interests in International Society* (Ithaca: Cornell University Press) 141.
- 4 In **Louis Henkins**. 1969. *How Nations Behave* (2ed, New York: Columbia University Press).
- 5 Discussed in **Thomas M Franck**. 1995. *Fairness in International Law and Institutions* (Oxford: Oxford and Clarendon Press) and 1990. *The Power of Legitimacy Among Nations* (New York: Oxford University Press).
- 6 **Harold H Koh**. 1997. “Why Do Nations Obey International Law?” 106 Yale L J 2599.
- 7 Note the comment from Hathaway and Koh that “[u]nlike many other treaties, human rights treaties do not offer states any obvious material benefits. Why, for example, would a state want to join an agreement that requires it to provide fair trials (a potentially expensive and intrusive prospect) when all it receives in return is a reciprocal promise by other members to treat their own citizens with similar respect. [...] Human rights law thus stands out as an area of international law in which countries have little incentive to police noncompliance with treaties or norms.” *Foundations of International Law and Politics* (New York: Foundation Press, New York, 2005) 206.
- 8 **Alan Boyle and Christine Chinkin**. 2007. *The Making of International Law* (Oxford: Oxford University Press), 25. Consider also Habermas: “According to legal positivism, norms, verdicts and decrees derive their binding force and validity from the occurrence of certain law-generating events: These decisions must only be processed in the right way and authorised by the right institutions. Which procedures, practices and authorities may count as the right ones is again defined by law, and by law only.” **Jürgen Habermas**. 2003. “On Law and Disagreement. Some Comments on “Interpretative Pluralism” 16(2) *Ratio Juris* 187, 189.
- 9 These ideas are supported by constitutional theories of democracy and law making, expressed, for example, by the likes of **Jeremy Waldron**. 1999. *Law and Disagreement* (Oxford: Oxford University Press, 1999).
- 10 As Hurd notes, legitimacy “can come from the substance of the rule or from the procedure or source by which it was constituted.” **Ian Hurd**. 1999. “Legitimacy and Authority in International Politics” 53 *Int Org* 379, 381.
- 11 **Benedict Kingsbury**. 1997. On the relationship between legitimacy and conceptions of the law in “The Function of Compliance as a Function of the Competing Conceptions of International Law” *Stud Transnat’l Legal Pol’y* 49. See, also, **Ian Hurd**. “theorizing international legitimacy var[ies] across countries, regions and political traditions.” Citing Benedict Kingsbury “The International Legal Order” in Peter Cane and M Tushnet. 2003. *The Oxford Handbook of Legal Studies* (Oxford) 272, 284 and **Alan Boyle and Christine Chinkin**, above n 7, 28.
- 12 UN ECOSOC “Resolution 1982/34: Working Group on Indigenous Populations” UN Doc E/RES/1982/34 (7 May 1982).

- 13 Although noting that the UN's division of the world into geopolitical regions does not correspond to the indigenous peoples' division of the world into the various indigenous regions. The "Indigenous World" is reflected in to the regional groupings from which the indigenous members of the UN Permanent Forum are appointed.
- 14 Above n 12.
- 15 Again, note Daes' Chapter in this book. However, also note that states began to withdraw from the Working Group on Indigenous Populations during the period when the first incarnation of the Declaration was drafted. See **Alexandra Xanthaki. 2007.** *Indigenous Rights and United Nations Standards: Self-determination, Culture and Land* (Cambridge: Cambridge University Press).
- 16 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities "Resolution 1994/45: Draft UN Declaration on the Rights of Indigenous Peoples" UN Doc E/CN.4/Sub.2/Res/1994/45 (1994).
- 17 UN Commission on Human Rights "Resolution Establishing a Working Group to Elaborate a Draft United Nations Declaration on the Rights of Indigenous Peoples" Report on the 51<sup>st</sup> Session UN ESCOR Supp (No 4) UN Doc E/1995/23 (3 March 1995) at 110.
- 18 Although only among the official UN languages. There was no simultaneous interpretation from or to indigenous languages.
- 19 UN Human Rights Council "Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994" (29 June 2006).
- 20 **Mattias Ahren. 2007.** "The United Nations Declaration on the Rights of Indigenous Peoples: How was it Adopted and Why is it Significant?" (4) *Galdu Journal of Indigenous Peoples' Rights* 84.
- 21 See Dr Albert Barume's and Naomi Kipuri's chapters in this book.
- 22 Documents on file with the author.
- 23 Above n 8.
- 24 **Jürgen Habermas. 1979.** *Communication and the Evolution of Society* (T McCarthy trans, Boston: Beacon Press) 185.
- 25 **Chris Tennant. 1994.** "Indigenous Peoples, International Institutions, and the International Legal Literature from 1945-1993" 16 *Hum Rights Q* 1, 49 [emphasis in the original].
- 26 UN Sub-Commission on Prevention of Discrimination and Protection of Minorities *Study of the Problem of Discrimination against Indigenous Populations* U.N. Doc. E/CN.4/Sub.2/1986/7, Add. 4, para 379 (1986).
- 27 The 1977 International NGO Conference on Indigenous Peoples of the Americas was a key event. See **Tennant**, above n 25, citing **Roxanne Dunbar Ortiz. 1984.** *Indians of the America: Human Rights and Self-Determination* (Praeger) 29; **Anthony Simpson. 1987.** in Panel Discussion "The Role of Indigenous Nongovernmental Organizations in Developing Human Rights Standards Applicable to Indigenous Peoples" *Am Soc'y Int'l L Proc* 282, 283; and **Rodolfo Stavenhagen. 1989.** *Report of the United Nations Seminar on the Effects of Racism and Racial Discrimination: Effective Protection and Comprehensive Development of the Social and Economic Sectors in Indigenous Communities Through International Standard-Setting Activities (Background Paper)* UN ESCOR, Commission on Human Rights, 45<sup>th</sup> Sess, Agenda Item 21, UN Doc E/CN.4/1989/22, 53, 67.
- 28 See Daes' chapter in this book.
- 29 Above n 20, 84.
- 30 Daes' chapter in this book.
- 31 **Alexandra Xanthaki** writes, "[e]ssentially it is the outcome of a 'partnership between experts and indigenous peoples'. States gradually withdrew from the drafting process, attending in small numbers and often reluctant to engage in a dialogue on the provisions." Above n 14, 102 and citing **Julian Burger. 1996.** "The United Nations Draft Declaration on the Rights of Indigenous Peoples" 6 *St Thomas Law Review* 209, 210.
- 32 Turpel too highlights the remarkable "power-sharing of the pen" between states and indigenous peoples; **Mary-Ellen Turpel. 1994.** "Draft Declaration on the Rights of Indigenous Peoples – Commentaries" 1 *CNLR* 50, 50.
- 33 **Habermas**, above n 8, 190.

- 34 “Furthermore, NGO participation in the work of the United Nations speaks to the needs of often marginalized communities and groups that are not served directly through the lengthy machinery.” **Christine Tinker**. 1995. “The Role of Non-State Actors in International Law-Making During the UN Decade of International Law” 89 *Am Soc’y Int’l L Proc* 177, 178.
- 35 *Ibid.* “There is an important role for non-state actors in bringing issues to the forefront, putting issues on the national agenda. A natural link exists between local grassroots and activist organizations and groups active at the international level, where UN-affiliated groups and even the United Nations itself may be a source of inspiration, assistance or leadership, when national governments are less responsive to their concerns. Note also **Dianne Otto**. 1996. “Nongovernmental Organizations in the United Nations System: The Emerging Role of International Civil Society” 18 *Hum Rights Q* 107.
- 36 **Karen Knop**. 2002. *Diversity and Self-Determination in International Law* (Cambridge: Cambridge University Press) 213 and citing **Robert Williams Jr.** 1990. “Encounters on the Frontiers of Human Rights Law: Redefining the Terms of Indigenous Peoples Survival in the World” *Duke Law Journal* 660 at 700; **Dalee Sambo**. 1993. “Indigenous Peoples International Standard-Setting Processes: Are State Governments Listening?” 3 *Transnat’l L & Contemp Probs* 13.
- 37 **Knop**, *ibid.*, 263.
- 38 The comment that “NGOs lack democratic approval” in **Ignaz Seidl Hohenveldern**. 2001. “The Attitude of States towards the Proliferation of International Organizations” in Neils M Blokker and Henry G Schermers. 2001. *Proliferation of International Organizations: Legal Issues* (The Hague: Kluwer Law International) 51, 62.
- 39 Thus, “participation is not the straightforward panacea for the democratic deficit of international law, but requires more complex analysis.” **Knop**, above n 36, 215.
- 40 See Albert Barume’s chapter.
- 41 **Franck**, *Fairness*, above n 5.
- 42 **John Rawls**. 1971. *A Theory of Justice* (Belknap Press) 303: “All social primary goods – liberty and opportunity, income and wealth, and the basis of self-respect – are to be distributed equally unless an unequal distribution of any or all of these goods is to the advantage of the least favoured.”
- 43 **Franck**, *Fairness*, above n 5, 8.
- 44 **John Tasioulas**. 2002. “International Law and the Limits of Fairness” 13 *European J of Int’l Law* 993; and **Phillip R Trimble**. 1997. *Globalization, International Institutions and the Erosion of National Sovereignty and Democracy* 95 *Mich L R* 1944, 1952; **Lea Brilmayer**. 1996. “International Justice and International Law” 98 *W Va L Rev* 611.
- 45 See, for example, **S James Anaya**. 2004. *Indigenous Peoples in International Law* (2ed, Oxford: Oxford University Press); **Anthony Anghie**. 2005. *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge Studies in International and Comparative Law, Cambridge University Press); **Richard Falk**. 1996. “The New States and International Legal Order” II *Academie du Droit International, Recueil de Cours* 1-102 at 34ff; **Paul Keal**. 2003. *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (Cambridge: Cambridge University Press); **Knop**, above n 36; **Siegfried Wiessner**. 1999. “Rights and Status of Indigenous Peoples: A Global Comparative and International Analysis” 12 *Harv Hum Rts J* 57.
- 46 **Anaya**, *ibid.*
- 47 *Western Sahara* case, Advisory Opinion ICJ 12 (16 October 1975).
- 48 UN Committee on the Elimination of Racial Discrimination, “General Recommendation XXIII: Indigenous Peoples” (18 August 1997) UN Doc A/52/18, annex V; and for example in *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 *Arizona J Int’l and Comp Law* 395). For a full description of the proceedings leading to the decision, see **S. James Anaya and C Grossman**. 2002. “The Case of *Awas Tingni v Nicaragua*: A New Step in the International Law of Indigenous Peoples” 19 *Arizona J Int’l and Comp Law* 1; and *Mayan Indigenous Communities of the Toledo District Toledo v Belize* (Merits). I/A.C.H.R., Report No. 40/04, Case 12.053 (12 October 2004).
- 49 *Mayagna (Sumo) Awas Tingni*, *ibid.*
- 50 **Martha Finnemore**, above n 3.

- 51 **Ronald Dworkin**. 1986. *Law's Empire* (Cambridge: Harvard University Press) 188.
- 52 **Benedict Kingsbury**. 2001. "Reconciling Five Conceptual Approaches to Indigenous Peoples' Claims in International and Comparative Law" 34 NYU Jnl Int'l L & P 189.
- 53 See, in particular, Luis Rodriguez-Pinero's chapter in this book.
- 54 **Thomas M Franck**. 2006. "The Power of Legitimacy and the Legitimacy of Power: International Law in an Age of Power Disequilibrium" 100 Am J Int'l L 88, 93. The Chayes argue that non-compliance is more often a result of norm ambiguity and capacity limitations than from deliberate disregard. **Abram Chayes and Antonia Handler Chayes**. 1995. *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge: Harvard University Press).
- 55 **Franck**, *ibid*, 93.
- 56 **Richard Falk**. 1988. "The Rights of Peoples (In Particular Indigenous Peoples)" in James Crawford (ed) *The Rights of Peoples* (Oxford: Clarendon Paperbacks, Clarendon Press) 17, 27.
- 57 *Mayagna (Sumo) Awas Tingni*, above n 48.
- 58 **S. James Anaya**. 2010. "The Declaration within its International Legal Context" in Claire Char- ters, Les Malzer and Vicky Tauli-Corpuz (eds) *Indigenous Voices: The UN Declaration on the Rights of Indigenous Peoples* (forthcoming, Oxford: Hart Publishing).
- 59 See, for example, **Antonio Cassese**. 1995. *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press).
- 60 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980, articles 31-33.
- 61 UN General Assembly Official Records New York, UN Doc A/61/PV.107 (13 September 2007).
- 62 "If transnational actors obey international law as a result of repeated *interaction* with other actors in the transnational legal process, a first step is to empower more actors to participate. It is here that explaining the role of intergovernmental organizations, nongovernmental organizations, private business entities, and "transnational moral entrepreneurs" deserves careful study." **Koh**, above n 6, 2656.
- 63 **Raidza Torres**. 1991. "The Rights of Indigenous Populations: The Emerging International Norm" 16 Yale J Int'l L 127, 145.
- 64 See, for example, *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct).
- 65 **Finnemore**, above n 3, 2.
- 66 *Ibid*, 5.
- 67 *Ibid*, 5.
- 68 *Ibid*, 5-6.
- 69 **Koh, Harold Hongju**. 2005. "Internalization Through Socialization" 52 Duke L J 975, 976.
- 70 *Ibid*, 978.
- 71 **Koh**, above n 6, 2646.
- 72 *Ibid*, 2651.
- 73 *Ibid*, 2656.
- 74 Treaties should be interpreted in the light of their context including "any relevant rules of international law applicable in the relations between the parties." 1155 UNTS 331, 8 ILM 679, entered into force 27 January 1980), article 31(3)(c). See discussion in **Campbell McLachlan**. 2005: "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention" 54 ICLQ 279. Note, also, the comments in Rodriguez-Pinero chapter in this book.
- 75 Human Rights Council "Resolution 6/12" (28 September 2007), at para. 1(g), reproduced in "Report of the Human Rights Council on its sixth session" UN A/HRC/6/22 (14 April 2008).
- 76 (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct).
- 77 *Ibid*, para 131.
- 78 *Ibid*, para 132.
- 79 Author's notes of the Human Rights Council meeting September 2007, on file with the author.
- 80 Assembly of First Nations et al "United Nations Declaration on the Rights of Indigenous Peoples: Canadian Parliament calls for Implementation of Critical Universal Human Rights Instrument" Press Release, Ottawa, 9 April 2008.
- 81 UN Human Rights Council Resolution 6/12, above n 75.

- 82 UN Economic and Social Council Permanent Forum on Indigenous Issues “Information Received from the United Nations System: World Intellectual Property Office” UN Doc E/C.19/2006/6/Add.13 (21 March 2006) paras 6 and 14.
- 83 UN Permanent Forum on Indigenous Issues “Report of the Inter-Agency Support Group on Indigenous Issues” UN Doc E/C.19/2008/6 (5 February 2008) Annex.
- 84 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991. Inter-Agency Support Group (IASG) on Indigenous Peoples “Special Meeting on United Nations Declaration on the Rights of Indigenous Peoples (Geneva, 26-27 February 2008) UN Doc E/C.19/2008/CRP.7 (27 March 2008).
- 85 Ibid.
- 86 UN Permanent Forum on Indigenous Issues “Report of the International Expert Group Meeting on Indigenous Languages” UN Doc E/C.19/2008/3 (21 January 2008) para 40.
- 87 United Nations Permanent Forum on Indigenous Issues “Implementation of the Human Rights Mandate of the Permanent Forum on Indigenous Issues” (9 March 2007) UN Doc E/C.19/2007/6, para 39.
- 88 Ibid, para 59.
- 89 Human Rights Council “Resolution 6/36: Expert Mechanism on the Rights of Indigenous Peoples” UN Doc A/HRC/Res/6/36 (14 December 2007).
- 90 UN Office of the High Commissioner for Human Rights and UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Press Release, Geneva, 9 August 2008 and available at [www.un.org/events/indigenous/2008](http://www.un.org/events/indigenous/2008).

# MAKING THE DECLARATION WORK FOR HUMAN RIGHTS IN THE UN SYSTEM

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Julian Burger\*

## Introduction

For the human rights community, every new international agreement on human rights represents a small but significant victory. Outside, these triumphs often pass unnoticed, are barely recorded in the press and filter with difficulty into the working practices of government administrations which are meant to apply them. When the UN Declaration on the Rights of Indigenous Peoples (the Declaration) was finally adopted by the UN General Assembly (UNGA),<sup>1</sup> after 25 years in the making, the diplomats, non-governmental organizations and international civil servants who had committed so much time to negotiation rightly felt their efforts were well rewarded. However, the value of the Declaration will be measured by other means and, most particularly, it will be judged on whether it brings positive changes to indigenous communities.

The challenge facing the UN system is how it will use the Declaration to make its contribution to the advancement of the rights of indigenous peoples and the improvement of their conditions. More specifically, the UN system needs to give visibility to this new human rights instrument, integrate its principles into its own work, especially in the development field, and give support to the efforts of governments, civil society actors and indigenous peoples themselves to implement the Declaration. The Declaration identifies a role for the UN in promoting and protecting the rights of indigenous peoples. It explicitly calls upon the organs and specialized agencies of the UN system to contribute to the full realization of the rights contained in the Declaration, including through the mobilization of financial cooperation and technical assistance.<sup>2</sup>

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The present article considers action that can be taken by the political, advisory and monitoring bodies of the UN system as well as by UN organizations, funds and specialized agencies. The former include legislative bodies such as the Human Rights Council, composed of States, and monitoring or advisory organs comprising independent experts. The latter include UN system organizations and their secretariats operating at Headquarters and the country level, and managers of programmes and technical assistance.

### **The role of the Permanent Forum on Indigenous Issues, the Special Rapporteur on Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples**

Articles 41 and 42 of the Declaration state that the organs and bodies of the UN, including the Permanent Forum on Indigenous Issues (PFII), shall contribute to the realization of its provisions. These bodies include, in the area of human rights: the Human Rights Council; its recently-established advisory body, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP); the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR on Indigenous Peoples); the other special procedures mechanisms that report to the Council; as well as the human rights treaty monitoring bodies.

These human rights advisory and monitoring bodies of the UN are each independent and will determine how they will contribute to the implementation of the provisions of the Declaration in their own way. The PFII has, for example, stated that it will consider the Declaration as its legal framework.<sup>3</sup> The SR on Indigenous Peoples, appointed in 2008, focused his first report to the Council on the Declaration and its operationalization, noting that Council resolution 6/12 requires that the SR on Indigenous Peoples promote the Declaration.<sup>4</sup> The SR on Indigenous Peoples affirms that the Declaration represents the normative framework for his own work and, more broadly, the activities of UN institutions, mechanisms and specialized agencies. The EMRIP has indicated that the Declaration will be the main part of the normative framework for its substantive work and has proposed that the Declaration become a permanent point on its agenda.<sup>5</sup>

The question arises as to what these three mechanisms on indigenous peoples in the UN will and can actually do, how they will cooperate with each other and coordinate their activities, and to what extent and in what way States, representatives of the UN system, and delegations of non-governmental and indigenous peoples, will contribute. During the first session of the EMRIP, the SR on Indigenous Peoples clarified that, with the creation of the EMRIP, his role in contributing thematic studies would be secondary and that he would rather provide input to the thematic work of the EMRIP. His principal function, he noted, is to examine specific situations on indigenous peoples' human rights and identify

root causes and engage States in constructive dialogue.<sup>6</sup> The members of the EMRIP repeatedly stressed that the new body would not take up specific human rights cases or address country-specific human rights situations. The SR on Indigenous Peoples for his part, by way of reinforcing the distinctive mandates of the two human rights mechanisms related to indigenous peoples, informed participants at the first session that the secretariat of the Office of the High Commissioner for Human Rights (OHCHR) was available to receive communications and documentation of alleged violations of human rights.

As far as the EMRIP is concerned, the first session heard very few statements on country situations, despite the fact that many indigenous delegations had come with stories about the situations in their countries.<sup>7</sup> The Council, in its Resolution 9/7, had requested the EMRIP prepare a study on “lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education” and contributions by both members and participants provide an indication of how the Declaration will be operationalized by the new body. In the first place, the objective of the study is not to elaborate a comprehensive review that would clearly be beyond the capacity of the Mechanism within the 12-month time-frame. The study can, as suggested by participants, help to understand the scope of the right to education as it relates to indigenous peoples, in particular as the right is expressed in the Declaration, include good examples of successful governmental programmes and indigenous-run educational systems, identify challenges and make recommendations to States. In so doing, the EMRIP could produce a commentary that will contribute in a practical way to a better understanding of the relevant articles of the Declaration and give some guidance as to their implementation. As far as the role of observers in the work of the EMRIP is concerned, States and indigenous peoples are explicitly invited to contribute to the study, including by providing examples of good practice.

The PFII organized, in January 2009, a meeting to consider how it will implement Article 42 of the Declaration. Given the division of labour regarding the Declaration agreed upon by the EMRIP and the SR on Indigenous Peoples, the 2009 session of the Forum provides an opportunity for this body to define how it will contribute to the implementation of the Declaration and ensure that there is complementarity among the three mechanisms. The mandate of the Forum suggests two clear areas of work. The first is in disseminating the Declaration as widely as possible and the second in promoting integration of its provisions into the programmes and activities of the UN system. Both these tasks fall under the mandate of the Forum, which is to contribute to coordination of the UN system through advice to Economic and Social Council, and to inform the wider public about indigenous peoples. Furthermore, these are activities that are not within the mandates of the two human rights mechanisms referred to above. It may be that deliberations taking place in the coming years will further clarify the distinctive roles of these bodies and the ways in which they will cooperate but, for the

time-being, the formal mandates ascribed to each of the mechanisms appears to provide clear, quite distinctive and complementary roles in contributing to the implementation of Articles 41 and 42 of the Declaration.

### **The role of the Human Rights Council, special procedures and the treaty bodies**

The adoption of the Declaration by the Human Rights Council at its inaugural session in June 2006 was one of its triumphs and certainly suggested that the new body, replacing what some saw as the discredited Commission on Human Rights, had a sense of purpose and decisiveness. The governments that championed the document at the Council went on to negotiate the Declaration when it reached the General Assembly, met resistance from the so-called CANZUS States (Australia, Canada, New Zealand and the US) and had to respond to the concerns raised by the Africa region. In the end, the UNGA in New York adopted the declaration some 18 months after the adoption by the Council but the nearly 25-year story of the elaboration of the declaration is one that sits firmly in Geneva. It is for this reason, and also because the Human Rights Council is the principal inter-governmental body responsible for human rights in the UN system, that there are legitimate expectations that the Council will play a specific role in the implementation of the Declaration.<sup>8</sup>

The creation of the EMRIP may be considered as the principal means by which the Human Rights Council obtains proposals for implementing the Declaration. While the establishing resolution for the Mechanism gives no direct mandate to the body in this regard, the preambular paragraphs include a reference to the Declaration by way of explanation for the establishment of the new body.<sup>9</sup> According to the mandate of the Mechanism, it is the Council which decides on the thematic advice it requires. In due course, it may be expected that the advice forthcoming from the Mechanism will directly serve the Council and help it to fulfil its mandate as the principal inter-governmental body for human rights and, therefore, for the implementation of the Declaration.

As noted by the SR on Indigenous Peoples, the Universal Periodic Review (UPR) offers a tool for promoting the rights of the Declaration. He suggests that, in time, the Declaration will be entrenched in the UPR process. As the procedure exists at the moment, this would imply that the sources for the reports, in particular the treaty bodies and special procedures mandates, systematically incorporate the standards affirmed in the Declaration into their country reports and reviews. It also means that non-governmental organizations and indigenous peoples themselves make use of the Declaration when they prepare their reports to the UPR process. Finally, it does suggest that the States given the task of reviewing country reports consistently use the Declaration as the framework in the in-

teractive dialogues and as the basis for their recommendations, which is not always the case.

UN treaty bodies have contributed over at least two decades to the jurisprudence on indigenous peoples' rights.<sup>10</sup> This is reflected both through decisions taken on individual cases and the adoption of general comments interpreting specific treaty articles. A number of these comments and decisions were used by the participants in the negotiations on the Declaration to uphold particular provisions. With the adoption of the Declaration, these bodies have an interest in knowing how they can use the Declaration to enhance their work.<sup>11</sup> It is generally agreed that the Declaration does not create new and separate rights but rather elaborates existing rights and applies them to specific cultural, historical and political circumstances. Notwithstanding, the treaty bodies monitoring the human rights covenants and conventions are faced with questions relating to identity and definition, the scope and extent of the right of self-determination, how rights such as the right to lands and resources may be understood, and other issues. The Declaration, now that it is established as the universal standard on indigenous rights, will and should provide a reference.

The special procedures for human rights established under the Human Rights Council, including independent experts, special rapporteurs and special representatives of the Secretary-General, have intermittently covered indigenous peoples' issues in both thematic and country reports.<sup>12</sup> The adoption of the Declaration has, however, provided an impetus to further integration of indigenous rights into these human rights mechanisms and it is noteworthy that a number of mandate holders have expressly called for further information about its provisions and scope.<sup>13</sup> In particular, with the affirmation of the provisions contained in the Declaration, it can be argued that there is no thematic mandate that is not relevant to indigenous peoples, who can and in the future should make use of all these mechanisms rather than concentrating their attention exclusively on the SR on Indigenous Peoples.

## **The role of UN departments, organizations, funds and specialized agencies**

Articles 41 and 42 of the Declaration ascribe to the UN system the specific responsibility of contributing to the realization of the rights contained in the document through the mobilization of financial cooperation and technical assistance. Implicit in this commitment made by the General Assembly is the realignment of programme priorities, budgets and even staffing of the operational parts of the UN so that they can respond effectively to the aspirations set out in the Declaration. As many have noted, the UN is an unwieldy entity with decisions concerning its different parts taken by separate governmental departments – the World

Health Organisation by ministries of health, UN Educational, Scientific and Cultural Organisation by ministries of education, and human rights standards such as the Indigenous Declaration often by ministries of foreign affairs. It goes without saying that all the goodwill of programme managers to enhance their activities relating to indigenous peoples will be of little long-term impact if the corresponding political and practical support is not forthcoming at the level of the governing bodies and, particularly, those committees deciding upon the allocation of human and financial resources. Article 41 specifically calls for the mobilization of financial cooperation and technical assistance and Article 39 notes that “[i]ndigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation for the enjoyment of the rights contained in this Declaration”.

Two UN system initiatives exist which already contribute and will, in the future, contribute further to the realization of enhanced international cooperation on indigenous issues. The first is related to the approval, by the UN Development Group (UNDG), of Guidelines on Indigenous Peoples Issues in February 2008. The second relates to the ongoing work of the Inter-Agency Support Group on Indigenous Issues (IASG). The UNDG Guidelines have been agreed upon at the highest level of management of the UN system and recommend the integration of indigenous peoples’ rights and issues into all UN country programmes. The Guidelines: set out the normative framework for engagement with States based upon the Declaration and the International Labour Organization’s Convention 169 on Indigenous and Tribal Peoples (ILO Convention 169); propose programme areas to address indigenous peoples’ disadvantage and development priorities; and promote the establishment of consultative mechanisms at the country level that would formalize indigenous peoples’ participation in decision-making in the formulation, implementation and evaluation of projects and programmes affecting them.<sup>14</sup>

If the UNDG Guidelines are fully implemented then indigenous peoples will have a key role to play in determining future UN activities including through input into planning and resource allocation.<sup>15</sup> It will also give them a greater say in the planning and implementation of activities aimed at realizing the Millennium Development Goals (MDGs) and reducing poverty.

The IASG was created in 2000 to formalize inter-agency cooperation on indigenous issues and prepare for the first session of the PFII.<sup>16</sup> Since then it has established itself as an important partner for the PFII in the implementation of its recommendations. When the Declaration was adopted, the IASG held a special meeting in February 2008, organized by the OHCHR and the International Labour Office (ILO), to consider ways of integrating the Declaration and ILO Convention 169 into the UN system’s policies and programmes. The IASG considered that the adoption of the Declaration created a momentum in the UN system that could be used to increase inter-agency cooperation and engage governments in

policy dialogue. There were some practical measures that were already being undertaken, such as the development or revision of internal policies to bring them into line with the Declaration. If such policies are endorsed by the leadership of the organization, they will have the effect of giving greater visibility to the rights of indigenous peoples and influencing programmes.

An area of work identified by the IASG was that related to the dissemination and better understanding of the Declaration. It was proposed that UN Country Teams translate the Declaration into the national and indigenous languages, disseminate the Declaration widely, especially to indigenous organizations, and develop a range of publications that would help to clarify the provisions for governmental officials, professional groups (e.g. parliamentarians, legal professionals, teachers, etc), and provide examples of good practice. The IASG recognized that it would need to build capacity amongst its own staff and give them guidance on how to integrate indigenous issues into their programme areas. It was suggested that UN organizations and specialized agencies establish interdepartmental task forces to coordinate approaches and efforts on indigenous issues. At the country level, it was suggested that indigenous programmes and goals be included in Common Country Assessments/UN Development Assistance Frameworks, MDGs, and poverty reduction activities. The importance of creating, at the country level, consultative mechanisms between the UN Country Teams and indigenous peoples to ensure systematic consultation and joint planning was stressed. Many of these proposals are included in the workplan for implementing the UNDG Guidelines and are being implemented.<sup>17</sup>

Finally, a word needs to be said about the role of the High Commissioner for Human Rights and her office in promoting implementation of the Declaration. The mandate of the High Commissioner, *inter alia*, is to prevent human rights violations and promote international cooperation to protect human rights as well as lead efforts to integrate a human rights approach in the work carried out by UN agencies. She and her office can play a pro-active role by promoting the normative content of the Declaration, including the provisions related to free, prior and informed consent, consultation, land and resource rights, access to justice and recognition of indigenous juridical systems. The field presences of OHCHR also have a role to play in integrating the Declaration into their country programmes and engaging governments in dialogue on implementation.

## Conclusion

With the adoption of the Declaration, with its specific call for action by the UN system to contribute to the implementation of the rights it contains and the approval of Guidelines by the UNDG, the UN has in place both the legislative and managerial mandates to advance the rights and strengthen the programmes re-

lated to indigenous peoples. In the year following the adoption of the Declaration, several initiatives have been established that will lead to better integration of indigenous peoples' rights into the work of the UN's human rights mechanisms and its technical assistance programmes. But the establishment of universally accepted standards on indigenous peoples' rights is no magic wand. The states' agreement on the Declaration does not mean that there will be concomitant changes to bring to an end years of discrimination, poverty and exclusion. Only States have the capacity and authority to address this disadvantage and this implies, in many countries, changes in legislation, the introduction of appropriate administrative measures, increased funding for indigenous peoples, the establishment of meaningful consultative processes, capacity building and, above all, the political will to bring about change. What the Declaration offers is a framework for reconciliation and an agenda for policy discussion, and the UN system can play, as it often does, a valuable role as the catalyst for dialogue and understanding. ○

## Notes

- 1 General Assembly "Resolution 61/295: Declaration on the Rights of Indigenous Peoples" UN Doc A/61/67, Annex (13 September 2007).
- 2 The role of the UN is referred to in preambular paragraph 20 and articles 41 and 42 of the Declaration, *ibid.*
- 3 Permanent Forum on Indigenous Issue "Report on the seventh session (21 April – 2 May 2008)" UN Doc E/2008/43, E/C.19/2008/13 (2008).
- 4 "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people" UN Doc A/HRC/9/9 (11 August 2008).
- 5 Human Rights Council "Report on the first session of the Expert Mechanism on the Rights of Indigenous Peoples (1 – 3 October 2008)" UN Doc A/HRC/10/056 (2008).
- 6 Statement of the Special Rapporteur to the Expert Mechanism on the Rights of Indigenous Peoples, 1 October 2008.
- 7 A notable exception was made by the Expert Mechanism at the request of the Permanent Mission of Bolivia when it heard the first-hand testimony of a survivor of a massacre from the Province of Pando.
- 8 Prior to adoption of the Declaration by the Human Rights Council, some participants prevailed upon the Chairperson-Rapporteur of the Commission's working group, who presented the final draft to the Council, to include in Article 42 a reference to the newly-established Human Rights Council, thereby giving it a specific role in implementing the Declaration. In the end the proposal was not accepted.
- 9 Human Rights Council "Resolution 6/36: Expert Mechanism on the Rights of Indigenous Peoples" UN Doc A/HRC/Res/6/36 (14 December 2007).
- 10 A detailed account of the jurisprudence on indigenous peoples of the Treaty Bodies has been made by numerous authors. Best known is perhaps **Patrick Thornberry**. 2002. *Indigenous peoples and human rights* (Manchester: Manchester University Press).
- 11 Several human rights treaty committees have organized briefings on the Declaration, including CERD, CESCR and the Convention on Migrant Workers and their Families.
- 12 See, for examples, the "Report of the Office of the High Commissioner for Human Rights to the seventh session of the Permanent Forum" UN Doc E/C.19/2007/3/Add.2 (2007).



- 13 Briefings on the Declaration were given at the annual meeting of special rapporteurs in June 2008 and at the meeting of newly appointed mandate-holders.
- 14 UN Development Group "Guidelines on Indigenous Issues" (February 2008) and available on the website:  
[http://www.undg.org/docs/8646/UNDG\\_Guidelines\\_indigenous\\_FINAL-01FEB08.pdf](http://www.undg.org/docs/8646/UNDG_Guidelines_indigenous_FINAL-01FEB08.pdf)
- 15 At present, the UN Country Teams elaborate Common Country Assessments (CCAs) and UN Development Assistance Frameworks (UNDAFs) as the basic tools for elaborating country programmes. In many countries where there are populations of indigenous peoples, indigenous concerns are not reflected. Of interest in this respect are the Desk Reviews on implementation of the Millennium Development Goals prepared by the Permanent Forum secretariat, which are available on the website <http://www.un.org/esa/socdev/unpfii/>. The UNDG Guidelines seek to address these shortcomings.
- 16 The IASG, composed of 31 UN organizations, departments, funds and agencies, was established following a request by the then High Commissioner for Human Rights to all Heads of UN organizations and special agencies. The purpose of the IASG is to ensure an exchange of information among participating organizations, provide a framework for joint activities and cooperation and give support to the Permanent Forum. The chair of the IASG is rotated annually among the participating agencies. Informal annual meetings of UN agencies were organized by the former Centre for Human Rights and the ILO between 1990 and 2000, when it was decided that inter-agency cooperation on indigenous issues should be formalized. Interestingly, when the OHCHR organized the first session of the Permanent Forum in 2002, before the creation of a secretariat in New York, several inter-governmental organizations, including the ILO and the World Bank, contributed staff to help with the organization.
- 17 For example, the Declaration has now been translated into several national languages. The OHCHR Nepal office has translated the Declaration into Nepali and the Latin American and Caribbean Fund for Indigenous Peoples based in La Paz has begun translations into indigenous languages such as Quechua and Aymara. Various publications have been prepared, or are in preparation to make the Declaration more accessible. OHCHR, for example, has produced an introductory booklet on the Declaration and is preparing a user-friendly manual for policy-makers, NGOs and governmental officials.



# “WHERE APPROPRIATE”: MONITORING/IMPLEMENTING OF INDIGENOUS PEOPLES’ RIGHTS UNDER THE DECLARATION

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Luis Rodríguez-Piñero Royo\*

*The Special Rapporteur [shall] promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate.*<sup>1</sup>

## Introduction

The adoption of the Declaration of the Rights of Indigenous Peoples (the Declaration) brings to a close, at least momentarily, the prolonged phase of standard-setting at the United Nations (UN) level concerning the rights of indigenous peoples. A new phase is now opening: the phase of implementation.

Without losing sight of the importance of the local level as the primary location for the implementation of indigenous rights standards, the international community has long expressed a special commitment to, and involvement in, the promotion and protection of these rights. Article 42 of the Declaration reflects this special commitment, calling upon the UN system, along with states, to promote “respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”.

The objective of this essay is to provide a brief description of the different roles that international institutional actors can and should play with regard to the implementation of the Declaration. To do so, the essay first explores ongoing debates concerning the legal status of the Declaration, discussing a number of conceptual misrepresentations that may indeed turn into obstacles for the future implementation of the Declaration’s standards. Secondly, the essay proposes a categorization of international actors along the lines of their monitoring or implementation functions. The first category encompasses bodies and mechanisms with supervisory roles deriving from legally-binding international instruments, while the latter includes a number of international bodies or mechanisms with direct or indirect mandates to promote human rights generally or indigenous

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rights specifically. In reviewing the different spheres of competence of all these actors, I will ultimately attempt to make the argument that an effective implementation of indigenous rights under the Declaration necessarily involves cooperative relations among all actors based on a responsible assumption of their respective mandates.

## The debate on the legal status of the declaration

### The declaration as a non-binding instrument

The fact that, despite the multiple legal subtleties and qualifications that can be argued in this case,<sup>2</sup> the Declaration is merely a resolution adopted by the UN General Assembly which has, *as an instrument*, no legally binding character, was emphasized by several states, voting both for and against, as well by the UN system.<sup>3</sup> For instance, the United Kingdom, a country that voted in favour, emphasized that the Declaration “is not legally binding” but will constitute “an important policy tool” for states.<sup>4</sup> In addition, the non-binding character of the Declaration was naturally underlined by those states that eventually voted against or abstained at the moment of the adoption of the text. Thus the Government representative of Canada stated that the Declaration has “no legal effect in Canada, and its provisions do not represent customary international law”.<sup>5</sup> The representative of the Australian government similarly stated that the Declaration is “an aspirational declaration with political and moral force but no legal force” which “is not intended itself to be legally binding or reflective of international law”.<sup>6</sup>

The argument of the non-legally binding character of the Declaration has been subsequently echoed in subsequent international and state practice. This was notably the case in the discussion concerning the assessment and renewal of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (SR on Indigenous Peoples) during the sixth session of the Human Rights Council, which took place only a few months after the adoption of the Declaration. Echoing this adoption, the original draft resolution tabled by the co-sponsors of the mandate, Mexico and Guatemala, included, as part of the SR on Indigenous Peoples’ functions, the promotion of “the UN Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples”. This specific phrase was the object of controversy right up to the adoption of the resolution by the Council. Canada, as member of the Council, eventually managed to make the adoption of the resolution conditional on the introduction of a limiting clause to the text.<sup>7</sup> The Resolution, as finally adopted, refers to the SR on Indigenous Peoples’ promotion of the Declaration only “where appropriate” (*“s’il y*

*a lieu*" or "*cuando aplicable*", in the somehow unconsciously decaffeinated French and Spanish versions).<sup>8</sup> A similar argument was made by the United States delegation at the presentation of the former SR on Indigenous Peoples' report to the General Assembly's Third Committee.<sup>9</sup>

The Canadian and United States' shared position can easily be criticized from an international legal point of view, as they obviously confuse the Declaration with an international treaty whose legal force at the domestic level is dependent upon an act of formal acquiescence by a given state. This position also tends to obscure the fact that the negative vote of these and other states with regard to the adoption of the Declaration does not preclude, as a Resolution adopted by the General Assembly, that the Declaration should have a general normative value *vis-à-vis* all UN member states.<sup>10</sup> However, the position shared by these two governments that voted against the Declaration also reflects an anxiety to restate the argument of the non-legally binding character of the Declaration, particularly with regard to domestic law, an argument that merits consideration inasmuch as it may evolve into a practical barrier in the implementation of the Declaration's standards.

### **The declaration as a binding instrument**

Together with the argument of the non-legally binding character of the Declaration, and in part as a reaction to it, some authoritative voices have tried to argue just the opposite: that the Declaration, because of the special characteristics of the process that led to its adoption, is actually binding *as an instrument*. This discourse has been promoted by a number of indigenous and civil society organizations, and has been taken up by some members of the UN Permanent Forum on Indigenous Issues (PFII), which has become a key locus for the reproduction of this discourse.

A good example of this position is that of Professor Bartolomé Clavero, current member of the PFII and a recognized specialist on indigenous rights in the Spanish-speaking milieu, at the seventh session of the Forum in 2008, the first after the adoption of the Declaration. In discussing the future role of the Forum with regard to the implementation of the Declaration, Clavero advocates for a role similar to international human rights monitoring mechanisms, "as if, for the Declaration on the Rights of Indigenous Peoples, the Forum was a body equivalent to the human rights committees of the International Covenants and of the Conventions or Treaties".<sup>11</sup> To be sure, Clavero clarifies that the Declaration "is not a Convention".<sup>12</sup> However, the Declaration "is not a mere and simple Declaration".<sup>13</sup> Indeed, according to the author, the Declaration is a "radical novelty",<sup>14</sup> with "a value different from other Declarations".<sup>15</sup>

To provide foundation for his conclusions, the author has recourse to a myriad of arguments, based either on a literal reading of the text of the Declaration or on the special characteristics of the standard-setting process that led to its final adoption. First, Article 42, in calling states and international actors to promote the implementation of the Declaration, “uses the strong expression of *full application*”, as distinct from other similar human rights instruments.<sup>16</sup> Second, by singling out the PFII in Article 42, the Declaration “is the first Declaration that describes its own binding character without a foundation either in a Convention or a Treaty, or, for that matter, in a relevant Committee”. It is thus the first declaration that assigns its application to a body not created by treaty, “and hence without the mediation of State ratification”.<sup>17</sup> Third, the Declaration, as distinct from other similar instruments, was adopted with the active participation of indigenous peoples themselves. In this respect, Clavero argues that the Declaration “is certainly not a Convention or a Treaty among States, but it constitutes a Treaty, Convention or Covenant between States and Peoples”.<sup>18</sup>

### **Transcending the debate: focus on rights**

To a great extent, the current debate on the legal status of the Declaration mixes three separate issues: first, the legal standing of the Declaration as a UN declaration; second, the normative value of the various rights enshrined therein; and third, the means of monitoring these rights.

Regarding the first question, whether we like it or not, the distinction between *hard* law and *soft* law is a well-established one in modern international human rights law. This distinction draws on the basics of general international law, where the list of legally-binding sources is limited to treaties ratified by states, customary international law and general principles of law.<sup>19</sup> Despite the specificities of the international human rights regime, it is nonetheless clear that the difference between an international treaty or convention and a declaration is still fully understood and applied by states, international organizations and other relevant operators.<sup>20</sup>

It worth noting, however, that the distinction between hard law and soft law in the area of human rights is obviously a *legal* one, which is not necessarily relevant in practice. Empirical research has shown that the legal status of specific human rights norms is far from a determinative factor in promoting compliance with these norms, and in several instances formally non-binding norms have played an even more effective role in promoting respect for human rights.<sup>21</sup> But it is one thing to stress this empirical fact and it is another to deny that the existence of the distinction between binding and non-binding is still effective among the overwhelming majority of actors, and thus fully op-

erative, despite the instances in which international legal theory may be pushing towards other understandings.

The arguments exposed by Bartolomé Clavero and others regarding the specificities of the Declaration may be valid inasmuch as they are directed towards the normative standing of the individual rights affirmed in the Declaration, as opposed to the instrument itself. If the focus is shifted from the current debate on the formal legal standing of the Declaration towards the legal character of the substantive standards included in the text, the picture may change completely. As James Anaya has demonstrated in his official capacity as SR on Indigenous Peoples, the Declaration “reflects the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon [international] developments, including the interpretations of other human rights instruments by international bodies and mechanisms”.<sup>22</sup> Victoria Tauli-Corpuz, Chairperson of the UN PFIL, has similarly advocated for a reading of the Declaration which relates it to “existing international law”.<sup>23</sup> In actual fact, as discussed below, most of the substantive rights affirmed in the Declaration relate to already existing obligations under treaty law, as interpreted by the relevant monitoring bodies. Moreover, as Anaya and Wiessner have argued, at least some of the provisions of the Declaration may be considered as reflecting international customary norms.<sup>24</sup>

The distinction between the normative value of the specific rights enshrined in the Declaration and the legal status of the Declaration as an instrument is particularly relevant with regard to the third issue: monitoring. Stating that the Declaration lacks a specific monitoring mechanism does not imply that the rights under the Declaration should not be monitored. If the focus is placed on the rights, the standards of the Declaration are subject to supervision by existing international monitoring bodies and mechanisms as they relate to the general rights affirmed in the treaties they are respectively responsible for supervising. Moreover, if the debate is geared towards actual compliance with specific standards rather than on their formal monitoring, other actors are invited to play a significant role in promoting the implementation of the Declaration by means other than normative supervision *strictu sensu*.

## **The monitoring of indigenous peoples’ rights under the Declaration**

### **UN treaty bodies**

Since the 1980s, starting with the expansionist reading of Article 27 of the International Covenant and Civil and Political Right (ICCPR) (rights of minorities) by the Human Rights Committee, UN treaty bodies have gradually elab-



orated a cohesive body of interpretation of international human rights treaties in a way that incorporates indigenous peoples' rights. This jurisprudence has been developed both through its individual observations on individual states' compliance with the Convention or in the form of general comments, including the Human Rights Committee's General Comment on Article 27 and the General Recommendations on indigenous peoples by the Committee on the Elimination of Racial Discrimination (CERD).<sup>25</sup> Indigenous peoples' rights have also been specifically addressed by the Committee on Economic, Social and Cultural Rights in relation to state obligations under the International Convention on Economic, Social and Cultural Rights.<sup>26</sup>

Other UN human rights treaties include provisions that are relevant to the Declaration's call that "[p]articular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities."<sup>27</sup> The rights of indigenous children are explicitly safeguarded by the UN Convention on the Rights of the Child (CRC).<sup>28</sup> Article 30 of the Convention affirms indigenous children's right to "to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language". This provides a clear entry point for the Declaration as an authoritative interpretative tool of the Convention in the context of indigenous children.<sup>29</sup> A specific focus on indigenous women as particularly marginalized groups has similarly started to appear relatively recently in the monitoring activities of the Committee on the Elimination of Discrimination against Women (CEDAW).<sup>30</sup> It is to be expected that the recently constituted Committee on the Rights of Persons with Disabilities will also pay particular attention to indigenous persons in the supervision of its respective convention.<sup>31</sup>

An analysis of UN human rights standards and the jurisprudence of their monitoring bodies with regard to indigenous peoples clearly shows a significant synergy between general state human rights obligations and the rights affirmed in the Declaration. This is particularly relevant in areas of priority concern for indigenous peoples, including self-determination; cultural integrity; lands and natural resources; and social and economic advancement. In addition, UN general human rights standards safeguard the rights of indigenous individuals and specific groups as affirmed in the Declaration (for a summary of the connection between UN human rights treaties and the Declaration, *see* Table 1). These rights are fully enforceable by UN treaty bodies, for which the Declaration now constitutes an inescapable framework of reference for the application and development of new interpretations of state obligations under those treaties.

UN Treaty	Substantive rights	Article	Indigenous Rights under the Declaration	Article
CERD	Prohibition of racial discrimination	2	Political participation Consultation, consent Cultural integrity and language Development compatible with culture	5, 18 19, 32(2) 38 11-13, 34 32(1)
ICCPR	Self-determination	1	Self-determination Autonomy and self-government	3 4
	Rights of minorities	27	Cultural integrity and language Lands, territories and resources Subsistence economies Political participation	11-13, 25-29 20 5, 18
	Life, torture, liberty and security	6, 7, 9	Life, physical and mental integrity, liberty and security	7(1)
	Slavery and forced labor	8	Equal enjoyment of labor rights	17(1)
	Fair judgment Use of language in legal proceedings	14	Fair and just redress Use of indigenous languages in legal proceedings	40 13(2)
	Privacy and family	17, 23	Lands, territories and resources	25-28
	Freedom of religion or belief	18	Indigenous religions and spirituality	11-12
	Freedom of opinion	19	Indigenous media	16(1)
	Freedom of association	22	Political or social institutions	5, 34
	Children, nationality	24	Indigenous children Nationality	21(2) 22 6

UN Treaty	Substantive rights	Article	Indigenous Rights under the Declaration	Article
	Political participation	25	Political participation	5,18
	Equality before the law	26	Equality	2
International Covenant on Economic, Social and Cultural Rights	Self-determination	1	Self-determination	3, 4
	International cooperation	2 (1)		39
	Labor rights	7-9	Equal enjoyment of labour rights	
	Education	13	Language Education and media Children's education Improvement of education	13 4-16 17(2) 21
	Food	11(1)	Means of subsistence Improvement of social conditions Lands, territories and resources Environment	20 21 25-28 29
	Housing	11(1)	Improvement of housing conditions Housing programs Interdiction of forced removal Lands, territories and resources	21 23 10 25-28
	Health	12	Improvement of health conditions Health programs Right to health and traditional medicine Environment Children's health	21 23 24 29 17(2)
	Education	13	Language Education and media	13 14-16

UN Treaty	Substantive rights	Article	Indigenous Rights under the Declaration	Article
			Children's education Improvement of education	17 (2) 21
	Cultural life Benefits from intellectual or artistic production	15	Cultural integrity Cultural institutions Traditional knowledge	11-12 5, 34 31
CRC	Indigenous children Violence against children Indigenous language in media Education free of prejudice	30 et al. 19 17(d) 29(d)	Special measures for indigenous children Violence against indigenous children Indigenous media Prejudice in education and media	21(2) 22(1) 22(2) 16(1) 15 16(2)
Convention Against Torture	Prohibition of torture generally		Physical and mental integrity	7(1)
CEDAW	Women rights generally		Special measures for Indigenous women	21(2) 22(1)
Convention on Migrant Workers	Migrant rights generally		Trans-border cooperation	36
Convention on Persons with Disabilities	Rights of persons with disabilities generally		Indigenous persons with disabilities	21(2) 22(1)
Convention for the Protection of All Persons from Enforced Disappearance	Prohibition of enforced disappearance		Personal liberty and security	7(1)

**Table 1:** Comparison between the provisions of the UN human rights treaties, as interpreted by UN treaty bodies, and the provisions of the Declaration on the Rights of Indigenous Peoples

### The Universal Periodic Review (UPR)

The recently inaugurated UPR mechanism of the Human Rights Council is also an important tool in promoting the rights affirmed in the Declaration. As distinct

from UN treaty bodies, the UPR is an inter-state, peer-review mechanism aimed at the promotion of all human rights based on the principles of cooperation and objectivity.<sup>32</sup> By its very nature, the UPR differs from the role that independent experts' mechanisms play in monitoring state practice, and its outcomes may be seen, as shown by the practice of the mechanism thus far, as more limited.<sup>33</sup>

The framework for the UPR exercise is defined by the states' international human rights obligations under: the UN Charter; the UN Declaration on Human Rights; human rights instruments to which the state is party, and states' voluntary pledges and commitments.<sup>34</sup> Given the complementary and interrelated character of international human rights law, as well as the existing and developing jurisprudence of general human rights treaties by international bodies and mechanisms, it is clear that the provisions of the Declaration should guide the states' interpretation of their international human rights obligations and the positive developments and challenges faced when implementing them. Recent examples in this regard include the national reports submitted by Ecuador<sup>35</sup> and Peru,<sup>36</sup> which include references to the Declaration both as part of their human rights commitments and as a framework for their domestic indigenous policies. While the Declaration becomes gradually mainstreamed in the practice of both states and human rights bodies and mechanisms, it is to be expected that the Declaration will also be mainstreamed in the UPR process, contributing to defining the human rights obligations of the states under review.

### **The ILO supervisory bodies**

ILO Convention No. 169 on Indigenous and Tribal Peoples' Rights (ILO Convention 169) and the Declaration share something more than the actual content; they are products of a wider common standard-setting regarding the rights of indigenous peoples, of which the Convention is an early off-spring.<sup>37</sup> The adoption of the Declaration now naturally calls for a consistent reading of the Declaration and of the Convention, which even today stands as the most advanced international instrument regarding indigenous peoples with legally-binding effects for those countries that have formally ratified it.

Article 35 of ILO Convention 169 provides a formal entry point for considering the interpretation of its different provisions with reference to the Declaration, by including an interpretative clause that relates it to other international instruments.<sup>38</sup> While the list of rights affirmed in the Declaration covers areas other than those included in the Convention, the convergence and mutual reinforcement between the provisions included in the two instruments is self-evident (see Table 2).

<b>Indigenous rights under ILO Convention 169</b>	<b>Articles</b>	<b>Indigenous rights under the Declaration</b>	<b>Articles</b>
<b>General principles</b>			
Equal enjoyment of human rights	2, 3, 4(3)	Equal enjoyment of human rights	1, 2
		Self-determination	3
<b>Individual rights</b>			
Prohibition of force or coercion in violation of human rights	3(2)	Life, physical and mental integrity, liberty and security Forced assimilation	7(1) 8
Citizenship	4(3)	Nationality - Citizenship	3, 33
Account of indigenous origin in criminal proceedings	10		
Access to justice Right to interpretation in legal proceedings	12	Right to interpretation in legal proceedings	12
Prohibition of forced labor	11		
Equal enjoyment of labor rights	20	Equal enjoyment of labor rights, including children	17
<b>Autonomy rights</b>			
		Autonomy and self-government	4
Customs and legal institutions	8		34
Criminal justice systems	9		35
		Right of belonging to a community	9, 33
		Participate in decision-making	18
<b>Cultural rights</b>			
Social, cultural, religious and spiritual values and practices	5	Historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature	11(1)

<b>Indigenous rights under ILO Convention 169</b>	<b>Articles</b>	<b>Indigenous rights under the Declaration</b>	<b>Articles</b>
		Spiritual and religious traditions, customs and ceremonies; religious and cultural sites; ceremonial objects; human remains	12(1) 13
		Histories, languages, oral traditions, philosophies, writing systems and literatures	31
		Cultural heritage, traditional knowledge and traditional cultural expressions, human and genetic resources, seeds, medicines, knowledge of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts	
		Restitution and/or compensation	11(2), 12(2)
		Intellectual property rights	31
<b>Participation/consultation/consent</b>			
Consultation to reach an agreement	6	Consultation to reach free, prior and informed consent	19
Participation in development projects	7 (1)	Participation in development projects	23
		Participation in decision-making	18
<b>Lands, territories and natural resources</b>			
Recognition of special relation with the lands and territories	13 (1)	Recognition of special relation with the land and territories	25
Lands rights	14	Land and resource rights	26, 27
Resource rights	15 (1)	Land and resource rights	26, 27
Consultation in relation to resource exploitation	15 (2)	Consultation in relation to resource exploitation	32 (2)
Interdiction of forced removal	16		14



<b>Indigenous rights under ILO Convention 169</b>	<b>Articles</b>	<b>Indigenous rights under the Declaration</b>	<b>Articles</b>
Transfer of property	17		
Protection against abuse	18		
Non discrimination in agrarian programs	19		
Environment, including measures of conservation	5, 7(4)	Environment, including reparation and/or compensation	29
		Means of subsistence	20
		Restitution and/or compensation	28
		Traditional knowledge over biological resources	31
<b>Social services and development</b>			
Right to decide priorities over development	7(1)	Right to decide priorities over development	23, 32(1)
Priority in development programs	7(2)	Special measures to promote social and economic advancement	21(2)
Impact Assessment Studies	7(3)		
		Mitigation of impact of development	32(3)
Education, including bilingual education	26-29	Education, including bilingual education	14
Elimination of prejudices in national education	30		15 16(2)
Social security	24		
		Indigenous media	16(1)
Health, including traditional medicine	25	Health, including traditional medicine	24
Vocational training	21-25		

Indigenous rights under ILO Convention 169	Articles	Indigenous rights under the Declaration	Articles
<b>Trans-border cooperation</b>			
		Trans-border cooperation	36
<b>Specific groups</b>			
Women	2(2)	Special measures for women Violence against women	21(2) 22(1), 22(2)
Children	25-26	Special measures for children Violence against children	21(2), 22(1) 22(2)
		Elders, youth and persons with disabilities	22(1)
<b>Other issues</b>			
		Prohibition of genocide	7(2)
		Militarization of indigenous lands	30
		Treaties and constructive arrangements	37

**Table 2:** Comparison between the provisions of ILO Convention 169 and the Declaration

The ILO supervisory bodies have played an active role in monitoring indigenous rights under Convention 169.<sup>39</sup> Under Article 35 of the Convention, the Declaration now stands as an interpretative tool that should guide this process, as is the case in relation to other UN human rights instruments.

### **The monitoring of the Convention on Biological Diversity**

Albeit not properly human rights instruments, a number of international environmental treaties and declarations adopted at or after the 1992 Rio Conference on the Environment include a specific focus on indigenous peoples.<sup>40</sup> One of the main instruments resulting from the discussions in Rio was, as is known, the Convention on Biological Diversity (CBD).<sup>41</sup> Article 8(j) of the Convention affirms a state's duty to "respect, preserve and maintain the knowledge, innovations and practices of indigenous and local communities relevant for the conservation of biological diversity" and to "encourage equitable sharing of benefits arising out

of the use of biological diversity". This and related provisions of the Convention are echoed in Article 31 of the Declaration, which spells out indigenous peoples' rights over their traditional knowledge, including *inter alia* knowledge over "genetic resources, seeds, medicines, knowledge of the properties of fauna and flora".

The monitoring process of the CBD includes the periodic Conferences of the Parties (COP) and a number of *ad hoc* technical working groups concerning specific provisions of the Convention. In 1998, COP-4 established an Ad Hoc Open-Ended Working Group on Article 8(j) and related provisions, with the active involvement of indigenous organizations.<sup>42</sup> As part of its activities, the Working Group promoted the adoption of the Akwé: Kon Guidelines, a set of voluntary guidelines for impact assessment activities in relation to development projects in indigenous territories.<sup>43</sup> Indigenous peoples' interests have also been incorporated in the Bonn Guidelines, dealing with access to and benefit-sharing deriving from genetic resources, in a way that complements indigenous traditional knowledge rights under Article 31 of the Declaration.<sup>44</sup>

In its first session after the adoption of the Declaration, the COP took formal note of the Declaration.<sup>45</sup> Moreover, the COP included the Declaration as part of the normative framework of reference for the elaboration of a draft Code of Ethical Conduct in relation to Article 8(j), recognizing the need for the "harmonization and complementarity and effective implementation" of existing international instruments as they relate to indigenous peoples' rights.<sup>46</sup> This development signals a decided commitment on the part of the CBD monitoring process to interpret Article 8(j) and related provisions in the light of the indigenous rights provisions of the Declaration, and thus to contribute to their effective application.

### The inter-American human rights system

Like the UN treaty bodies, the bodies of the inter-American human rights system, including the Inter-American Commission and the Inter-American Court, have in recent years elaborated a fairly advanced jurisprudence regarding the rights of indigenous peoples.<sup>47</sup> This jurisprudence is based on an "evolutionary interpretation" of various general provisions of the American Convention on Human Rights and related instruments, and has considered issues of particular concern to indigenous peoples, including: the right to life, the right to property, and the right to political participation.<sup>48</sup>

The draft Declaration was effectively operative in the articulation of the land rights jurisprudence by the inter-American monitoring bodies.<sup>49</sup> Since its adoption, the Declaration has been explicitly cited by the Inter-American Court in its decision in *Saramaka People v. Suriname*.<sup>50</sup> In this case, in which the Court devel-

oped new jurisprudence regarding indigenous peoples' rights over natural resources, the Court developed a special test regarding the impact of development plans on indigenous territories.<sup>51</sup> The Court's test derives from some of the provisions based in ILO Convention 169 and the Declaration.<sup>52</sup> In addition, the Court cited the Declaration to conclude that the American Convention prescribes that states "in certain circumstances, and in addition to other consultation mechanisms...must obtain the consent of indigenous and tribal peoples to carry out large-scale development or investment projects that have a significant impact on the right of use and enjoyment of their ancestral territories".<sup>53</sup> The Court implicitly recognizes that these are operative principles of international law irrespective of the legal character of the Declaration and despite the fact that the state involved in this specific case, Suriname, is not a party to Convention 169.

The jurisprudence of the inter-American human rights bodies has been influential, as has been the Declaration, in the standard-setting process inaugurated in 1993 at the OAS regarding the drafting of the American Declaration on the Rights of Indigenous Peoples.<sup>54</sup> The provisions of the Draft American Declaration mirror, and in some cases widen, the standards affirmed in the UN Declaration.<sup>55</sup> The adoption of the latter has actually been a trigger in ongoing negotiations between states and indigenous peoples leading to the final adoption of the American Declaration.<sup>56</sup> When it is eventually adopted, the two declarations will play a common role of informing and enlarging the interpretation of the general OAS human rights instruments regarding the human rights of indigenous peoples in the Americas.

## **Beyond monitoring: working towards implementation**

International monitoring of human rights is one thing but translating human rights into people's real lives is a different thing altogether. Decades of developing the standards and practice of international mechanisms has shown the sad, well-known reality that the impact of the human rights regime in the field is, at best, limited; that the effectiveness of "name and shame" techniques has long been superseded by crude facts; and that violations of human rights continue to be widespread no matter how sophisticated the means to protect them. The debate on the legal status of the Declaration tends to obscure the fact that the real question is indeed not whether or how the Declaration should be monitored but how the specific rights affirmed in the Declaration can be made effective, improve the lives of indigenous peoples and individuals and prevent the serious violations from continuing.

Drawing from the lessons of the past, the international human rights regime has come to realize that the effectiveness of international human rights standards relies on a broad variety of techniques and involves a number of key actors that are different and complementary to international bodies in their application of

legally binding norms. This perspective shifts the focus from a purely syllogistic reading of international law, based on the dichotomy of obligations and violations, to a more sophisticated approach, closer to real-life experience, which underlines the importance of empowering rights-holders, of reinforcing duty-bearers' capacities, and of the role of technical cooperation in this regard.

This approach further moves the exclusive focus on the normative work of the international human rights bodies and mechanism to a broader array of "implementing" actors that play a complementary role in promoting the effective application of human rights standards on the ground. For the purposes of this discussion, I will focus on those mechanisms with a particular potential for implementing indigenous rights under the Declaration, including UN mechanisms with a specific mandate relating to indigenous peoples.

### The Special Rapporteur on Indigenous Peoples

The special procedures created by the former UN Commission on Human Rights, and taken up by the Human Rights Council, are key to promoting the implementation of human rights standards worldwide.<sup>57</sup> Special procedures are not monitoring mechanisms proper: their products, such as thematic and country reports, and communications sent to states regarding specific cases of human rights violations, are not technically binding upon states in the same way as treaty bodies' jurisprudence. However, the flexibility and universality of their mandates – unrelated to a state's ratification or not of given instruments – allows them to play a promoting role that is in certain regards more effective than that of treaty bodies in bringing actual changes on the ground. As authoritative, independent voices with UN official standing, special procedures also in some way play a critical role in advancing normative understandings of existing international instruments or in promoting the adoption of new ones, as was the case in relation to the Declaration.<sup>58</sup>

As is known, the mandate of the SR on Indigenous Peoples is the key mechanism within the system of the Human Rights Council's thematic special procedures with regard to the promotion and protection of indigenous peoples.<sup>59</sup> The SR on Indigenous Peoples' original mandate as established by the Commission on Human Rights in 2001 framed his activities under human rights instruments of general applicability.<sup>60</sup> With the adoption of the Declaration, as discussed above, the Human Rights Council attributed the SR on Indigenous Peoples with the mandate to promote the implementation of the Declaration and other international instruments relevant to indigenous peoples' rights.<sup>61</sup>

The prior experience of the first mandate holder, Prof. Stavenhagen, clearly shows that the formal distinction between monitoring and implementation functions is superficial in practice. Irrespective of the technically non-binding charac-

ter of the SR on Indigenous Peoples’ “recommendations”, his reports, particularly those on country visits, have played, and still play, a crucial role in fostering domestic processes leading to more effective safeguards of indigenous rights. The SR on Indigenous Peoples put a particular emphasis on the “implementation gap” between indigenous rights at the domestic and international levels and the daily lives of indigenous peoples on the ground,<sup>62</sup> and accordingly developed, in cooperation with international actors and civil society, a number of mechanisms to follow-up on the implementation of his own recommendations – again, irrespective of their non-binding character.<sup>63</sup>

While the Human Rights Council has bestowed upon the SR on Indigenous Peoples a specific mandate to promote the implementation of the Declaration, it is also important to note that other thematic (and country) procedures also play a role in this regard within their respective spheres of competence. A comparison between the substantive provisions of the Declaration and the different thematic mandates of the Human Rights Council show a number of important connections indeed (see Table 3).

Thematic Special Procedures	Main Normative Framework	Indigenous Rights under the Declaration	Articles
SR on adequate housing	UDHR, Art 25(1) ICESCR, Art 11(1)	Improvement of housing conditions Housing programs Interdiction of forced removal lands, territories and resources	21 23 10 25-28
WG on African descent	Durban Declaration		
WG on arbitrary detention	UDHR, Art 3 ICCPR, Art 9	Personal liberty and security	7(1)
SR on the sale of children	CRC, Arts 34-35 Optional Protocol to CRC	Indigenous children	21(2) 22
SR on education	UDHR, Art 26 ICESCR, Art 13 CRC, Arts 28-29	Language Education and media Children’s education Improvement of education	13 14-16 17(2) 21
WG on disappearances	CED UN Dec. on disappearances	Personal liberty and security	7(1)

Thematic Special Procedures	Main Normative Framework	Indigenous Rights under the Declaration	Articles
SR on summary executions	UDHR, Art 3 ICCPR, Arts 6, 14 & 15	Right to life	7(1)
Independent Expert (IE) on extreme poverty	UDHR, Arts. 22, 25 ICESCR, Arts 9, 12-13	Means of subsistence Improvement of social conditions	21 22
SR on the right to food	UNDR, Art. 25(1) ICESCR, Arts 2, 11 Food Aid Convention, 1999	Means of subsistence Improvement of social conditions Lands, territories and resources Environment	20 21 25-28 29
IE on foreign debt	Commission on Human Rights (CHR) resolutions	Means of subsistence Improvement of social conditions	21 22
SR on freedom of opinion	ICCPR, Art 19	Indigenous media	16 (1)
SR on freedom of religion	UDHR, Art 18 ICCPR, Art 18	Indigenous religions and spirituality	11-12
SR on the right to health	UDHR, Art 25(1) ICESCR, Art 12	Improvement of health conditions Health programs Right to health and traditional medicine Children's health	21 23 24 17 (2)
SR on HR defenders	UN Dec. on HR defenders, 1999	Life and physical integrity	7 (1)
SR on indep. of judges	UDHR, Art 10 ICCPR, Art 14	Fair and just redress	40
SR on indigenous peoples	UN Dec. on indigenous peoples	All	All
Representative of the Secretary General on Internally Displaced Persons	Guiding principles on IDPs, 1998 Geneva Convention, 1949	Forced removal	10
WG on mercenaries	UN Conv. on mercenaries, 1989	Life and physical integrity	7 (1)



Thematic Special Procedures	Main Normative Framework	Indigenous Rights under the Declaration	Articles
		Militarization	30
SR on migrants	CMW ILO Conv. on Migrant Workers, 1975	Trans-border cooperation	36
IE on minority issues	ICCPR, Art. 27 Dec. on minorities, 1992		
SR on racism	ICERD UNESCO Dec. on Race, 1978 Durban Declaration	Interdiction of discrimination	2
SR on slavery	Convention on Slavery, 1926 Forced Labour Convention, 1930 UDHR, Art 4	Enjoyment of labour rights	17(1)
IE on int'l solidarity	UN Dec. on development, 1986	International cooperation	39
SR on counter-terrorism	GA res. 59/195, 2004 CHR res. 2004/44, 2004 SC res. 1456, 2003	Enjoyment of individual rights	
SR on torture	CAT UDH, Art 5 ICCPR, Art 7	Physical integrity	7(1)
SR on toxic waste	UDHR, Arts 3, 35 ICESCR, Arts 7, 11-12, 15 Basel Convention, 1989	Environment	29
SR on trafficking	Palermo Protocol, 2000 OHCHR Guidelines	Indigenous women and children	21 (2) 22 (1)
Special Representative of the Secretary General on transnationals	CHR decision 2004/116 on responsibilities of transnationals	Development projects	32 (2)

Thematic Special Procedures	Main Normative Framework	Indigenous Rights under the Declaration	Articles
SR on Violence Against Women (VAW)	CEDAW UN Dec. on VAW, 1993	Violence against women and children	22 (2)

**Table 3:** Comparison between the Normative Framework of Thematic Special Procedures of the Human Rights Council and the Substantive Provisions of the Declaration.<sup>64</sup>

As their respective mandates relate to specific provisions of the Declaration, thematic special procedures other than the SR on Indigenous Peoples have the responsibility to mainstream indigenous rights in their work, as affirmed in the Declaration. In the past, some mandates have demonstrated how this is possible and may indeed be useful to gradually ensuring the insertion of indigenous peoples' rights on the broader human rights agenda.<sup>65</sup>

### Expert Mechanism on the Rights of Indigenous Peoples

Also part of the human rights machinery of the Human Rights Council, the main function of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) is "to provide the Council with thematic expertise on the rights of indigenous peoples", focusing mainly on "studies and research-based advice".<sup>66</sup> The EMRIP is an expert body composed of five members representing the different regions, most of whom are indigenous persons. The EMRIP's mandate to some extent overlaps with that of the SR on Indigenous Peoples inasmuch as that of the SR on Indigenous Peoples also covers thematic research, actually one of the main lines of work of former SR on Indigenous Peoples Rodolfo Stavenhagen.<sup>67</sup> Moreover, the EMRIP's mandate mirrors that of the Expert Advisory Committee of the Human Rights Council, the 18-expert body that replaced the former Sub-Commission on the Promotion and Protection of Human Rights of the Commission (the Sub-Commission).<sup>68</sup> The establishment of the EMRIP can actually be explained more as a response to the demands of indigenous peoples, afraid of "losing" an institutional space within the new Human Rights Council machinery – that of the former Working Group on Indigenous Population of the Sub-commission – than as conscious step towards cohesive institution building.

The function of "monitoring of the implementation of the Declaration", incorporated in previous draft resolutions proposed by the Indigenous Caucus, was explicitly excluded by the Human Rights Council in its Resolution establishing the EMRIP. Nonetheless, through its general advisory role and through the preparation of specialized studies regarding indigenous peoples' rights, the EMRIP is in a privileged

position to contribute to promoting authoritative interpretations of the standards of the Declaration, which may be subsequently endorsed by international human rights monitoring bodies with the participation of indigenous peoples themselves.

### **Permanent Forum on Indigenous Issues**

The establishment of the PFII by ECOSOC in 2001 was an important signal from the UN system regarding the special importance it attributes to the situation of the world's indigenous peoples. A subsidiary body of ECOSOC, the PFII has a broad mandate to coordinate the work of ECOSOC and the international agencies relating to indigenous peoples, in six specific areas including: social and economic development; culture; health; education; and human rights.<sup>69</sup> Because of its important coordinating role and, more broadly, its role of mainstreaming indigenous issues throughout the UN system, Article 42 of the Declaration expressly identifies the PFII as one of the actors responsible for promoting the "effective application" of the Declaration.

The adoption of the Declaration provides the PFII with clear normative terms of reference that were lacking in the PFII's original mandate. In its seventh session in April-May 2008, the PFII solemnly welcomed the adoption of the Declaration, assuming its responsibility under Article 42 to "making it a living document throughout its work".<sup>70</sup> Moreover, the PFII affirmed that "the Declaration will be its legal framework", pledging to ensure its integration in its work under its substantive mandated areas.<sup>71</sup>

The Declaration does indeed constitute an important framework of reference for the PFII role in coordinating the activities of the different international agencies, which can now properly be described as a mainstreaming role aimed at ensuring respect for the Declaration's standards among the UN's agencies.<sup>72</sup> As pointed out above, the PFII has, however, tended to see in the Declaration something more than a framework of reference for its work, and is promoting a reading of Article 42 that possibly differs from the intention of the Declaration's drafters.<sup>73</sup> Thus, according to the study presented by former Forum members Ida Nicholaisen and Wilton Littlechild, Article 42 the Declaration is to be construed as providing the Forum with "a new mandate".<sup>74</sup> According to the authors, to implement this mandate, the Forum "will have to promote a constructive dialogue with Governments on the challenges, achievements and priorities that indigenous issues require in each country. Such dialogue would take place periodically and enlist the participation of indigenous organizations and the UN system".<sup>75</sup>

These ideas have evolved into the PFII current plans to establish a Chamber on the Declaration within its functional structure, with powers to "promote a constructive dialogue with Governments on the achievements, challenges and future action required in relation to indigenous peoples' issues in each country under the Declaration", on a periodic basis.<sup>76</sup> This approach can be criticized in

a number of important ways. It attempts to bestow the Declaration with a legal status that, irrespective of the derivative binding force of most of the rights included in it, it does not have *as an instrument*. In addition, a serious flaw in the PFII's approach is the confusion between monitoring and implementation functions, which leads to the pretension of bestowing on the Forum a monitoring role similar to that of international treaty bodies or, more specifically, to the UPR mechanism of the Human Rights Council. This interpretation of the PFII's role under Article 42 of the Convention is at odds with the Forum's general mandate as defined by ECOSOC, and derives from a misunderstanding of its role under the mandated area of human rights. While human rights are included in the PFII's mandate on the same footing as other issues such as health or education – also human rights issues – the PFII is not strictly a human rights body within the UN meaning of the term, and its mandate is strictly one of producing recommendations to the international agencies and to ECOSOC – not to state members.<sup>77</sup>

Moreover, the idea of a parallel UPR process regarding the Declaration runs opposite to the direction that the PFII is meant to take in mainstreaming the Declaration in the work of the UN system. The adoption of the Declaration should indeed be taken as an opportunity to overcome the tendency to cluster indigenous issues into separate institutional schemes – as seen in the establishment of the EMRIP – and to fully integrate indigenous peoples' rights in the international human rights agenda and in the work of the international agencies.

## Conclusions

In this chapter, I have tried to draw a number of conceptual distinctions that may prove useful in overcoming unfruitful controversies to enhance action towards the effective implementation of the rights enshrined in the Declaration.

The first of these distinctions is that between the legal status of the Declaration as an instrument, on the one hand, and of the rights incorporated in the Declaration, on the other. Shifting the focus from the formal legal status of the Declaration to the actual human rights standards included in the Declaration allows us to conclude that most of the substantive rights enshrined in the Declaration, notably in key areas such as indigenous peoples' self-determination, autonomy, participation, land and resource rights, cultural rights, and social and economic rights, relate to already existing human rights obligations derived from general treaties, as well as to specific legally-binding instruments on indigenous rights, such as ILO Convention 169. The review of international practice shows that some of these rights have already been affirmed and elaborated upon by international bodies and mechanisms in their monitoring activities. With the adoption of the Declaration, international monitoring mechanisms now have an interpretative authoritative tool that should, and is, being used to operationalize in-

indigenous peoples' rights. In some instances, subject to the review of existing state practice and *opinio iuris*, a number of provisions of the Declaration may be constitutive or advance the crystallization of international customary norms.

A second distinction refers to the functions of international monitoring and of implementation. This distinction does not necessarily bear substantive difference in relation to the actual impact on the ground of monitoring or implementing mechanisms, as shown by the experience of the SR on Indigenous Peoples. However, it is a formal distinction that ought to be kept in order to preserve the legitimacy – and hence the effectiveness – of existing mechanisms within their respective realms of competence. Working towards the effective implementation of indigenous rights under the Declaration, as well as of the rest of human rights generally, is a long-term, fragile process that is plagued by difficulties and setbacks. Care should be made to avoid adding extra difficulties to this process by virtue of confusing institutional roles.

In reading the above conclusions, the reader may want to pose the legitimate question of what has changed since the adoption of the Declaration. The response is something and nothing. Nothing has changed concerning the general structure of international human rights law, whereby treaties continue to be treaties and declarations, declarations. Nothing has similarly changed concerning the general design of the international institutional machinery responsible for the promotion and protection of human rights. But a great deal has changed with regard to the future activities of international monitoring bodies, for many of which the distinction between a “declaration” and a “draft declaration” is still relevant. A great deal has changed also with regard to the activities of other human rights mechanisms, the mandates of which are not strictly that of monitoring, particularly those with specific mandates regarding indigenous peoples. For all of them, the Declaration now provides a formal normative framework of reference that spells out the “minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”,<sup>78</sup> and this will help advance a better understanding of the content of these rights in specific contexts and hold states and other actors accountable to them. The adoption of the Declaration will further advance the mainstreaming of indigenous peoples' rights within international agencies and other actors whose policies and actions are, or should be, guided by UN human rights standards. For these reasons, in addition to the many hopes placed in it by indigenous peoples across the world, all the efforts involved in the lengthy process leading to the final adoption of the Declaration have been truly meaningful. ○

## Notes

- 1 Human Rights Council “Resolution 6/12” (28 September 2007), at para. 1(g), reproduced in “Report of the Human Rights Council on its sixth session” UN A/HRC/6/22 (14 April 2008), para 27.

- 2 For authoritative analysis of the special character of the Declaration as distinct to other UN non-binding instruments, **S. James Anaya and Siegfried Wiessner. 2007**, "OP-ED: The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment," *Jurist* (3 October 2007); **Bartolomé Clavero. 2008**. *Nota sobre el alcance del mandato contenido en el artículo 42 de la Declaración sobre los derechos de los pueblos indígenas y el mejor modo de satisfacerlo por parte del Foro Permanente para las Cuestiones Indígenas*, presented by Bartolomé Clavero, Member of the Permanent Forum on Indigenous Issues, UN Doc E/C.19/2008/CRP.6 (26 March 2008).
- 3 UN Department of Public Information press release: "General Assembly adopts Declaration on Rights of Indigenous Peoples; 'major step forward' towards Human Rights for All, says President," UN Doc GA/10612 (13 September 2007).
- 4 UN General Assembly Official Records, 61<sup>st</sup> session, 107<sup>th</sup> plenary meeting, UN Doc A/61/PV.107, 22.
- 5 *Ibid.*, 13.
- 6 *Ibid.*, 12.
- 7 HRC Report, 6<sup>th</sup> session, above n 1, para 180.
- 8 HRC resolution 6/12, above n 1, para 1(g).
- 9 See Rodolfo Stavenhagen's chapter in this volume.
- 10 See, in general, **Ian Brownlie. 1988**. "To What Extent are the Categories of *Lex Data* and *Lege Ferenda* Still Valuable?" in Antonio Cassese and Joseph H. H. Weiler (eds). *Change and Stability in International Law-Making*. (Berlin: Walter de Gruyter, European University Institute, A Series).
- 11 Clavero, *Nota sobre el alcance del mandato contenido en el artículo 42 de la Declaración...*, above n 2, para 9 (author's translation).
- 12 *Ibid.*, para 10.
- 13 *Ibid.*
- 14 *Ibid.*, para 15.
- 15 *Ibid.*, para 16.
- 16 *Ibid.* (emphasis in the original).
- 17 *Ibid.*
- 18 *Ibid.*
- 19 As listed in the Statute of the International Court of Justice. See Statute of the International Court of Justice (26 June 1945), 3 *Bevans* 1153 (26 June 1945), Art. 38.1(a)-(c). For a recent reassessment of these resources, see **Anthony D'Amato. 2008**. "International Soft Law, Hard Law, and Coherence," Northwestern University School of Law Public Law and Legal Theory Series No. 08-01.
- 20 Thus, for instance, the Office of the High Commissioner for Human Rights (OHCHR) sticks to the dichotomy between treaties, which are "legally binding, written agreement concluded between States," and resolutions of the UN General Assembly, which are "not legally binding per se." OHCHR, *Human Rights in the Administration of Justice*, Professional Training Series No. 9. (New York & Geneva: UN, 2003) 7, 10.
- 21 See **Dinah Shelton. 2004**. "Commentary and Conclusions," in Shelton, Dinah (ed) *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford: Oxford University Press), 449, 458 (noting that, in actual practice, "it becomes difficult to separate the impact of the non-binding instruments from the treaty obligations").
- 22 See Special Rapporteur's Report 2008, above n 2, para 16.
- 23 Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues, on the occasion of the Adoption of the UN Declaration on the Rights of Indigenous Peoples, 61<sup>st</sup> Session of the UN General Assembly (13 September 2007), 2.
- 24 Anaya and Wiessner, "The UN Declaration on the Rights of Indigenous Peoples", above n 2. The argument is based on the authors' prior evaluation of comparative state practice. See **S James Anaya. 2005**. *Indigenous Peoples in International Law* (2 ed) (Oxford: Oxford University Press, 2004); **Siegfried Wiessner. 1999**. "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis," 12 *Harv HRLJ* 57.
- 25 CERD "General Recommendation XXIII: Indigenous Peoples" UN Doc A/52/18, annex V (1997), reproduced in *Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/Rev.7 (2004), para 1.

- 26 See General Comment No. 7: The right to adequate housing (Art 11(1)): Forced evictions, UN Doc E/C.12/1998/22 (13 November 1998), Annex IV, para 10; General Comment No. 12: The right to adequate food (Art 11), UN Doc E/C.12/1999/5 (12 May 1999), para 13; “General Comment No. 13: The right to education” (Art 13), UN Doc E/C.12/1999/10 (8 December 1999), para 50; “General Comment No. 14: The right to the highest attainable standard of health” (Art 12), UN Doc E/C.12/2000/4 (11 August 2000.), paras 12(b), 27; “General Comment No. 15: The right to water” (Arts 11-12), UN Doc E/C.12/2002/11), paras 7, 16. “General Comment No. 17: The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he or she is the author (Art 15 (1)(c))” UN Doc E/C.12/GC/17 (21 January 2006), paras 9, 32, 45, 18(b)(iii).
- 27 General Assembly “Resolution on Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007) [hereinafter, “UNDRIP,” Art. 22].
- 28 Convention on the Rights of the Child, 20 November 1989, 1577 UNTS 3, entered into force 2 September 1990.
- 29 On the basis of Article 30 and related provisions of the Convention, the Committee on the Rights of the Child adopted in 2003 a number of recommendations regarding indigenous children. See CRC “Day of General Discussion on the Rights of Indigenous Children: Recommendations”, 34<sup>th</sup> session (15 September-3 October 2003) (3 October 2003). In addition, the Committee is currently engaged in consultations leading to the adoption of a general recommendation on indigenous children, which takes into account several of the provisions of the Declaration.
- 30 See, for example, “General Recommendation No. 24 (1999): Women and health” UN Doc A/54/38/Rev.1, Chp. I (5 February 1999), para 6
- 31 International Convention on the Rights of Persons with Disabilities, 30 March 2007, 993 UNTS 3, entered into force 30 May 2008.
- 32 Human Rights Council “Institutional Building” Annex of HRC resolution 5/1 (18 June 2007), paras. 3(a)-(b).
- 33 For recent civil society critiques on the working of the UPR mechanism, see, e.g. **Maria Stoyanova. 2008.** “Civil Society Involvement in the UPR: The Example of Indonesia,” Friedrich Ebert Stiftung Conference Report (March); International Service for Human Rights “Universal Periodic Review: Overview of First Session (7-18 April 2008)” (Human Rights Monitor Series: UPR Monitor) (May 2008).
- 34 “Human Rights Council: Institutional Building,” above n 32, para 1.
- 35 “National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: Ecuador” UN Doc A/HRC/WG.6/1/ECU/1 (7 April 2008), paras 21, 141.
- 36 “National report submitted in accordance with paragraph 15(a) of the annex to Human Rights Council resolution 5/1: Peru” UN Doc A/HRC/WG.6/2/PER/1 (4 August, 2008), para 72.
- 37 For a history of the interconnection of the UN and the ILO standards in this regard, see **Luis Rodríguez-Piñero. 2005.** *Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919-1989)* (Oxford: Oxford University Press) Chps. 8-9.
- 38 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991 [hereinafter ILO Convention 169], Art 35 (“The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.”).
- 39 See **Luis Rodríguez-Piñero. 2004.** “Historical Anomalies, Contemporary Consequences: International Supervision of the ILO Convention on Indigenous and Tribal Peoples (No. 169)” 12 *Law & Anthropology: Int’l YB for Leg Anthr*, 55.
- 40 Specific references to indigenous peoples are incorporated in the UN non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, UN Doc A/CONF.151/26 (Vol. III) (26 August 2006), Annex III, paras. 2, 5-6, 12; and the UN Framework Convention on Climate Change 9 May 1992, 1771 UNTS 107, entered into force on 21 March 1994 Art. 3. In addition, Article 10(2)(e) of



- the UN Convention to combat desertification in those countries experiencing serious droughts and/or desertification, particularly in Africa, 17 June 1994, 1954 UNTS 3, entered into force on 26 December 1996, includes a reference to the role of “local populations and community groups”.
- 41 Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79, entered into force on 29 December 1993.
  - 42 COP-4 Decision IV/9 (Bratislava, 4 - 15 May 1998).
  - 43 Akwé: Kon Guidelines, the voluntary guidelines for the conduct of cultural, environmental and social impact assessment regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. COP-7 Decision VII/16 (Kuala Lumpur, 9 - 20 February 2004), Annex.
  - 44 Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits arising out of their Utilization. Cop-6 Decision VI/24 (The Hague, 7 - 19 April 2002).
  - 45 COP-9 Decision IX/13 (Bonn, 19 - 30 May 2008), preambular para 3.
  - 46 Draft Elements of a Code of Ethical Conduct to [promote] [ensure] respect for the cultural and intellectual heritage indigenous and local communities relevant to the conservation and sustainable use of biological diversity, *ibid*, Annex, para 11.
  - 47 See **Fergus Mackay**. 2002. *A Guide to Indigenous Peoples' Rights in the Inter-American Human Rights System* (Copenhagen: IWGIA); **Isabel Madariaga Cuneo**. 2005. “Los derechos de los pueblos indígenas y el sistema interamericano de derechos humanos” 22 *Ariz J Int'l & Comp L* 53; **Jo. M Pasqualucci**. 2006. “The Evolution of International Indigenous Rights in the Inter-American Human Rights System,” 6 *Hum Rts L Rev* 1; **Luis Rodríguez-Piñero**. 2006. “El sistema interamericano de derechos humanos y los pueblos indígenas” in Mikel Berraondo (coord), *Pueblos indígenas y derechos humanos* (Bilbao: Universidad de Deusto).
  - 48 American Convention on Human Rights, 21 November 1969, OAS TS 36, 1144 UNTS 143, entered into force on 18 July 1978.
  - 49 *Vid. Marie and Carrie Dann v United States* (Merits), I/A C.H.R., Report No. 75/02, Case 11.140 (27 December 2002), para 118; *Mayan Indigenous Communities of the Toledo District Toledo v Belize* (Merits). I/A C.H.R, Report No. 40/04, Case 12.053 (12 October 2004), para 118; Concurring opinion of Judge Sergio García Ramírez on the judgment on the merits and reparations of the case “Awat Tingni Mayagna (Sumo) Indigenous Community” (2001), para 7.
  - 50 *Saramaka People v. Suriname* (Preliminary Objections, Merits, Reparations, and Costs). I/A Court H.R., Judgment of 28 November 2007. Series C No. 172.
  - 51 *Ibid*, para 129 (footnotes omitted).
  - 52 *Ibid*, para 131 (quoting Article 32 of the Declaration).
  - 53 *Ibid*, para 136 (citing again Article 32).
  - 54 The latest version of the draft American Declaration can be found in “Registro del estado actual del proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas (Resultados de las Diez Reuniones de Negociación para la Búsqueda de Consensos celebradas por el Grupo de Trabajo)” OAS Doc GT/DADIN/doc.301/07 (27 April 2007).
  - 55 See “Cuadro comparativo entre el proyecto de Declaración Americana sobre los Derechos de los Pueblos Indígenas y la Declaración de las Naciones Unidas sobre los Derechos de los Pueblos Indígenas” OEA Doc GT/DADIN/Doc.317/07 Rev. 1 (14 March 2008).
  - 56 In its first session after the adoption of the UN Declaration, the OAS General Assembly decided to renew the mandate of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples for the period 2008-2009, with a view to finding a final consensus on the text.
  - 57 On the UN system of special procedures, see generally **Elivira Domínguez**. 2005. *Los procedimientos públicos especiales de la Comisión de Derechos Humanos de Naciones Unidas* (Madrid, Editorial Tirant Lo Blanch); **Jeroen Gutter** (ed). 2006. *Thematic Procedures of UN* (Amberes, Intersentia); **Ingrid Nifosi**. 2006. *The UN Special Procedures in the Field of Human Rights* (Amberes, Intersentia).
  - 58 See, e.g., “The situation of human rights and fundamental freedoms of indigenous people” UN Doc A/61/490 (6 September 2006). In this report, presented at the Third Committee of the UN General Assembly, the Special Rapporteur made an “urgent appeal” to the members of the Assembly to adopt the draft declaration as adopted by the HRC, *ibid*, paras 33-40.

- 59 On the mandate and activities of the UN Special Rapporteur on indigenous peoples, see **Lola García-Alix et al. 2007**. *The UN Special Rapporteur. Indigenous Rights: Experiences and Challenges* (Copenhagen: IWGIA).
- 60 Commission on Human Rights “Resolution 2001/51: UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people” UN Doc E/CN.4/Res/2001/57 (24 April 2001). The preamble of the resolution generally framed the mandate under the UN Charter, the Universal Declaration of Human Rights, the UN human rights treaties, the International Decade of the World’s Indigenous People, and the Durban Declaration and Programme of Action. It further included a reference to ILO Convention No. 169.
- 61 HRC Resolution 6/12, above n 1, para 1(g).
- 62 See *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen* UN Doc. E/CN.4/2006/78 (16 February 2006). Stavenhagen’s report, the first he presented to the Human Rights Council, provides an analysis of the implementation, or lack thereof, of existing international and domestic norms and judicial decisions concerning indigenous peoples’ rights. As put by Stavenhagen, coining a phrase which has deeply resounded in contemporary discussions of indigenous peoples’ rights, despite ‘legislative measures and institutional reforms, there still exists an ‘implementation gap’ between legislation and day-to-day reality.” *Ibid*, para 14.
- 63 For an analysis of the impact of the Special Rapporteur’s recommendations, including a description of past and ongoing initiatives to follow-up on these recommendations by OHCHR, the specialized agencies and civil society, see *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen. Addendum: Study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur* UN Doc A/HRC/4/15/Add.4 (26 February 2007).
- 64 CHR stands for Commission on Human Rights; GA for General Assembly; IDPs for internally displaced persons; RSG for Representative of the Secretary General; SRSG for Special Representative of the Secretary General; SC for Security Council; SR for Special Rapporteur; UDHR for Universal Declaration on Human Rights; VAW for violence against women; WG for Working Group.
- 65 For a further analysis of the system of thematic and country special procedures of the Human Rights Council as they relate to indigenous rights issues, see **Luis Rodríguez-Piñero**. “Los procedimientos especiales y los derechos indígenas: el papel del Relator Especial,” in Mikel Berrando et al (ed) *Los pueblos indígenas y el Consejo de Derechos Humanos* (Copenhagen: IWGIA) (forthcoming).
- 66 Human Rights Council “Resolution 6/36: Expert Mechanism on the Rights of Indigenous Peoples” UN Doc A/HRC/Res/6/36 (14 December 2007) para 1(g).
- 67 For an edited compilation of Prof. Stavenhagen’s thematic reports on his capacity as Special Rapporteur, see **Rodolfo Stavenhagen. 2008**. *Los pueblos indígenas y sus derechos: informes temáticos del Relator Especial sobre la situación de los derechos Humanos y las libertades fundamentales de los pueblos indígenas del Consejo de Derechos Humanos de la Organización de las Naciones Unidas* (Mexico City: UNESCO).
- 68 The composition, mandate and methods of work of the Human Rights Council Advisory Committee are outlined in “Human Rights Council: Institutional Building,” above n 1 paras 65-84. The Advisory Committee’s main function is “to provide expertise to the Council in the manner and form requested by the Council, focusing mainly on studies and research-based advice”, *ibid*, para, 75.
- 69 ECOSOC “Resolution 2000/22” UN Doc E/RES/2000/22 (28 July 2000). For an account of the process leading to the establishment of the Permanent Forum, as well as the main contours of its mandate, see **Lola García-Alix. 2003**. *The Permanent Forum on Indigenous Issues* (Copenhagen: IWGIA).
- 70 UN Permanent Forum on Indigenous Issues “Report of the Seventh Session” UN Doc E/C.19/2008/23.
- 71 *Ibid*, para 131.

- 72 Ibid, para 137 (calling on the specialized agencies “to re review their policies and programmes in order to comply with the provisions contained in the Declaration ensuring respect for the right to self-determination of indigenous peoples and the right to free, prior and informed consent”).
- 73 The specific reference to the Permanent Forum in Article 42 of the Declaration is explained by the early mention in the original draft prepared by the Working Group on Indigenous Populations, as adopted by the Sub-Commission, to the “creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples”. See Sub-Commission on the Prevention of Discrimination and Protection of Minorities “UN Draft Declaration on the Rights of Indigenous Peoples” Annex to Resolution 1994/45 (26 August 1994), Art. 41. With the protracted process of negotiations at the Commission, during which the Permanent Forum was effectively established along the lines proposed in the draft declaration, the original text was amended in the course of informal consultations during the 10<sup>th</sup> session of the Commission’s Working Group on the draft declaration. See *Report of the Working Group established in accordance with resolution 1995/32 of the Commission of Human Rights, of 3 March 1995* UN Doc E/CN.4/2005/89 (28 February 2005), at para 22.  
General Assembly “Resolution 60/251: UN Doc A/Res/60/251” (3 April 2006), para 5(e).
- 74 *Structures, procedures and mechanisms that currently exist or that might be established to effectively address the human rights situation of indigenous peoples: Paper prepared by two members of the Permanent Forum on Indigenous Issues* UN Doc. E/C.19/2008/2 (19 December 2007), para 39.
- 75 Ibid, para 38.
- 76 Ibid, para 133.
- 77 These arguments are further developed in **Luis Rodríguez-Piñero**. “La ‘implementación’ de la Declaración: Las implicaciones del artículo 42” and Bartolomé Clavero’s response, in Natalia Álvarez, Natalia, Daniel Oliva & Nieves Zúñiga (eds) *La Declaración de Naciones Unidas sobre los derechos de los pueblos indígenas* (forthcoming, 2009).
- 78 UNDRIP, above n 27, Art. 43.



## CULTURAL SUPREMACY, DOMESTIC CONSTITUTIONS, AND THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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Bartolomé Clavero\*

Since the formation and independence of Latin American republics, the region has been polarised between, on the one hand, a public law based on a single culture (of European foundation) and a pluralist society rooted in the presence of indigenous peoples, Afro-American communities, and other migrant groups both from Europe and - later - from Asia, which also brought with them their different cultures and customs. Legal multiculturalism is a *de facto* situation that has been in existence ever since, despite the continuing onslaught of States that deny it for the purposes of maintaining the primacy of a single culture. A simple proof of this can be seen in the fact that the Latin American constitutions – drafted by the heirs of Hispanic colonialism - have, since the earliest times when they were the languages of a relatively scarce minority, invariably been written in Spanish and Portuguese.

Throughout Latin America, constitutional law has been used as a tool to wipe out the existing or evolving pluralism of American societies with true determination, with the ultimate aim to annihilate indigenous peoples and their communities. The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) is far more suited to the reality of social pluralism than with exclusive constitutional systems, for these systems continue to be identified with, and to defend, the culture of a sector of the population of European descent, which still claims the monopoly of human civilisation.

This does not necessarily imply that the Declaration will clash with established law in Latin America. The rights affirmed for indigenous peoples in the Declaration, under the umbrella of the general principle of self-determination, are not exactly compatible with the assumptions and provisions of Latin American constitutions. There is, however, absolutely no need for conflict: Latin American constitutional law is not the same as it was. Some parts have clearly remained constant including the design and establishment of the core constitu-

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tional branches of governments – the legislature, the executive and the judiciary. But there has also been a number of substantial changes. In recent times, Latin American constitutional systems have evolved towards taking freedoms and their corresponding guarantees more seriously, moving towards a greater sensitivity to cultural pluralism and, particularly, to the recognition of indigenous peoples, previously ignored in most Latin American constitutions. In this context, the Declaration can now support and promote thriving tendencies towards a renewed Latin American constitutionalism.

This chapter examines, first of all, the most constant and thus characteristic features of Latin American constitutionalism with regard to indigenous peoples, from the very origins of Latin American republics. It then moves on to consider the changes that have recently taken place in terms of constitutional recognition of the indigenous peoples, as well as of their claims and expectations. The chapter concludes with a brief consideration of the significance of the Declaration for modern Latin American constitutionalism.<sup>1</sup>

### **Legal treatment of indigenous peoples in Latin American constitutions**

In general terms, Latin American republics were historically built on the basis of a monumental fiction, a fiction that legal jargon describes as “*iuris et de iure*” with “*erga omnes*” effects. This legal reckoning admits no proof to the contrary, not even the most glaring evidence, and supersedes any claim, without exception. This fiction assumed that the European colonialists, primarily Spanish, had completely dominated the region and assimilated all those indigenous people that survived the invasion and occupation. During the first half of the 19th century, some *Criollo* (Americans of European origin) minorities established states over areas that they were not in control of, thus assuming the representation of many peoples and communities that they were not even aware of and with whom they could not even communicate. And, in their name, in the name of completely unknown people, they proclaimed rights of freedom, gaining independence and forming states.

These states were established over indigenous peoples and communities without their consent and without even considering that such consent was required. Given that well-traced colonial boundaries already existed, the new republics were established as if their borders were contiguous, taking upon themselves the power to incorporate wide and rich territories of peoples that were still independent. While living in areas of colonial influence, other indigenous peoples had managed to preserve a significant level of autonomy based on their distinct languages and cultures. The new republics simply denied them any claim to territory. The underlying assumption was that the political nation that identified with the state - a state based on European culture and language - would de-

stroy any indigenous law that might bear any political implication. Political control of the territory and economic control of the resources were at stake.

The constitutional treatment of indigenous peoples in the first Latin American republics varied highly. It is important to note this because the initial constitutional approaches to indigenous peoples reappeared at later stages, even in our times. Some States admitted the continued existence of indigenous communities, with their own customary law, and on their own right, albeit dependent on the act of recognition by an outside party - the State itself. Other States even signed transitory agreements or treaties with independent indigenous peoples as a strategy for establishing their power over indigenous territories, as if indigenous peoples' jurisdiction over these territories was an anomaly that had to be rectified. There were constitutions that made reference to the States' obligation to enforce their powers within their boundaries so that their assumed "civilising nature" would prevail over the alleged "savagery" of indigenous peoples. Colonisation policies were initiated, and the so-called "whitening" of indigenous territories began. There were many cases of bloody conquests based on presumptions of power contained in both the constitutions and the theory of the "civilising" nature of the State. The 19th century was the most genocidal for the region's indigenous peoples, second only to the 16<sup>th</sup> century.

The "savagery" of indigenous people was another highly effective constitutional presumption. It was one of the kind that lawyers call "*iuris tantum*", in the sense that proof to the contrary can be admitted: the proof that indigenous peoples have stopped being indigenous by abandoning their language, by changing their clothes, by adopting other customs and, above all, by renouncing any pretension to community or peoplehood on their own. By abandoning one's indigeneity, these peoples could gain access to state constitutional rights and freedoms. On the other hand, the fundamental freedoms and constitutional guarantees of those indigenous peoples who retained their language, culture, customs and community remained in a legal limbo, simply ignored by the constitutions. While racism was pervasive, the constitutional system was not necessarily racist in formal terms. Indigenous people were not completely excluded from the system, but rather their access to citizenship rights was made conditional. They were considered bereft of the requisite culture and so had to be "culturalised" to access constitutional rights. The cultural supremacy of those who believed that they were the bearers of the one and only "civilisation", an island in the midst of an ocean of "savagery", was at stake.

The Latin American constitutions were written on the basis of those supremacist assumptions. They affirmed a number of rights and guarantees, they organized government - congress, executive, justice and so on - as if Latin American societies were homogeneous wholes and as if the states exerted power over the whole territory within its theoretical borders. This was obviously a fiction, although it had some logic. From this early constitutional perspective, indigenous



peoples and communities that retained their own laws and even controlled their territories and resources remained in a state of transition, in a precarious situation, waiting for the moment when states would take control of them and instruct them. The various models of constitutional treatment of indigenous peoples shared this common framework, one of cultural supremacy.

By way of example, reference could be made to one constitution regulating treaties between states and peoples: “For the same reason to provide the benefits of civilisation and religion we will be able to enter into treaties and negotiations with them (the savage Indians) over these objects (their territories), protecting their rights with all the humanity and philosophy that their current imbecility requires, and in consideration of the ills already caused them, without any blame on ourselves, by a conquering nation” (Constitution of Nueva Granada or Gran Colombia, 1811). In a more usual formulation: “It is for the Congress to take care of the civilisation of the territory’s Indians” (Chilean Constitution, 1822. Similarly: Peru -1823; Ecuador -1830; Argentina -1853; Paraguay -1870 and so on). The most expressive reference to indigenous peoples in early Latin American constitutional corpus is possibly that of Ecuador: “This Constituent Congress appoints the venerable parish priests as tutors and natural fathers to the Indians, energizing their ministry of charity in favour of this innocent, abject and miserable class.”

### **Constitutional reforms regarding indigenous peoples**

Throughout the 20th century, Latin American constitutionalism evolved in a direction that helped prepare the ground for the current significance of the Declaration. The underlying aim of the treatment of indigenous peoples in 19<sup>th</sup> century Latin American constitutions was the complete annihilation of these people as such, by promoting both the destruction of their cultures and the communities and the allotment of their communal territories into private plots for indigenous individuals or for invading settlers. The new century had barely arrived when the Mexican Revolution marked a turning point that inspired other states, particularly in the Andes.

The 1917 Constitution of the United States of Mexico recognised the legal status of “the joint owners, settlement dwellers, peoples, congregations, tribes and other population groups who *de facto* or *de jure* still hold the communal state” whilst also putting in place policies of land restitution and the granting of collective titles. This implied an acknowledgement of indigenous peoples’ communal way of life, which could also be extended to the recognition of customary law, jurisdictional practices and other cultural mores.

One thing, however, did not change. The guarantees afforded by the Mexican Constitution did not derive from any express mention of indigenous peoples’

entitlements by themselves. The provision concerning the legal recognition of communities was included in the chapter on constitutional rights, but it was not framed in a rights-based language. Under the 1917 Constitution, neither the peoples nor the communities are original rights-holders: it is up to the Federation to grant rights. In fact, Mexico was to unilaterally weaken these recognition and guarantees in a 1992 constitutional amendment.

The same can be said of other cases of constitutional recognition of indigenous communities that have taken place throughout the 20th century. Indigenous peoples' rights were not often included in the sections on constitutional rights. Instead, they are mere additions included in other sections that did not alter the overall constitutional design. The constitutional recognition of customary law, community government and indigenous jurisdiction did not question in the slightest, or in any way modify, the form in which States were constituted and the way in which the State's legislative, executive and judicial powers operated. There are constitutions that refer expressly to indigenous peoples' law and jurisdiction, and also to the use of their own language, but the general approach did not change. Cultural supremacy still rules quite openly. In the face of state constitutional powers, indigenous communities still found themselves in a situation of legal precariousness, social vulnerability and, save their own inveterate resistance, practically defencelessness.

A new turn was only heralded towards the close of the 20th Century, with a set of new constitutions or constitutional amendments that took place throughout the region around the 1980s and 1990s. New provisions related to indigenous peoples began to be included in constitutional rights chapters. More importantly, these provisions were crafted in a language of peoples' rights, somehow disassociating indigenous peoples from state recognition or from the exercise of state powers. These elements contributed to creating an atmosphere of greater constitutional respect towards indigenous communities and peoples. While recent approaches to the constitutional treatment of indigenous peoples have proved incapable of clearly overcoming the early 20th Century paradigm, they are however important because of the legal and political space they have provided to indigenous peoples in the defence of their rights. After the adoption of the Declaration, they also provide a framework for the domestic accommodation of the provisions contained therein.

Some Latin American constitutions now differentiate between human rights and constitutional rights, treating the former as international, and thus supranational and superior. Human rights now include indigenous rights, which have contributed to the development of international law itself. The Declaration affirms new rights that are of particular interest to indigenous peoples: a right to one's own culture, now expressed as both an individual and a collective right; a right of indigenous persons and communities to their own language or codes of communication; the right to their own uses of their territory and their own re-

source management; a right to their own conflict resolution methods; and to their own way of life.

The right to one's own way of life, to one's culture, has been historically taken for granted by those belonging to the dominant culture, who never felt the need for a constitutional recognition for themselves. Now it is affirmed as a right belonging to everyone. It is the potential foundation for all indigenous rights, particularly the right to self-determination of indigenous individuals, communities, and peoples, with the capacity to push States to redefine the way in which they are constituted and exercise their powers.

Before the Declaration was adopted in 2007, one Latin American Constitution had already affirmed indigenous peoples' right to self-determination. This took place in Mexico via the 2001 constitutional amendment: "This Constitution recognises and guarantees the right of indigenous peoples and communities to self-determination...". This is a most significant step, particularly in the Mexican context. The recognition came from initial agreements reached between indigenous representatives and the Federal Government, although the Congress later claimed its legislative power to avoid respecting the agreements. By not reassessing the organisational structure of State powers yet at the same time recognising indigenous peoples' right to self-determination, the Mexican constitutional reform was to no avail. The amendments introduced by Congress only aggravated the deadlock. The former UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, noted this clearly in the report he issued following his official visit to Mexico in 2003.<sup>2</sup> The Constitution, he wrote, "has locked in the closet with padlocks" the indigenous right of self-determination.

### **The significance of the Declaration in Latin American constitutionalism**

Despite all existing constitutional padlocks, the land in Latin America is fertile for the Declaration. The rights enshrined in the Declaration are based on, and elaborate upon, the recognition of indigenous peoples' self-determination in its political and economic, social and cultural dimensions. The force of the Declaration stems from its adoption by the UN General Assembly but also, and above all, from the real agreement that was reached within that international organisation between indigenous representatives and government delegations. The end result of this process is more, a lot more, than just another human rights declaration. For Latin America, it may represent the end of the internal colonialism that indigenous peoples have suffered as a result of the way in which independence was asserted and States were formed in that region.

This was immediately understood in Bolivia. In November 2007, only a couple of months after the adoption of the Declaration, the Bolivian Congress trans-

posed it fully into domestic law. It was not done as an act of lower rank than the Constitution, quite the opposite. A Constituent Assembly was at the same time completing a draft Constitution that was to break open doors, opening up spaces for the exercise of the right of self-determination of the peoples. One Latin American State now understands that it has to revise its entire organisational power structure in order to make effective the rights that a number of the region's constitutions have been recognising and which have now culminated in their most consistent expression in the Declaration.

Needless to say, the weight of the past still counts on the present. Cultural supremacy is alive and kicking in large social sectors of the region and in the constitutions themselves. States - both in Latin America and elsewhere - are still loath to take indigenous peoples' rights seriously, aware that, in practice, this requires not only a change in the political rules but also the economic ones. Nor are churches or transnational companies resigned to giving indigenous peoples a voice and a vote. International cooperation agencies and NGOs find it hard to respect indigenous self-determination. The past still weighs on the present; the difference is that the future now seems more promising. ○

## Notes

- 1 For expanded documentation and bibliography concerning the treatment of indigenous peoples in Latin American constitutions, see my recent book *Geografía Jurídica de América Latina: Pueblos Indígenas entre Constituciones Mestizas*, Mexico City, Siglo XXI, 2008.
- 2 UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples "Reporto n Mexico" UN Doc E/CN.4/2004/80/Add.2 (2004).



# MAKING THE DECLARATION WORK

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Rodolfo Stavenhagen\*

## Introduction

After more than twenty years of diplomatic negotiations, a great deal of lobbying in the corridors of power, plenty of infighting among civil society organizations, many headaches and no end of heartache, the UN General Assembly (UNGA) “solemnly proclaimed” the Declaration on the Rights of Indigenous Peoples (the Declaration) in September 2007.<sup>1</sup> This resolution marks a major step forward in the consolidation of the international human rights structure that the UN has been painfully building over the last sixty years. Only during the 20th century have indigenous peoples been recognized progressively as citizens of their respective countries, and many of the remaining restrictions and limitations on the full exercise of their rights and freedoms been removed.

The structural inequalities that led historically to the dispossession of their human rights and dignity are deeply rooted in contemporary society and their effects continue to exist and to determine the lives of indigenous peoples, despite recent legal reforms in numerous countries. In the preamble to the Declaration, the General Assembly expresses its concern “that indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests”. It also recognizes the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources. Considering the persistent patterns of political exclusion, social marginalization, economic exploitation and cultural discrimination that indigenous peoples suffered during the era of national state construction, it is noteworthy that, beginning in the 1980s, a number of states adopted legal

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reforms that for the first time incorporated indigenous peoples into their constitutional structures.

## **The new multiculturalism and the UN**

Numerous countries now recognize themselves as multicultural or multiethnic: indigenous cultures and languages have been designated as deserving of respect and state protection; indigenous communities have been given legal status; their lands and territories have sometimes been recognized; and, in some cases, indigenous peoples have been acknowledged as collective and individual holders of specific rights. At the same time, these reforms have spelled out the responsibilities and obligations of states regarding, among other things, the preservation of indigenous lands and territories, multicultural and intercultural education, respect for traditional customs, social organization and forms of governance, and special attention has been given to the social needs of indigenous communities, for example in the field of delivering health services. In some instances, the specific rights of indigenous peoples have been enshrined in the national constitution or in major legislation.

The progress thus achieved in many countries over the last quarter of a century or so is due to a number of factors, including the struggles of indigenous peoples and their organizations, the democratization of national polities, and the increasing relevance of international human rights instruments in the construction of more open, inclusive and just societies. Indigenous peoples have become not only socially and culturally more visible but they are also in the process of becoming acknowledged political actors in a number of countries.

Despite these gains, serious gaps between legislation and practice still exist. Not only are there contradictions in the laws themselves, which make their application enormously complex and difficult, but we can also detect an increasing gap between legal framework and public policy. Consequently, with few exceptions, the new legislation is not, in fact, being implemented as it should be. No wonder indigenous organizations are increasingly disappointed and often show their frustration by direct action such as street protests, sit-ins, land occupations and the like.

Furthermore, available evidence suggests that, in terms of development indicators and living standards (such as the UN Human Development Index and similar measures), indigenous peoples find themselves consistently below national averages and behind other more privileged sectors of society. Since the creation of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people by the UN Commission on Human Rights in 2001 (the SR on Indigenous Peoples), the SR on Indigenous



Peoples has provided the Commission (now the Human Rights Council) with data from many countries showing this to be the case.<sup>2</sup>

In the 1980s, even as they became increasingly organized and militant in their own countries, some indigenous peoples' organizations were able to send delegations to the UN to lobby for their cause within the framework of the human rights mechanisms that were daintily being sewn together by the Commission on Human Rights. With the support of a number of international non-governmental organizations and donor agencies, they met at the Working Group on Indigenous Populations (the WGIP) with fellow delegates from other parts of the world and diplomatic representatives of the member states, and together they began to hammer out the first drafts of the UN Declaration on the Rights of Indigenous Peoples.<sup>3</sup> The debates in the annual sessions of the WGIP were open to the participation of indigenous people, much to the amazement and discomfort of the traditional diplomatic elite that takes its seats at such gatherings.

For the first time, the UN opened the doors of its meeting rooms to the Indians of the American continent, the Aborigines of Australia, the Inuit and Sami of the Arctic, the tribals of South-east Asia, the indigenous of the Pacific Islands, the San, Pygmies and nomadic herders of Africa. The sessions of the Working Group on Indigenous Populations, which continued for over twenty years, soon turned into something akin to public hearings that were extensively covered by the international media and which helped to sensitize public opinion to the plight of indigenous peoples worldwide. In the end, the Human Rights Council adopted the Draft Declaration on the Rights of Indigenous Peoples in June 2006,<sup>4</sup> and transmitted it for adoption to the General Assembly, the pinnacle organ of the UN, which proclaimed it on September 13, 2007.<sup>5</sup>

Like all other international human rights instruments, the Declaration is the result of ideological debates, diplomatic negotiations, geopolitics, various group interests and personal relations. It needs to be seen in the wider context from which it emerges and in connection with the geopolitical controversies that have characterized the UN human rights debates from the start. While some indigenous representatives who were involved in the negotiating process at several levels insisted on a stronger text, and some states did not want a declaration at all, other government representatives would have preferred a weaker, more traditional declaration along the lines of the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities of 1992. The dispute between the maximalists and the minimalists continues to this day.

What we have now is surely a novelty in the annals of the UN human rights field, to the extent that the states that adopted the Declaration took into account the needs, arguments and desires of a highly vocal, assertive and organized collection of peoples who had been demanding the recognition of their identities and rights for several generations both at the domestic and the international levels.<sup>6</sup> Moreover, the Declaration clearly distinguishes between the individual

rights that indigenous persons share with all other persons according to the UN Bill of Rights, and the specific rights enjoyed by indigenous peoples collectively as a result of their indigenous identities. Although effective protection mechanisms for the rights of indigenous peoples are still few and weak in the UN system, the Declaration has opened the door to indigenous peoples as new world citizens.

### **The challenge: how to make the Declaration work**

To be sure, the Declaration on the Rights of Indigenous Peoples does not actually establish any new rights and freedoms that do not exist in other UN human rights instruments but it does spell out how these rights must relate to the specific conditions of indigenous peoples. Given the historical circumstances under which indigenous human rights have been violated or ignored for so long in so many countries, the Declaration is not only a long-awaited *statement of redress* for indigenous peoples but must also be considered as a *map of action* for human rights policies that need to be undertaken by governments, civil society and indigenous peoples themselves if their rights are actually to be guaranteed, respected and protected. *How to make the Declaration work* is the challenge that we now face. The adoption of the Declaration marks the closing of a cycle of great historical significance, even as it opens, at the same time, a new cycle relating to its implementation.

If the long-term struggle of indigenous peoples for their rights helps explain the background to the Declaration, the next stage will determine how the Declaration relates to other international human rights legislation and, more importantly, in what way it will be implemented at the national level. Of immediate concern is the fact that governments do not consider the Declaration to be legally binding because it is not an international convention that requires ratification. Many indigenous people and human rights activists ask themselves what good a Declaration is if it is not legally binding and will therefore not bring hard legal results. Similarly, state officials may consider that supporting the Declaration is certainly a gesture of goodwill but does not carry any real obligations for the governments concerned, and even less for those states that did not bother to endorse the Declaration or that actually voted against it in the UNGA (Australia, Canada, New Zealand, United States). At best, the Declaration is considered to be “soft law” which can be ignored at will, particularly as it does not include enforcement mechanisms.

This debate has opened up a new space for strong action on the part of those who believe that the Declaration does represent an important step forward in the promotion and protection of human rights. On the one hand there is the opportunity, indeed the need, to begin working on a future convention on the rights of

indigenous peoples. This has been the strategy in the UN before: the Universal Declaration of Human Rights (1948) was followed by the two international human rights covenants 20 years later (1966), and they did not enter into force until 1976.<sup>7</sup> Much the same happened with other specific declarations/covenants (women, children, racial discrimination) although the waiting period in these cases was shorter. While a number of indigenous and human rights organizations favor this route, others are more skeptical and feel that, given the controversial nature of indigenous rights, it is unlikely that a UN convention on the topic would be produced any time soon, if at all. They also point to ILO Convention No. 169 on Indigenous and Tribal Peoples (ILO Convention 169),<sup>8</sup> which has thus far only been ratified by 20 states. They are therefore searching for other, more effective, strategies.

The strongest argument for the Declaration is that it was adopted by an overwhelming majority of 143 states, from all the world's regions, and that as a universal human rights instrument it binds all UN member states morally and politically to comply fully with its contents. Just as the Universal Declaration of Human Rights has become customary international law, so the Indigenous Rights Declaration can become customary international law over time as well, if – as is possible and likely—national, regional and international jurisprudence and practice can be nudged in the right direction. Just as with good wine, but only given a favorable environment, the passing of time can improve the Declaration's flavour.

One of the preambular paragraphs of the Declaration recognizes “that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration”. While some observers might argue that the intention of this paragraph is to detract from the universality of the rights set out in the Declaration, a more constructive reading would lead one to conclude that it is precisely at the regional and country levels that the rights of the Declaration must be made to apply. And this requires interpreting every right within a particular context that may be national or regional. For example, the political right to vote will be exercised in one way through the ballot box, when registered political parties compete in elections and, in another way, when a village assembly appoints its representatives by consensus. Both are equally valid procedures as long as the freely expressed will of the people concerned is respected. How to implement the political right to vote in different contexts requires careful institutional management in each situation, and the evaluation of available alternatives. Thus Article 18 of the Declaration: “Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”

Another example, in the area of economic, social and cultural rights, might refer to Articles 23 and 32, which state that indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development and for the development or use of their lands or territories and other resources. This important right cannot simply be applied mechanically in any circumstance. It refers, in fact, to two interlocking rights, the right to development as defined in other UN instruments and the right of indigenous peoples to “determine and develop priorities and strategies” in order to best exercise that right, particularly with regard to their lands, territories and resources. Here it will be necessary to use the various tools of the social sciences in order to come up with the right answers to a myriad of problems involved in setting priorities, building and applying strategies, conceptualizing development, focusing on objectives, measuring and evaluating processes and results, let alone defining lands, territories and resources.

Approaches to these complex issues will vary according to region and country. States must consult and cooperate in good faith with the indigenous peoples concerned – Article 32 - through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources. Assuming that all government authorities everywhere are equally endowed with good faith, these issues become enormously complicated in practice. I received numerous complaints, in my capacity as SR on Indigenous Peoples, concerning allegedly rigged consultations carried out by officials whose good faith was being questioned. In other cases, the members of a given indigenous community may be divided on the issue that is being put before them, and the exercise of the right referred to in Article 32 ends up as part of a wider political negotiation, or perhaps in a stalemate.

Here, as in other issues, the rights in the Declaration can be seen as a framework of reference, a point of departure leading perhaps, among other things, to new legislation, to a different kind of judicial practice, to institution building and also, whenever necessary, to a different political culture (from authoritarian to democratic, from technocratic to participative). Each of the articles in the Declaration must be analyzed not only in terms of its origins and provenance, or solely in terms of its fit within the general structure of the UN human rights edifice, but particularly with regard to its possibilities as a foundation upon which a new relationship between indigenous peoples and states can be built. Besides methodology and skills, this requires imagination and will. The Declaration must be wielded by indigenous peoples and their advocates in government and civil society as an instrument for the pursuit and achievement of their rights.

The Declaration provides an opportunity to link the global and local levels, in a process of *glocalization*. At the beginning of this historical cycle, many of the people who came to the UN to contribute to the debates surrounding the draft Declaration followed the rule: “Think locally and act globally.” Now this rule can

be turned around into thinking globally (the Declaration) and acting locally (the implementation process). In fact, it appears that the major obstacle to the full operation of the UN human rights mechanisms (declarations, treaties, treaty bodies, resolutions etc.) is their lack of effective implementation and lack of enforcement mechanisms.

When human rights declarations are followed by a convention, their chances of effective implementation may increase slightly but, basically, the issue has to do with national and local-level political processes. At this stage, the Declaration carries sufficient momentum that serious efforts to push for its implementation at the national level may produce short-term results but these will surely vary greatly from case to case. Within two months of its adoption at the UN, the national congress of Bolivia had voted to incorporate the Declaration into national legislation but the government recognizes that, to make it effective, additional secondary legislation will be needed. The Supreme Court of Belize cited the Declaration in support of its finding in favor of an indigenous community involved in a land law case.<sup>9</sup> In June 2008, the Japanese Diet voted unanimously to recognize the Ainu as an indigenous people and called on the government to refer to the Declaration and take comprehensive steps to advance Ainu policies.<sup>10</sup> On 8 April 2008 the Canadian House of Commons passed a Motion that the Government (which had voted against the Declaration) endorse the Declaration as adopted by the UNGA, and also instructed Parliament and the Government of Canada to fully implement the standards contained therein. However, the potential impact of the Declaration is also being recognized by those whose interests may be affected by its implementation. A prominent and powerful member of the Brazilian Congress proposed that the government withdraw its signature from the Declaration because it was contrary to Brazil's national interest to have voted for its adoption at the UNGA. As they have been for so long, the battle lines surrounding the Declaration continue to be drawn. The worst thing that could happen to the Declaration now, in my opinion, is that it may be ignored even by the governments that affixed their signature to it. And this can only be avoided with adequate strategies for its implementation at the national and local levels and support for it at the international level.

Another window of opportunity for the implementation of the Declaration has opened within the UN system itself. The preamble clearly states that this Declaration is an important step forward in the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the UN system in this field, and that the UN has an important and continuing role to play in promoting and protecting the rights of indigenous peoples. The first responsibility lies within the human rights structure, the Human Rights Council, the treaty bodies, commissions and sub-commissions and expert groups, ECOSOC, the UNGA's Third Committee, which should not simply sit back and feel that their job is finished. The SR on Indigenous Peoples

was instructed by the Human Rights Council to promote the Declaration, which means that the mandate has to work with governments and other relevant actors on the best strategies to promote the implementation of the Declaration.<sup>11</sup> By Resolution 6/36 of December 2007, the Council decided to establish a subsidiary expert mechanism to provide the Council with thematic expertise on the rights of indigenous peoples in the manner and form requested by the Council (the EM-RIP). It is to be hoped that this new mechanism will build upon the work of the former WGIP and devise ways and means to promote and implement the Declaration.

The next responsibility lies within the structure of the Secretariat, where different departments and units, particularly within economic, social and cultural affairs, can generate numerous activities involving the principles set out in the Declaration. In fact the Declaration “calls upon the UN, its bodies, including the Permanent Forum on Indigenous Issues (PFII), and specialized agencies, including at the country level, as well as States to promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”. This is a major task that requires the full commitment of the Secretariat at all levels, including the field of technical cooperation, where UNDP country teams carry a particular responsibility. At the country team level, national and international civil society organizations have often proved extremely helpful in support of a robust human rights agenda for indigenous peoples. The Declaration can now serve as a beacon to improve the coordination between numerous UN agencies and non-governmental organizations, and promote the support of international donor agencies where required.

An important call has been sent out by the UNGA to the UN specialized agencies, many of which have, over the years, developed their own programs in support of the rights of indigenous peoples (with special emphasis on women and children). But much more can and should be done, especially now with the Declaration as the major legislative authority to prompt the specialized agencies to do more in promoting and protecting the rights of indigenous peoples. In recent years, the UN has adopted a human rights-based approach to development, recognizing that there can be no real development that excludes the human rights of target populations. This is certainly the case of indigenous peoples, who are often the object of specific programs in which the various specialized agencies of the UN play an important part.

## **How should rights be implemented?**

The Declaration is linked, on the one hand, to the emergence of the worldwide social and political movements of indigenous peoples in the second half of the 20th century and, on the other, to the widening debate in the international com-



munity concerning civil, political, economic, social and cultural rights. While much has been written about these topics, there are many unresolved issues that the new Declaration addresses.

In the literature on the rights of indigenous peoples, we can identify several perspectives that were clearly present in the process leading up to the Declaration, and which have become important issues of concern in a number of countries. The first perspective is grounded in the classic tradition of universal individual human rights. The preamble to the Declaration states that “indigenous individuals are entitled without discrimination to all human rights recognized in international law”. On this basis, many people and governments have asked why there should be a need for a specific declaration on indigenous peoples at all, if indeed they have the same rights as everybody else.<sup>12</sup>

One answer to this question is the extensive evidence showing that the universal human rights of indigenous peoples are not fully or actually respected in many circumstances. I spent seven (2001-2008) years documenting the human rights violations of indigenous peoples in various parts of the world for the Human Rights Council. Whereas their plight is generally acknowledged, the widely-held idea that it can be solved by simply improving existing implementation mechanisms is less than satisfactory. States are indeed expected to deploy stronger efforts for compliance with all human rights, whereas civil society as well as the international protection mechanisms (such as human rights committees and other monitoring bodies) need to become more effective in making states duly *accountable* in this regard.

The fact is, however, that indigenous people continue to suffer a serious human rights deficit. They do not, in practice, enjoy all their civil, political, economic, social and cultural rights in the same measure as other members of society. I have provided evidence of this in my 11 country reports to the Human Rights Council.<sup>13</sup> So the differential compliance with the human rights discourse points from the start to a situation of *inequality* between indigenous and non-indigenous peoples which results from a pattern of *differential and unequal access* to these rights. While the *inefficiency* of human rights implementation mechanisms is surely one factor in this situation, other factors are the *inadequacy* of human rights policies, the *obstacles* that indigenous peoples encounter when they wish to exercise their rights, and the various forms of *discrimination* that indigenous peoples continue to suffer around the world.

In many countries, public authorities are well aware of these issues, though in some parts they tend to deny them. And yet, even when there is awareness, remedial action is absent or insufficient or too little too late. A widespread response to all of this is the belief that “*improving human rights protection mechanism*” will turn the trick. In fact, however, the impulse to improve human rights protection mechanisms may entail all sorts of different actions and it is easier said than done. Numerous obstacles may be encountered in the attempt to improve human



rights protection mechanisms, such as the inertia of bureaucratic systems, particularly the judiciary, where attention to the specific needs of indigenous peoples is not usually of the highest priority.

One extra-judicial institution that, at least in some countries, has been called upon increasingly to concern itself with indigenous rights is the public human rights protection agency, or *ombudsman*. Frequently, national human rights institutions are thinly staffed and lack the necessary skills to provide protection to indigenous people: usually, their priorities are elsewhere. But even more serious is the widespread practice of corruption in poor societies with great inequalities. Indigenous peoples are often the victims of corruption, and sometimes they become partners in corruption as well. Unless we work out the nuts and bolts of improving human rights mechanisms, this will remain an empty word, and it has to do with existing institutional structures, legal systems and power relationships, which in turn relate to the wider social system in which indigenous peoples are the historical victims of human rights violations to begin with. Improving access to the courts, establishing an ombudsman office with special regard to indigenous peoples, setting up special monitoring agencies, adopting regulatory measures and new legislation may all point in the right direction but, unless the core issues are addressed directly, progress will be slow at best.

If the classic human rights protection mechanisms (equal access to the courts, impartial justice, efficient ombudsmen) have not worked or, at least, not worked well for indigenous peoples, then we must look at other causes of inequality which are not formally institutional but are more deeply embedded in the history and social structures of the national society. The underlying root here is ethnic racism and discrimination against indigenous peoples, which are multidimensional phenomena that must be dealt with at distinct levels. They concern not only subjective expressions of prejudice but also institutional discrimination as when social service agencies are so designed to provide services mainly to certain sectors of the population, and exclude entirely or partially, or deliver services of lesser quality, to indigenous communities. These inequalities have been documented extensively in my country mission reports, showing – mostly on the basis of official indicators and statistics — that indigenous peoples are victims of discrimination in the distribution of socially-valued goods, general social services necessary to maintain or improve adequate standards of living in health, education, housing, leisure, environment, benefits, employment, income etc. World Bank studies show that institutional discrimination against indigenous peoples in some Latin American countries has not changed much over the last ten years.<sup>14</sup>

The importance of adequate quantitative information and reliable indicators cannot be overstated because they are necessary to formulate the right public policies and target the neediest populations. Surprisingly, in most countries such information is lacking regarding indigenous peoples. They are most often lumped

together with a general category of “the poor”, or the “isolated communities”, or the “rural sector”, or the lowest “decile” of an income scale, a practice that tends to ignore the cultural specificities of indigenous peoples and simply locates them in relation to national or regional averages, medians or minimums. It is amazing how little information about the actual situation and condition of indigenous populations public officials in many countries possess. A lack of awareness that easily tends to inject anti-indigenous bias, very often unwittingly, in the design, operation and evaluation of social programs of all kinds (health, nutrition, education, housing, welfare and so on). No wonder indigenous organizations insist that such information be produced, used and made publicly available by the specialized agencies, a demand that the UN PFII and the SR on Indigenous Issues have made. Some of these UN agencies have now begun to work on these issues. In view of the importance of the problems involved, it is hard to explain why some governments still argue that generating such information disaggregated by ethnicity is an “act of racism” which they, being well-intentioned liberals, would want to avoid. I believe the shoe is on the other foot: not doing so perpetuates institutional racism.

Inter-personal discrimination can be attacked through legal measures, such as outlawing hate speech and racist organizations, and with educational and communication campaigns in favor of tolerance, respect for cultural and physical differences and so on. Institutional discrimination, however, requires a major overhaul of public institutions in terms of objectives, priorities, budgets, administration, capacity building, evaluation, feedback, coordination, and therefore constitutes a major challenge to public policy and the political power structures from which indigenous peoples are generally excluded.

Consequently, indigenous peoples face many obstacles, as individuals and as collectivities, before they can reach the equal enjoyment of all universal individual human rights. That is why the classic, liberal approach to human rights has so far been less than satisfactory for them. This does not mean, however, that the effort to improve human rights protection mechanisms for individual members of indigenous communities should not be pursued; on the contrary, it is a long neglected task that must be promoted and consolidated, according to Article 2 of the Declaration which states: “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.” Let me also add that even if indigenous people, as individuals, achieve full enjoyment of all universal individual rights as guaranteed in international human rights instruments and in domestic law in most countries, some of the basic human rights issues that indigenous peoples have been struggling for over so many decades will not be necessarily resolved.

Common ideas on the effectiveness of international human rights instruments hold that human rights conventions must include the protection mechanisms

that enable victims of human rights violations to seek legal remedies. Declarations, in contrast, have the drawback that they do not include such mechanisms, and therefore states are not obligated to provide legal remedies. As far as the rights of indigenous peoples are concerned, it may be argued that the prevention of human rights violations should be as much a matter of public policy as of existing legal remedies. And in that respect, the Declaration points to the obligations that states carry to protect these rights. That is why, at this point, strategies for the promotion and consolidation of appropriate public policies may be as effective as the recourse to judicial remedies.

### **Individual and collective rights**

Whereas the Declaration reaffirms that indigenous individuals are entitled without discrimination to all human rights recognized in international law, indigenous peoples also possess collective rights which are indispensable for their existence, well-being and integral development as peoples. The main departure from other human rights instruments is that here the rights holders are not only individual members of indigenous communities but the collective unit, the group, indigenous peoples as living societies, cultures and communities.

Many states refused for a long time to consider indigenous peoples as collective human rights holders, which is one of the reasons why the Declaration took such a long time to reach fruition. It is now progressively becoming a standard interpretation that there are certain individual human rights that can only be enjoyed “in community with others”, which means that for human rights purposes the group involved becomes a rights holder in its own right. Take linguistic rights, for example. These refer not only to the individual’s right to speak the language of his or her choice at home but to the right of a linguistic community to use its language in public communication at all levels, including education, the media, the judiciary and government. The use of language is not only a means of communication but a way to live one’s culture. Non-discrimination is not only a negative liberty (“to have a right not to be discriminated against”) but requires a favorable public and institutional environment, in which to be different is not a stigma but a right and an asset.

The issue of collective versus individual human rights is an old concern in the UN that became particularly controversial with regard to Article 1 of the two international human rights covenants, which recognizes the right of all peoples to self-determination.<sup>15</sup> A recent study of the human rights in the UN observes, “it was one of the most divisive human rights issues at the UN and nearly torpedoed the covenant [...] The self-determination debate affected the nature and composition of the UN itself and struck at the heart of the international system.”<sup>16</sup> It did so again in relation to the right to self-determination of indigenous peoples as

stated in Article 3 of the Declaration, a divisive debate that had been foreshadowed during the drafting of ILO's Convention 169.<sup>17</sup>

### **How can the right to self-determination be implemented?**

In the theory and practice of the UN, the right of peoples to self-determination has been strictly limited to the process of decolonization, and it has been invoked more recently in a number of instances of secession. The 1960 General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples rejects "any attempt aimed at the partial or total destruction of the national unity and the territorial integrity of a country",<sup>18</sup> and Article 46 of the Declaration makes it clear that "nothing in this Declaration may be ... construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States."<sup>19</sup> ILO Convention 169 includes a disclaimer that the use of the term indigenous peoples has no implication in international law.<sup>20</sup> As a result of years of negotiations, and despite the opposition of a number of states, the Declaration formally recognizes that indigenous peoples have the right to self-determination, a right that the UN has not been willing to recognize in the case of ethnic and national minorities.<sup>21</sup>

The challenge now is to renew the usefulness of a people's right to self-determination in the era of democratic multiculturalism when indigenous peoples claim this right for themselves. Indigenous peoples and states must now work together on the interpretation and application of the various facets of the right to self-determination within the specific contexts of their countries. How can this right – and other collective rights in the Declaration -- be defined in legal terms, how will they be interpreted and by whom, how are they to be implemented, how will they be protected? But, even more importantly, how is the rights holder of the collective right to self-determination to be determined? How will the bearer of this right (a People) be defined? The UN has never defined a "people", although it may be generally agreed that the right to self-determination is mainly a territorial right and, to a lesser degree, a political right. On this controversial issue, indigenous peoples have challenged states, and more than one state representative at the UN has challenged indigenous peoples. I have encountered numerous public officials in many countries around the world who would still deny indigenous peoples the right to self-determination fearing that the exercise of this right may lead to separatism or secessionist movements, which presumably would have serious consequences for national unity, territorial sovereignty and democratic governance.

Most observers of this problematique appear to agree that, in the context of the Declaration, the right to self-determination should be interpreted as an inter-

nal right, that is, within the framework of an established independent state, especially when this state is democratic and respectful of human rights. The UN Declaration links the right to self-determination (Article 3) with the exercise of autonomy or self-government in matters relating to internal and local affairs (Article 4). The external interpretation of self-determination would apply in case of secession or territorial separation from an existing state, and it has been said often enough that this is not what indigenous peoples have been demanding with regard to their claim to self-determination, although of course external self-determination cannot be excluded as a logical possibility.

Attention must now be paid mainly to the various forms and problems of the exercise of internal self-determination. To the extent that the legal, territorial, social and political situation of indigenous peoples varies considerably around the world, so also will the exercise of the right to (internal) self-determination (autonomy, self-government) have to take these differences into account. In countries where indigenous identities have been closely linked to recognized territories (such as might be the case in the circumpolar area, the Amazon basin, the Andean highlands), the right to self-determination will tend to present certain characteristics peculiar to these environments. Another approach might be taken in those countries that have a history of treaties, or where legal territories were established, such as reserves or reservations for indigenous peoples, which would be the case in Canada and the United States. Other perspectives will be required in those countries (such as in Latin America) that have a long history of social and cultural intermingling in rural and urban areas between indigenous peoples and the *mestizo* (mixed) populations. What are to be the scope and levels of autonomy arrangements? How will they be made legally and politically viable? There are many successful examples around the world, but also quite a few failures.

In contrast to an act of self-determination during the process of decolonization, which usually suggests that a one-time referendum has taken place, for example, in East Timor or in Namibia, the right to self-determination of indigenous peoples can be seen as an ongoing, continuing process which must be exercised on a daily basis involving a myriad of human rights issues, most of which are included in the Declaration. Thus, Article 3 does not refer to a right which is different from the other rights in the Declaration but rather to a general umbrella principle in the light of which the exercise of all other rights must be assessed. Let us take as an example: the struggle of an indigenous community to preserve its communal territory against the onslaught of a hydro-electric development project that has government backing and international financing. The project may affect numerous specific collective and individual rights of the members of this community and, in each case, specific remedies may be available. But the fundamental issue is much larger than a number of particular rights that are likely to be violated. Here, the fundamental issue is the community's permanent collective right to self-determination, which encompasses all the other rights. To the extent

that rights are never absolute, adequate human rights policies must be found to preserve the community's right to self-determination and to take into account the wider implications of the national development process, including the rights of third parties, within a human rights framework. Such is one of the many challenges that the Declaration has laid before us.

### **The need for specific human rights policies**

It is likely that, in the coming years, the focus of attention of many indigenous peoples' organizations will shift from the international arena to more local concerns. While at the UN and elsewhere (the regional African and American systems for example) indigenous diplomacy will undoubtedly continue with increasing effectiveness, at the national level attention will have to center on legislative and political activity, the formulation of social and economic policies, litigation in the courts, and varieties of local organizing. A new generation of indigenous representatives and leadership will have to begin working with the Declaration at the national level, finding ways to introduce it in the courts, the legislative organs, political parties, academic centers and the public media. Many of the indigenous activists who worked for the Declaration at the UN have also had practical experience in their own countries. Making the Declaration work at the national level will surely re-energize indigenous movements everywhere. The international networks and transnational cooperation that indigenous organizations were able to set up during the process leading up to the adoption of the Declaration will surely continue across the bureaucratic separators of the UN, perhaps shifting more into the development and conflict resolution fields. Putting into practice the collective right to self-determination at the local level will also be a new experience for all parties concerned.

Governments will now have to pick up where the diplomats left off their task. How should states implement their obligations emanating from the Declaration? Numerous technical and operational branches of government will have to adjust their activities to the objectives of the Declaration and become accountable to indigenous peoples as well as the UN system. Not least, academic research institutions, social science and law departments and programs are now challenged to incorporate the Declaration in their plans and activities.

A major victory for indigenous peoples are the articles in the UN Declaration referring to the rights to land, territories and resources, although perhaps not everybody is satisfied with the final text as approved by the UNGA (Articles 25, 26, 27, 28, 29).<sup>22</sup> Consequently, these articles also represent a major challenge to both indigenous peoples and states in terms of their adequate interpretation, practical application and effective implementation. These may require new legislation, litigation in the courts and detailed political negotiations with different

stakeholders. As observed in various Latin American and South-east Asian countries, simply the question of mapping and delimiting traditional indigenous lands and territories, let alone the process of adjudication itself, requires careful, costly, conflictive and often drawn-out procedures.

In 2001 the Inter-American Court of Human Rights handed down a landmark case in which it recognized the collective property rights of the Awas Tingni community against the Nicaraguan state.<sup>23</sup> The lands in question had never been delimited or titled, like many other such indigenous territories, raising complex legal and technical issues between the government and the local population. In Brazil and Colombia the law recognizes vast indigenous territories but there are no efficient mechanisms to protect these areas from invasion by outsiders. The same situation prevails regarding the territories set aside for uncontacted tribes (or, rather, peoples in voluntary isolation) in the remote Amazonian regions of Ecuador and Peru, which are being coveted by international oil and timber companies (not to mention drug traffickers) and poor landless settlers from other areas. Similar processes are reported in Cambodia and Malaysia, among other South-east Asian countries. Very often, governments say, on the one hand, that they are protecting these indigenous lands while, on the other, handing out concessions to transnational corporations for so-called development purposes in the same places. How can the Declaration, which is very clear on the collective territorial and land rights of indigenous peoples be brought to bear in practice on the problems faced by indigenous communities in such situations?

The implementation of laws is one of the principal stumbling blocks in the long, painful process of getting human rights to work for people. This will be no different regarding the implementation of the Declaration. In one of my reports to the UN Human Rights Council, I wrote about the “implementation gap” between laws and practical reality,<sup>24</sup> which I have observed in many countries. This means that there may be good laws on the books (sometimes the result of lengthy lobbying efforts or carefully negotiated political deals) but then something happens and they are not implemented. Many people I talk to about this come up with a simple answer: “there is no political will.” But what exactly does this mean? How can political will be made to appear if there is none?

At this level, the full import of the collective rights of indigenous peoples can empower indigenous peoples, build multicultural citizenship and ensure their effective participation in national society and the polity. If this is to be achieved, it will require more than improving human rights protection mechanisms; it will require institutional, economic, political and judicial reform across the board.

To be sure, this may sometimes lead to social confrontation of various kinds, as it has before, and so new policies and new spaces for dialogue and negotiation must be designed. This will be particularly urgent in relation to issues concerning land rights, natural resources and the environment.



The issue is more complex than the absence of political will to implement legislation. In fact, I have observed in some countries that human rights legislation may be adopted for any number of political, cultural, diplomatic or other reasons, even when there is no real intent to implement it, or when the legal and political system is sufficiently complex that its implementation is almost out of the question, meaning that politicians may be ready to adopt such legislation knowing fully well that there is no real chance of it being implemented. Some people suspect that this may be the case with the Declaration as well. A good case in point is a local state law passed in the state of Oaxaca, Mexico in the 1990s on the rights of the indigenous peoples (a majority in that state). It looks like a good law on the books; many distinguished local indigenous leaders and intellectuals participated in its design and preparation. The State governor pushed hard for its passage. A decade later it is still waiting to be implemented. It turns out that most of the actors involved in the passage of this law had other objectives in mind, and were not really concerned about implementation from the very beginning.

The UN has, in recent years, put forward a new human rights-based approach to development. The basic principle underlying this approach is that the realization of human rights should be the end goal of development, and that development should therefore be perceived as a relationship between rights holders and the corresponding duty bearers. All programs designed in accordance with this approach incorporate human rights indicators for the purpose of monitoring and assessing the impact of development projects and programs. The key to this approach lies in its explicit link to human rights norms and principles, which are used to identify the start-up situation and goals and to assess the development impact.<sup>25</sup>

A rights-based approach identifies indigenous people as full holders of human rights and sets the realization of their rights as the primary objective of development. As documented in many best practices followed in different parts of the world, an endogenous and sustained development is possible when it is based on respect for the rights of indigenous peoples and ensures their observance. Attested best practices in development based on the rights of indigenous peoples are to be found in social and political processes initiated by indigenous communities and organizations in exercising and defending their rights. These are empowerment processes which are predicated on the assumption that indigenous peoples own their rights and on strengthening the ability of these peoples to organize and demand the observance and exercise of their rights, and also their political participation. The rights-based approach brings with it a system of principles which may be used in formulating, applying and evaluating constructive policies and agreements between governments and indigenous peoples. With the recent adoption of the Declaration, development stakeholders now have at their disposal a clearly formulated regulatory framework for development policies and actions to target them.

The human rights-based approach stems from a concept of development that identifies subjects of rights and not merely a population that is the object of public policies. Indigenous peoples must thus be identified as subjects of collective rights that complement the rights of their individual members. A human rights-based development approach is:

- a) endogenous: it should originate with the indigenous peoples and communities themselves as a means of fulfilling their collective needs;
- b) participatory: it should be based on the free and informed consent of the indigenous peoples and communities, who should be involved in all stages of development. No project should be imposed from outside;
- c) socially responsible: it should respond to needs identified by the indigenous peoples and communities themselves and bolster their own development initiatives. At the same time, it should promote the empowerment of indigenous peoples, especially indigenous women;
- d) equitable: it should benefit all members equally, without discrimination, and help to reduce inequality and alleviate poverty;
- e) self-sustaining: it should lay the foundations for a gradual long-term improvement in living standards for all members of the community;
- f) sustainable and protective of environmental balance;
- g) culturally appropriate in order to facilitate the human and cultural development of the persons involved;
- h) self-managed: resources (economic, technical, institutional, political) should be managed by those concerned, using their own tried and tested forms of organization and participation;
- i) democratic: it should be supported by a democratic state that is committed to its population's well-being, respects multiculturalism and has the political will to protect and promote the human rights of all its citizens, especially those of indigenous peoples;
- j) accountable: the actors responsible for development must be able to render a clear account of their performance to the community and society in general.

Beyond specific human rights issues, the Declaration challenges the modern nation-state to rethink basic issues of political philosophy, such as the reconceptualization of national identity and national culture, multicultural citizenship, environmental ethics, collective decision-making, community and individual rights, participatory democracy, and human rights based development. The Declaration is thus well-placed to contribute to a truly alternative agenda for the 21st century.

Even if one swallow does not yet a summer make, the Declaration is one more building block in the international protection structure of human rights that now

needs to be put to work, and one more step in the construction of the full world citizenship of indigenous peoples globally. Professor Richard Falk of Princeton University has written that “among the most improbable developments of the previous hundred years or so is the spectacular rise of human rights to a position of prominence in world politics”.<sup>26</sup> I would add that even more improbable was the adoption of the Declaration. But that is precisely why it is so encouraging and why it has given rise to great expectations, which should not and must not be betrayed. ○

## Notes

- 1 General Assembly “Resolution 61/295: Declaration on the Rights of Indigenous Peoples” UN Doc A/61/67, Annex (13 September 2007).
- 2 See the Special Rapporteur’s annual reports to the Human Rights Council, which can be accessed at <http://documents.un.org>.
- 3 The UN Working Group on Indigenous Populations met for over 20 years under the successive chairmanship of Asbjorn Eide (Norway), Erica Irene Daes (Greece) and Miguel Alfonso Martínez (Cuba). The dialogue between states and indigenous representatives benefited for many years from the guidance of UN official Augusto Willemsen Díaz (Guatemala). For a good introduction to indigenous peoples and international law see **James Anaya**. 2004. *Indigenous Peoples in International Law* (Oxford: Oxford University Press, 2ed).
- 4 UN Human Rights Council “Resolution 2006/2: Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in Accordance with Paragraph 5 of the General Assembly Resolution 49/214 of 23 December 1994” (29 June 2006).
- 5 See chapters by John Henriksen, Erica Irene Daes and Asbjorn Eide in this book.
- 6 The first delegation of American Indians demanding their rights sought to address the nascent League of Nations in the 1920s but was rebuffed. A Maori chief was equally unsuccessful.
- 7 International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171, 26 March 1976 and the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 999 UNTS 3, entry into force 3 January 1976.
- 8 International Labour Organisation (ILO) Convention on Indigenous and Tribal Peoples in Independent Countries, 1989 (No. 169) adopted on 27 June 1989 by the General Conference of the ILO at its seventy-sixth session, entered into force on 5 September 1991.
- 9 *Cal & Ors v the Attorney General of Belize & Anor* (2007) Claim Nos 171 and 172 of 2007, Conteh CJ (Belize Sup Ct).
- 10 The Japan Times Online, 7 June 2008.
- 11 At the insistence of some government delegations, the Resolution added the phrase “where appropriate”. Whereas they may have had in mind that their countries would thereby be exempt from the application of the Declaration, the Special Rapporteur felt that “where appropriate” means wherever indigenous peoples are facing human rights issues, which would certainly include the states that voted against the Declaration. Human Rights Council “Resolution 6/12” (28 September 2007), at para. 1(g), reproduced in “Report of the Human Rights Council on its sixth session” UN Doc A/HRC/6/22 (14 April 2008). The US delegate at the General Assembly in October 2007 stated his government’s questionable view that the Special Rapporteur was not authorized to promote the Declaration in countries that had voted against it.
- 12 We have heard the same argument regarding the rights of women, and yet not only was there a declaration at the UN but also an international convention on the rights of women, which took decades to achieve.
- 13 Above n 2.

- 14 **Gillette Hall and Harry Anthony Patrinos (eds).** 2006. *Indigenous Peoples, Poverty and Human Development in Latin America* (New York: Palgrave Macmillan).
- 15 Above n 7.
- 16 **Roger Normand and Sarah Zaidi.** 2008. *Human Rights at the UN. The Political History of Universal Justice* (Bloomington: Indiana University Press), 212-213.
- 17 See James Anaya's chapter in this book.
- 18 UNGA "Resolution 1514: Declaration on the Granting of Independence to Colonial Countries and Peoples" (14 December 1960).
- 19 Above n 1.
- 20 Above n 8.
- 21 UNGA "Resolution 47/135: The Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities" (1992).
- 22 Above n 1.
- 23 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 Arizona J Int'l and Comp Law 395).
- 24 "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen" UN Doc A/HRC/ 2007 (27 February 2007).
- 25 "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen" UN Doc A/HRC/6/15 (2007).
- 26 **Richard A Falk.** 2000. *Human Rights Horizons. The Pursuit of Justice in a Globalizing World* (New York: Routledge).

# WHEN INDIGENOUS PEOPLES WIN, THE WHOLE WORLD WINS

## Address to the UN Human Rights Council on the 60<sup>th</sup> Anniversary of the Universal Declaration on Human Rights

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Wilton Littlechild\*

Thank you Mr. President Uhomoibhi.

Respectful greetings from the Maskwacîs Cree in the Treaty No. 6 Territory and the Assembly of First Nations in Canada to His Excellency Secretary General Ban Ki-moon,

Her Excellency High Commissioner Navanethem Pillay,  
to all your Excellencies and distinguished ladies and gentlemen.

It is certainly a great honour to address this special session of the UN Human Rights Council to commemorate the 60th Anniversary of the Universal Declaration on Human Rights.

In the wisdom of a Cree Elder who said, “You must know where you came from yesterday; know where you are today; if you are to know where you are going tomorrow”, we make this intervention:

### **Yesterday:**

Sixty years ago the United Nations General Assembly adopted the world’s most important human rights document, an international law to recognize the inherent rights of all peoples. For the Cree Nation we say “Kikpaktinkosowin”, “Oyotamasowin”, those we were blessed with by the Great Spirit, Our Creator, rights we were born with as members of the human family. An inherent right to self-

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\* Chief Wilton Littlechild is Cree and a pioneer of the global indigenous rights movement. He was the first Treaty Indian from Alberta to graduate from the University of Alberta and became the first in Canada to serve as a Member of Parliament. He was also a member of the United Nations Permanent Forum on Indigenous Issues.

determination. An inherent right to govern ourselves, our territories and resources, according to our own laws and customs. Rights that were recognized for all peoples as the foundation of freedom, justice and peace in the world.

But in 1948 Indigenous Peoples were not included in the Universal Declaration. We were not considered to have equal rights as everyone else. Indeed we were not considered as human nor as peoples. Consequently, there were violations, at times gross violations of our human rights. Indigenous peoples simply did not benefit from the rights and freedoms set forth in the Universal Declaration.

Your Excellencies, in my community the leaders and Elders gathered in the mid-seventies, very concerned about this. “We have a Treaty No. 6 with Her Majesty the Queen of Great Britain and Ireland. It is not being respected according to the original spirit and intent”, they said, “as an international agreement, nor is it being honoured.” After much deliberation and spiritual ceremonies they decided to seek recognition and justice from the international community. We were here in 1977, when we could not gain access so we could inform the UN family of nations about our issues and concerns. The Maskwacis Cree delegations have been coming here since then. Yes, we have called attention to ongoing Treaty and Treaty rights’ violations but we have always also recommended solutions for positive change, recognition and inclusion.

### **Today:**

Our delegation wants to take this opportunity to acknowledge the tremendous advancements we have made together over the past three decades in efforts to better the quality of life for Indigenous Peoples worldwide.

The United Nations has, for example, taken many steps within its system through its various bodies to address indigenous issues. There have been several UN Expert Seminars and studies on a number of major areas: the nine-year study and Final Report by Professor Miguel Alfonso Martínez on Treaties, Agreements and other Constructive Arrangements; the Expert Seminar and Report on the Permanent Sovereignty of Indigenous Peoples over Natural Resources by Madame Erica Daes; and others on Self-Government, Education, Health, Lands and Culture, Free Prior Informed Consent, Private Industry, Justice, all contributed to a better understanding of indigenous world views.

If one was to highlight other major achievements they include: the establishment of the UN Working Group on Indigenous Peoples; the UN Permanent Forum on Indigenous Issues, and its thematic focus on indigenous women and children; the Interagency Support Group established by all major UN agencies to contribute to the mandated areas; the proclamation of two International Decades and the establishment of the Special Rapporteur on human rights and fundamen-

tal freedoms of Indigenous Peoples; the ongoing work on indigenous children, climate change, intellectual property, traditional knowledge and more. The collective work of all these entities would not be possible without the individual contributions of experts and Special Rapporteurs, the coordination by the Indigenous Unit of the Office of the High Commissioner for Human Rights and the Secretariat of the UN Permanent Forum.

Today we see with the successive efforts of High Commissioners, Special Rapporteurs and support of preceding Secretary Generals of the UN, two pinnacles of success. First the pronouncement by former Secretary General Kofi Annan that indigenous issues were now one of the top ten priorities for the UN and, secondly, his welcoming us into the UN family of nations.

Your Excellencies, this has been tremendous work to date. Many have died along this tough struggle together and, yes, we have a long way to go. As we look back, we see we have climbed many mountains together. One of the most satisfying was to see all these contributions leading to better understanding, better relations and respect that accumulated in a historic decision last year. With goodwill on all sides the foundation was set for the General Assembly to adopt the UN Declaration on the Rights of Indigenous Peoples; and the Human Rights Council to establish an Expert Mechanism on the Rights of Indigenous Peoples.

Excellencies, one could argue that the UN has, with the important contribution of indigenous leaders and representatives, succeeded in ensuring that Indigenous Peoples are now part of humankind with equal rights and freedoms. The UN Declaration on the Rights of Indigenous Peoples clarifies how the Universal Declaration on Human Rights applies for our survival, dignity and wellbeing. As an Elder wanted me to tell you, "Now I am not an object, I am not a subject, I am a human being!"

### **Tomorrow:**

Many challenges remain. Why is it that we as indigenous tribes, peoples and nations continue to lead in all the negative statistics? Why is it that there is still abject poverty among our families, especially our children? Why is it in our country the education of indigenous students is in a crisis? Why is it that we continue to be excluded from the economic mainstream, especially during this current global economic crisis? Why is it that our treaties continue to be violated? Why is it that four states continue to actively oppose the recognition of our rights, in particular the UN Declaration on the Rights of Indigenous Peoples as recently as two days ago on the eve of this important commemoration of the 60th anniversary? Why do they want to pick and choose which rights they want to uphold, contrary to the statement of the Secretary General today?



Your Excellencies, we know where we were, where we are today. For tomorrow, we must put all the good words of the past three decades and, if I may be so bold as to say, the last three hours, into more concrete action. We are a solution! What we need is implementation of the UN Declaration. On this important occasion let me thank the States that support us.

Through your Excellencies, I would not do justice to those I represent not to call on the others to:

Say Yes to a new framework for partnership

Say Yes to better relationships among our peoples and nations

Say Yes to honouring treaties and agreements with mutual respect for each other

Say Yes to our full inclusion and continued contribution to humankind

We respectfully urge you to call on the CANZUS states to now support the UN Declaration on the Rights of Indigenous Peoples and its full implementation as a solution that will give real meaning to this celebration. Finally, when Indigenous Peoples WIN, the whole world WINS.

Thank you.

Chief Wilton Littlechild, IPC  
Samson Cree Nation  
Ermineskin Cree Nation  
Louis Bull Tribe  
Montana Cree Nation  
Regional AFN of Treaties 6, 7, 8 (Alberta)  
Assembly of First Nations



UNITED NATIONS  
DECLARATION ON  
THE RIGHTS OF  
INDIGENOUS PEOPLES

ANNEX

# UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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## **Resolution adopted by the General Assembly**

*[without reference to a Main Committee (A/61/L.67 and Add.1)]*

### **61/295. United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Taking note* of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,<sup>1</sup> by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

*Recalling* its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

*Adopts* the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting  
13 September 2007*

## **Annex**

### **United Nations Declaration on the Rights of Indigenous Peoples**

*The General Assembly,*

*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

1 See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)*, part one, chap. II, sect. A.

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

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

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

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

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights<sup>2</sup> and the International Covenant on Civil and Political Rights,<sup>2</sup> as well as the Vienna Declaration and Programme of Action,<sup>3</sup> affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law, *Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peo-

2 See resolution 2200 A (XXI), annex.

3 A/CONF.157/24 (Part I), chap. III.

ples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

*Article 1*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights<sup>4</sup> and international human rights law.

*Article 2*

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

4 Resolution 217 A (III).



*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 6*

Every indigenous individual has the right to a nationality.

*Article 7*

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

*Article 8*

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - a. Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
  - b. Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
  - c. Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
  - d. Any form of forced assimilation or integration;
  - e. Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

*Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

*Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

*Article 11*

Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

*Article 12*

Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

*Article 13*

Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

*Article 14*

Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including

those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

*Article 15*

Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

*Article 16*

Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

*Article 17*

Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

*Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decisionmaking institutions.

*Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain

their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

*Article 20*

Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

*Article 21*

Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

*Article 22*

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

*Article 24*

Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

*Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

*Article 26*

Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

*Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

*Article 28*

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources

equal in quality, size and legal status or of monetary compensation or other appropriate redress.

*Article 29*

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

*Article 30*

Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

*Article 31*

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

*Article 32*

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

*Article 33*

Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

*Article 34*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

*Article 35*

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

*Article 36*

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

*Article 37*

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded



with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

*Article 38*

States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

*Article 39*

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

*Article 40*

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

*Article 41*

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

*Article 42*

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

*Article 43*

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*Article 44*

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

*Article 45*

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

*Article 46*

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



