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Why There Should not have to be a Declaration on the Rights of Indigenous Peoples*

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On June 29, 2006 the newly established United Nations Human Rights Council adopted a Declaration on the Rights of Indigenous Peoples,¹ and it recommended the same action by the UN General Assembly. For more than 20 years representatives of indigenous peoples had worked on the Declaration within the UN human rights machinery. Now, at its inaugural session, the Human Rights Council adopted the text of the Declaration that had been negotiated with states and that indigenous peoples overwhelmingly support. When the vote in favor of the Declaration was announced, the UN High Commissioner for Human Rights joined Council members and indigenous observers in a standing ovation. News of this action, and the near certainty the UN General Assembly will itself adopt the Declaration later this year, was met around the world with celebration.

But what is this celebration about? The Declaration should not exist; or, better said, it should not have to exist. The Declaration exists because massive human rights

* This paper was written and first presented before the Declaration on the Rights of Indigenous Peoples was finally adopted by the UN General Assembly on September 23, 2007. The Declaration as adopted by the General Assembly, with few changes, the same as the text adopted by the UN Human Rights Council in June 2006, which text is the subject of this paper. The General Assembly's amendments to the text added emphasis on the need to contextual the implementation the Declaration given the wide diversity of circumstances in which it might be relevant and inserted language reiterating the already existing international law principles that favor the territorial integrity and political unity of states. The text of the Declaration as adopted by the General Assembly is available at:

<http://daccessdds.un.org/doc/UNDOC/LTD/N07/498/30/PDF/N0749830.pdf?OpenElement>

¹ United Nations Declaration on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/L.3, Annex (June 23, 2006) [hereinafter "Declaration"].

violations occurred historically and the systemic effects of those violations continue to be felt. The Declaration is targeted at removing inequities that should not be. The ultimate goal of the Declaration is that it may one day be irrelevant.

With its 23 preambular paragraphs and 46 operative articles, the Declaration is anchored in the complementary human rights of equality and self-determination.

“Indigenous peoples and individuals”² are declared to be “equal to all other peoples and individuals.” Accordingly, the declaration specifies that, like all other peoples, “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.”³ On this grounding, the Declaration affirms the collective rights of indigenous peoples in relation to culture, development, education, social services, and traditional territories; and it mandates respect for indigenous-state historical treaties and modern compacts.

The Human Rights Council’s Declaration on the Rights of Indigenous Peoples is now the leading international instrument that articulates and affirms the collective rights of groups other than states. This recognition of collective rights breaks from the classical framework of international law and relations, a framework that could not accommodate rights other than those corresponding to the sovereign powers of the state or reducible to the rights of the individual. The collective rights of indigenous peoples clearly stand apart from the rights of states. But are they human rights?

During the negotiations leading to the Declaration some states insisted that human rights by definition are individual and not collective rights. As a result, the Declaration

² *Id.*, Article 2.

³ *Id.*, Article 3.

does not specify that the multiple collective rights it affirms are human rights.

Nonetheless, as evident from the Declaration's language, the discussions surrounding its drafting, and the very fact that its genesis is from within the United Nation's human rights regime, the articulated collective rights derive from values of human dignity that are commonly associated with human rights. Moreover, these collective rights can be seen as derived from previously established human rights principles of general applicability. I will return to this point later. Thus, the declaration is properly viewed as a human rights instrument, whether or not the collective rights it affirms for indigenous peoples are themselves, in a strict sense, human rights.

The international attention to indigenous peoples highlighted by the Declaration is driven by concern over patterns of human rights abuses that are linked to histories of colonialism, or something like colonialism. The very concept of indigenous peoples as it has developed in international legal and political discourse is bounded to this concern. The most commonly cited definition of indigenous peoples, provided by UN special rapporteur Jose Martinez 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 ...⁴

The voluminous Martinez Cobo *Study on the Problem of Discrimination Against Indigenous Population*,⁵ mandated in 1970 by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (now the Sub-Commission on 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 colonization and ongoing discrimination.

One of the programmatic recommendations of the Martinez Cobo study was the establishment of the Sub-commission Working Group on Indigenous Populations, which first met in 1982. Through its policy of open participation in its annual session, the five-member Working Group became an important platform for the dissemination of information and exchange of views among indigenous peoples, governments, nongovernmental organizations, and others. The Working Group completed in 1993 a draft Declaration on the Rights of Indigenous Peoples, which became the basis for the text recently adopted by the Human Rights Council. The Working Group standard-setting work was strengthened by its parallel mandate to review developments concerning indigenous peoples. In both discussions about what should go into the text of the Declaration and about developments worldwide, the Working Group heard countless indigenous peoples' representatives tell of specific problems stemming from histories of

⁴ U.N. Subcommission 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).

⁵ *Id.* & Adds. 1-4.

invasion or colonization, problems usually framed as violations of basic human rights. Illustrative is the following statement, made by a coalition of North American Indian nations at the Seventh session of the Working Group in 1989.

In the United States, as in many other countries, the national government has often abdicated its historic treaty and moral obligation to find just and proper resolutions of indigenous land issues....

The right to land is a question of human rights, because indigenous peoples cannot survive and live decent lives, cannot maintain their cultures, religions and languages and cannot enjoy other fundamental human rights without the right to their lands and territories....In many areas ...the future of many Indian and indigenous peoples depends on recovering land that has been wrongfully taken or used by others.⁶

During the earliest years of the Working Group, indigenous participation came mostly from the Americas. But participation soon expanded to include numerous groups from all regions of the world, as more and more groups came to identify with the common set of human rights problems being identified and discussed by the Working Group.

⁶ Statement of the Indigenous Land Rights Council (a coalition of the Rosebud Sioux Tribe, Haudenosaunee, Onondaga Nation, Mohawk Nation, Seneca Nation, Tuscorora Nation, the Western Shoshone National Council, the Yupiit Nation, and Traditional Seminole Nation), U.N. Working Group on Indigenous Populations, Seventh Session, July 31 – Aug. 4, 1989.

The Declaration adopted by the Human Rights Council does not 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 common Article 1 of the widely ratified international human rights covenants 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. This remedy should not have to exist, just as the history of oppression that gives rise to it should not have been. But that history did happen, and its ongoing consequences make necessary a global remedial response.

Recognition as “peoples” with rights of “self-determination” has been central to the chorus of indigenous peoples’ demands within the international arena. Article 3 of the Declaration which provides that recognition proved to be the most contentious of the Declaration’s provisions during the negotiations preceding its adoption. Independently 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 Article 3’s affirmation of indigenous self-determination difficult to accept for many states. However, through the discussions leading to Declaration, the complete text adopted by the Human Rights Council, and an appreciation of self-determination’s grounding in the human rights, as

opposed to states rights, framework of international law, an alternative understanding of the right of self-determination emerges.

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 with 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 a separate state and may even be impeded by a separate state. It is a rare case in the post-colonial world in which self-determination, understood from a human rights perspective, will require secession or the dismemberment of states.

Indigenous peoples’ representatives have almost uniformly disclaimed designs of independent statehood in arguing for self-determination before international bodies, and state representatives increasingly have expressed understanding that the right of self-determination does not necessarily imply a right of a separate sovereign existence. Thus, the text of the Declaration clearly presupposes that indigenous peoples, having been denied self-determination, will recover or develop it within the framework of the states in

which they live, through contextually defined arrangements that accommodate to diverse realities.

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 over time have yielded diverse understandings of the self-determination ideal. Lenin and Wilson, for example, both championed the self-determination of peoples in the early part of the 20th 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 in the construction and functioning of governing institutions under which they live at all levels.

Projected back in time, self-determination thus understood can be seen as having been massively and systematically denied 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 industrial and less-developed countries in which indigenous people live, the indigenous sectors almost invariably are on the lowest rung of the socioeconomic ladder, and they exist at the margins of power. Historical phenomena grounded on 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 light of their common characteristics and in *sui generis* fashion mark the parameters for measures to implement a future in which self-determination for them is secure.

With its remedial thrust, the Declaration contemplates change that begins with state recognition of rights of indigenous group survival that are deemed "inherent," such recognition being characterized as a matter of "urgent need."⁷ Professor Erica-Irene Daes, the long time chair of the U.N. 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

⁷ Declaration, *supra*, preambular para. 6.

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.⁸

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,”⁹ and it further includes particularized requirements of special measures in connection with most of the rights affirmed. Such special measures are to be taken with the end of building healthy relationships between indigenous peoples and the larger societies as represented by the states. Thus, the Declaration emphasizes that “indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect.”¹⁰ 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.¹¹

Among the special measures required are those to secure “autonomy or self-government” for indigenous peoples over their “own internal and local affairs,”¹² in accordance with their own political institutions and cultural patterns;¹³ as well as

⁸ Erica-Irene A. Daes, “Some Considerations on the Right of Indigenous Peoples to Self-Determination,” 3 *Transn’l L. & Contemp. Probs.* 1, 9 (1993).

⁹ Declaration, *supra*, Article 37.

¹⁰ *Id.*, preambular para. 12.

¹¹ *Id.*, preambular para. 13; Article 36.

¹² *Id.*, Article 3 *bis*.

¹³ *See id.*, Article 21.

measures to ensure indigenous peoples “rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State”¹⁴ and to have a say in all decisions affecting them.¹⁵ The affirmation of these dual aspects of self-determination – on the one hand autonomous governance and on the other participatory engagement – 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.”¹⁶ 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.¹⁷ 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

¹⁴ *Id.*, Article 4.

¹⁵ *See id.*, articles 19, 20.

¹⁶ *Id.*, Article 26.1.

¹⁷ *Id.*, Article 27.1.

rights principles that are deemed of universal application. These include, especially, principles of equality and self-determination as already stressed. Other generally applicable human rights also are foundational, including the right to enjoy culture, the right to health, 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 derivative of the universal human right to property, as concluded by the inter-American human rights institutions,¹⁸ or as extending from the right to enjoy culture, as affirmed by the UN Human Rights Committee in light of the cultural significance of lands and resources to indigenous peoples.¹⁹ 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 other words—to repeat myself—the Declaration exists because indigenous peoples have been denied equality, self-determination, and related human rights. It does not create for

¹⁸ See *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Court H.R. (Ser. C) No. 79 (Judgment on merits and reparations of August 31, 2001); *Mary and Carrie Dann, Case 11.140 (United States)*, Inter-Am. Comm. H.R., Report No. 75/02 (merits decision of Dec. 27, 2002).

¹⁹ See 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)*, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 7.

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.

The Declaration, especially once the UN General Assembly adds its endorsement, will go a long way in consolidating gains made by indigenous peoples in the international arena toward rolling back inequities and oppression. It builds upon numerous decisions and other standard-setting measures over recent decades by a wide range of international institutions that are favorable to indigenous peoples' demands. The vote in favor of the Declaration by the Human Rights Council was not unanimous. Of the forty-seven Council members, thirty voted in favor of it, twelve abstained, and two voted against it. Three members were not present. Notably, Canada was one of the states that voted against the Declaration, and it may well be that when the Declaration reaches the full UN membership in the General Assembly, a few other states that have expressed reservations about the text, including the United States, New Zealand and Australia, will also vote against it. Still, however, if approved in the General Assembly by a substantially majority of states from all regions of the world – as happened in the Human Rights Council – the Declaration will have substantial moral and political force, and indeed it will contribute to customary and general principles of international law that have already been building concerning indigenous peoples on the basis of long standing human rights principles. It should be noted that even Canada and other states that thus far have declined to endorse the Declaration, have done so because of particular language they

view as too far reaching, while expressing support for the core principles reflected in the text.

The Declaration will be the benchmark for all the many United Nations programs that touch upon indigenous issues, the Human Rights Council and other international human rights issues will use the Declaration to scrutinize state behavior and push for domestic reforms, and domestic judicial and other authorities will be pulled toward applying the Declaration. Even those states that have or may vote against the Declaration almost certainly find themselves having to contend with it, if not being influenced by it.

There should not have to be a Declaration on the Rights of Indigenous Peoples, because it should not be needed. But it is needed. The history of oppression against indigenous peoples cannot be erased, but the dark shadow that history has continued to cast can and should be lightened. The Declaration is needed for the difference it can and will make for the future. That's what the celebration is about.