

INTERNATIONAL LAW ASSOCIATION

RIO DE JANEIRO CONFERENCE (2008)

RIGHTS OF INDIGENOUS PEOPLES

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FIRST REPORT*

I Introduction

One of the most notable features of the contemporary international system has been the emergence of the rights of indigenous peoples as distinct issues of concern. This has been largely due to their own advocacy at the international level. Over the last three decades in particular, indigenous peoples around the world have increasingly turned to international forums for clarification, confirmation and development of their rights. This reflects in part the long standing refusal of indigenous peoples to surrender their autonomy to the nation states in which they find themselves. It also reflects frustration on the part of indigenous peoples at the intransigence of nation states in recognising indigenous autonomy in respect of their lands and territories, resources, and law and custom.

Indigenous peoples are now clearly established as important non-state actors in international law. This trend has been confirmed by, among other things, the appointment in 2001 of a UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples,¹ the establishment of the UN Permanent Forum on Indigenous Issues which first met in 2002,² and the overwhelming endorsement of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) by the UN General Assembly on 13 September 2007.³ As well, the jurisprudence of UN treaty bodies such as the Human

*The Rapporteur, in developing this First Report of the Committee, wishes to thank in particular the incoming Chair, Professor Siegfried Wiessner, for his assistance and suggestions. The Report represents in part a consolidation of progress reports submitted by various Committee members. Such reports have been provided by Professor Wiessner (chapters 1 and 8), Steven Wheatley (chapter 3), Professor Xanthakis (chapter 4), Claire Charters (chapter 5), Professor Graham (chapter 6), Greg Marks (chapter 7), Professor van Genugten (chapter 9). The Rapporteur wishes to thank Committee members who have contributed to progress reports and otherwise provided comments and suggestions.

¹ See Office of the High Commissioner for Human Rights, 'Resolution 2001/57 of the 76th Meeting 24 April 2001' UN Office of the High Commissioner on Human Rights [1]

<http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2001-57.doc> at 28 April 2008.

² The UN Permanent Forum on Indigenous Issues was established by the United Nations Economic and Social Council (ECOSOC) resolution 2000/22 on 28 July 2000.

³ Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/47/1 (2007).

Rights Committee and the Committee for the Elimination of Racial Discrimination (the CERD Committee) has dealt extensively with indigenous issues. The International Labour Organisations Conventions No 107 and No 169⁴ provide binding legal obligations in respect of the indigenous citizens and communities of the States parties, and the deliberations of the ILO's Committee of Experts provides a body of jurisprudence in respect of the content and scope of the rights protected by the ILO Conventions.⁵

Thus numerous processes of the international system have responded to the common set of ongoing problems that are central to the demands of indigenous groups, so that discernible patterns of responses and normative understandings have emerged at the international level in respect of indigenous peoples. Within the UN system and other standard-setting bodies such as the Organisation of American States, indigenous peoples have forged new understandings of processes and institutional arrangements and forced a place for themselves at the negotiating table and within the structural arrangements of multilateral organisations. Similarly, development agencies such as the World Bank and the UNDP have responded to emerging understandings of the importance of human rights in the development process and in the context of poverty alleviation. The emerging right of indigenous peoples to free, prior and informed consent in respect of proposals affecting their lands, territories and resources is an example of such development and articulation of international norms and practice.

Nevertheless, the rights of indigenous peoples remain to a considerable degree uncertain and contested. Issues of general concern to international law, and human rights law in particular, are brought into sharp focus by indigenous claims and the extent to which they have been recognized on the international plane. For example, how can collective rights and individual rights be accommodated within the one body of law? Do claims for autonomy and self-determination constitute a potential threat to national sovereignty and territorial integrity?

Indigenous rights have shown to be a dynamic element of international law meriting close attention because they raise important issues of justice and restitution for the peoples concerned and because of the wider implications for the general body of international law.

II. The ILA Rights of Indigenous Peoples Committee

Following suggestions from members of the Australian Branch, the ILA Executive Council meeting in June 2006 at the time of the 72nd Biennial Conference, Toronto Canada approved the establishment of a Committee on the Rights of Indigenous Peoples. Professor S James Anaya of the University of Arizona College of Law (USA Branch) was appointed as chair of the Committee and Mr Greg Marks (Australian Branch) as the rapporteur.

Mandate

The original proposed mandate of the new Committee was to clarify and consolidate the international norms of indigenous rights by conducting a study of relevant treaties, other instruments, and international practice with the objective of producing a concise Restatement of those rights.

In the meantime, the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted by the UN General Assembly on 13 September 2007 (143 in favour, 4 against with 11 abstentions). This landmark event meant that the UNDRIP would now become a major, if not the major, focus of developing international law and practice in respect of indigenous rights. By its very nature UNDRIP, whilst it affirms that the rights set out:

constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world (Article 43),

⁴ ILO Convention 107 (1957) concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries; ILO Convention 169 (1989) concerning Indigenous and Tribal Peoples in Independent Countries.

⁵ This is not an exhaustive list of international and regional conventions, treaties, declarations and other instruments that reflect international standards and practice in respect of the rights of Indigenous peoples. Relevant international instruments will be covered in the text of the Committee's report as it is developed.

does not of itself provide a full explication of the state of international law in respect of indigenous peoples. In relation to some provisions it is uncertain whether they have yet crystallised into customary law and/or reflect existing treaty obligations. The provisions of UNDRIP would clearly benefit from further analysis of their meaning, scope and status.

Consequently, at the first meeting of the ILA Rights of Indigenous Peoples Committee, held in conjunction with the ILA South African Branch regional conference Pretoria August 2007, it was proposed that the mandate of the Committee be progressed by the development of an Expert Commentary on the UN Declaration on the Rights of Indigenous Peoples. The objective of the proposed Expert Commentary is to provide authoritative clarification, elucidation and guidance in respect of the UNDRIP provisions, including their development, context and status in international law. By providing such clarification, it is expected that the Commentary will reduce confusion and contention over the normative status of the UNDRIP provisions and of indigenous rights in general.

The Commentary will be available to practitioners and advocates, governments, courts and tribunals, academics and indigenous organisations, to draw on and refer to in dealing with and utilising the Declaration. To this end, it is proposed to publish the Commentary once the Final Committee report has been accepted by the ILA Biennial Conference. At this stage it is anticipated that the Final Report of the Committee will be presented at the 74th Biennial Conference to be held at The Hague in 2010.

Resignation of Chair of Committee

On 26 March 2008 the UN Human Rights Council appointed Professor James Anaya, for an initial period of three years, as the new UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples. In the context of the recent adoption of the UNDRIP it is evident that Professor Anaya's role as Special Rapporteur will be closely involved in explaining and implementing UNDRIP in the UN and its agencies and in offering support for incorporation of the standards contained in the UNDRIP in domestic legislation and practice of States. In these circumstances, Professor Anaya felt that there could be an inconsistency in his role as UN Special Rapporteur and his role as chair of the ILA Committee. In this situation he felt it preferable to resign from the chair of the Committee.

The Committee wishes to express its appreciation to Professor Anaya for the leadership and vision he has provided to the Committee. He will, however, remain a member of the ILA, and the Committee will maintain a constructive relationship with him in his new role. On Professor Anaya's suggestion an existing member of the Committee, Professor Siegfried Wiessner (USA Branch) has taken on the role of Chair with the agreement of the Committee members. The change of Chair is expected to be formalised at the Executive Committee meeting in Rio de Janeiro in August.

Work Program

The development of the UNDRIP has been a long and somewhat tortuous process.⁶ There have been numerous textual drafts and changes, particularly as some States have had major concerns about aspects of the text. At the same time the process has had a significant element of inclusiveness as indigenous voices have insisted, with a degree of success, on being an integral part of the process rather than it being simply a states-centred negotiation with only token involvement of indigenous representatives.

The result of the prolonged negotiations as the draft wound its way through the UN system is that while the UNDRIP provides a comprehensive and authoritative statement of standards, its provisions are not always clearly grouped by subject or issue, some provisions overlap, some articles have subsections that could as easily appear in other provisions and the import and scope of some articles is uncertain. As indicated, this outcome is the result of the highly negotiated nature of the text and the need to accommodate various concerns and views. In the end, although full consensus was not achieved, the UNGA adopted the Declaration by an overwhelming majority⁷ and UNDRIP can be seen as a major

⁶ See below summary of progress on Chapter 1.

⁷ As stated above, the UNDRIP was adopted by UNGA on 13 September 2007 by a vote of 143 in favour and 4 against, with 11 abstentions. Since then, 2 of the states that voted against the adoption, viz

advance in the response of the international community to indigenous concerns. It significantly incorporates indigenous aspirations and can be seen to reflect the preponderant state of world opinion on what constitutes the minimal standards of protection that should apply to indigenous peoples.

However, an article by article description and analysis of UNDRIP for the purposes of the Commentary would fail to provide a sufficiently coherent and cogent account and consequently could fall short of being of adequate assistance to those dealing with UNDRIP. An article by article approach would be difficult to organise as it would have problems of overlap, duplication and repetition. It could also unduly narrow the analysis, as to interpret the Declaration it will be necessary to consider it in the context of the broad body of international law and practice. For such reasons, the Committee has rejected an article by article approach.

Instead, it has decided to identify the major themes or classes of rights protected by UNDRIP, bring together the articles relevant to each such theme, and analyse each theme in a separate chapter. Each chapter has one member of the Committee as its convenor, and other members have elected to work on one, or more, themes. Thus there is a group or sub-committee for each chapter. The current arrangement of the work is as follows:

Chapter 1	General Discussion	Professor Siegfried Wiessner - Dr Dalee Dorrough - Professor Stefaan Smis - Dr Alexandra Xanthaki - Dr Dorothee Gottwald - Professor Camilo Perez-Bustillo*
Chapter 2	Self-determination	Professor Jon Van Dyke - Professor Stefaan Smis - Dr Dorrough - Professor Lorie Graham
Chapter 3	Autonomy and Political Participation	Mr Steven Wheatley - Professor Wiessner - Dr Gottwald
Chapter 4	Cultural Rights and Identity	Professor Alexandra Xanthaki - Ms Megan Davis - Professor Takanobu Kiriya - Professor Kaoru Obata
Chapter 5	Land Resources and Environment	Ms Claire Charters - Professor Wiessner - Dr Dorrough - Mr Tom Calma - Dr P G McHugh
Chapter 6	Education and Media	Professor Lorie Graham
Chapter 7	Social and Economic Improvement Rights	Mr Greg Marks - Mr Tom Calma - Mr Darren Dick* - Ms Megan Davis - Professor Perez-Bustillo
Chapter 8	Treaty Rights	Professor Wiessner - Ms Claire Charters
Chapter 9	Development and International Cooperation	Professor Willem van Genugten - Dr Margot Salomon - Professor Perez-Bustillo*

* Contributors to the work of the Committee but not yet formally members of the Committee. The processes of formalising their membership are in train.

Australia and Canada, have indicated that they are reconsidering their position and are likely to move to a position of supporting the Declaration.

Timetable

Some early draft texts are expected to be ready to share with the full Committee in July 2008, and these will also help inform the discussion at the Committee Working Session at the Rio Conference.

Whilst the timetable is flexible and has already been adjusted to meet changed circumstances, the targets to which the Committee is working are as follows:

- Circulation of some early drafts of text in July 2008
- Feedback prior to Rio Conference and further discussion during the Rio Conference in August 2008
- Intensive drafting, circulation, comments and feedback on texts during late 2008 after Rio and in first half of 2009
- Preparation of edited Commentary in second half of 2009
- Preparation of Final Report for presentation at the 75th Biennial Conference at the Hague in 2010.

Progress

Not all groups have been in a position to proceed at the same pace. The following information presents feedback on progress to date and issues that have arisen for further consideration by the Committee. This part of the report is not meant to be exhaustive - rather it is intended to give a snapshot of where the Committee has got to, and give a flavour of issues that have arisen and the sort of outcomes that will be the final product of the Committee's deliberations. Nevertheless, it must be stressed that the Committee is at a relatively early stage of its drafting work. Because of the dynamic nature of the subject matter, and because of the relative newness of indigenous rights to the ILA agenda, the Committee necessarily must 'feel its way' to a degree. However, progress to date has been significant. Now that the organisation of the work is settled, the Committee's work can be expected to move at an increasing pace towards the full development of the Commentary on the UNDRIP.

III Themes / Chapters

Chapter 1 – General Discussion

The background and history of the development of the Declaration on the Rights of Indigenous Peoples is a unique story in the context of UN human rights standard setting. This part of Chapter 1 briefly traces the history of the international community's response to the question of indigenous peoples. The early policy development of the International Labour Organization, which tended to be assimilationist in character, will be touched upon as the initial, substantive response to the status and conditions of indigenous peoples. The growing awareness and interest of human rights experts engaged in the work of the UN, which prompted the voluminous Martínez Cobo report⁸ and his pivotal recommendation to establish the Working Group on Indigenous Populations (WGIP) is a central focus of this part. The WGIP as well as the open, democratic nature of this forum provided by its members, are highlighted as a key dimension to the eventual text adopted by the UN General Assembly.

The role of indigenous peoples in the process is unmatched in any other standard-setting exercise within the UN. This element will be addressed in the context of the highly politicized nature of the work within the Commission on Human Rights and the successor body the Human Rights Council. Finally, the efforts of the detractors within the Third Committee and the UN General Assembly plenary session will be discussed.

The treatment of the background and history of the adoption of UNDRIP is largely a narrative chronology of events. Other parts of the chapter and the overall Commentary will elaborate upon and analyse the import of the language and provisions of the final, adopted text.

⁸ José Martínez Cobo, Special Rapporteur, *Study on the Problem of Discrimination against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4.

A key aspect of this chapter and the future work of the Committee is the determination of the scope *ratione personae* of its discussion, *i.e.* the concept of indigenous peoples. Whether a definition of the term is needed or even desirable has been a major source of contention. The discussion usually starts with UN Special Rapporteur J. Martínez Cobo's definition for the purposes of his 1986 ILO Convention No. 169 offers slightly different criteria, as it applies to both 'indigenous' and 'tribal' peoples. Quite a number of scholars in the field question the usefulness of defining the term by pointing, *inter alia*, to the need for flexibility and contextuality and also to the lack of authoritative definition of the term 'peoples' in the context of the principle and/or right of self-determination. Some scholars offer non-exclusive factors to be considered in the determination of a claim of indigenousness; others offer a definition arguing that if there are international legal rights of indigenous peoples the holders of such need to be able to be determined. In the lead-up to the Declaration, the US delegation and African states, among others, decried the lack of a definition; the Declaration, in its final version, however, does not define the term. Another issue is the separateness *vel non* of the concept of indigenous peoples from the concept of minorities.

A key issue to be considered in this chapter is the legal nature and content of UNDRIP. Under the UN Charter, the Declaration as a simple General Assembly resolution is not legally binding. There are opinions, however, that consider a 'Declaration', especially one adopted by an overwhelming majority of states, as of some legal authority. Those, however, who see the universe of 'sources' of international law as limited by Article 38(1)(a) through (c) of the ICJ Statute, have a problem locating such an instrument there. What traditionally positivist international legal scholars might agree on, however, is that such an instrument can reaffirm pre-existing customary international law or become the *fons et origo* of new customary international law, much as the Vienna Convention on the Law of Treaties codified *and* progressively developed customary international treaty law.

The problem then shifts to the issue of how to determine the content of customary international law. The *North Sea Continental Shelf* paradigm is the original touchstone offered by the ICJ; it determines the existence of a norm of customary international law by reference to a very widespread practice of states in conjunction with a pertinent *opinio juris*. Using this traditional standard, some scholars have found indigenous peoples' rights to wide-ranging autonomy, their lands and their culture as well as to treaty entitlements, affirmed by international and domestic decision makers (most recently, the Supreme Court of Belize). Others critique this method, in particular its reliance on state practice, as inapplicable in the human rights context.

Others, again, find international legal standards in a concentrating web of intergovernmental instruments, classically binding ones (such as treaties) and classically non-binding ones (such as intergovernmental organizations' resolutions, draft declarations, including possibly IDI and ILA resolutions etc.), as well as moral and theological arguments, considered particularly appropriate in the human rights field and possibly yielding rights for indigenous peoples as collective human rights. This issue of 'sources' has been obscured lately by the ICJ's 2004 *Wall* advisory opinion (*Legal Consequences of the Constriction of a Wall in the Occupied Palestinian Territory*) which might have elevated General Assembly resolutions to the level of standards used by the ICJ to evaluate the international legality of state action.

Beyond the issue of the source of indigenous peoples' rights, there will need to be a discussion of the location of such rights in the general regime of international human rights. Within that regime, another general issue to be discussed is the extent to which UNDRIP includes not only rights of the *status libertatis*, negative rights, rights to culture and land, but also rights of the *status activus*, *i.e.* self-determination; rights to equal status, *i.e.* non-discrimination; and rights of the *status positivus*, *i.e.* state obligations of affirmative action and remedies, *e.g.* regarding indigenous peoples' access to education and media in their own languages. These classifications might yield differential outcomes in terms of the nature and content of states' obligations.

There will also be a brief introductory discussion of the general provisions of UNDRIP, which provide an important contextual framework for the specific provisions. A final issue to be considered is where the *lex ferenda* suggestions in all chapters are to be anchored: in the Declaration itself, in the claims of indigenous peoples, in a public order of human dignity which aims at maximizing access by all to all the things humans value, or in some other concept of global good order.

Chapter 2 - Self-determination

Article 3 of the Declaration on the Rights of Indigenous Peoples says:

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.

This text has always been controversial, and approval of the Declaration was not possible until an interpretive provision was added as 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.

Even with this addition, a number of key countries with substantial indigenous populations voted against the Declaration, namely the United States, Canada, Australia, and New Zealand. Eleven abstained, including some with substantial indigenous populations such as the Russian Federation and Colombia.

This section of the Commentary on the Declaration will focus on the competing views regarding “self-determination” and evaluate what rights can be asserted under Article 3, when understood in conjunction with Article 46(1). During the final debates on the Declaration, Australia’s representative (Robert Hill) presented a perspective that illustrates the complexity of this matter:

The Australian Government had long expressed its dissatisfaction with the references to self-determination in the Declaration....Self-determination applied to situations of decolonization and the break-up of States into smaller states with clearly defined population groups. It also applied where a particular group with a defined territory was disenfranchised and was denied political or civil rights. Australia supported and encouraged the full engagement of indigenous peoples in the democratic decision-making process, but did not support a concept that could be construed as encouraging action that would impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government.⁹

The Declaration recognizes the right of indigenous peoples to ‘self-determination’, but what does that mean if they must work within existing state structures. The U.S. representative (Robert Hagen) explained during the debates that:

Under United States domestic law, the Government recognized Indian tribes as political entities with inherent powers of self-government as first peoples. In its legal system, the federal Government had a government-to-government relationship with Indian tribes. In that domestic context, that meant promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, economic activities, and land and resources management.¹⁰

It is thus clear that the right of self-determination for indigenous peoples is a substantial one, even if it falls short of complete independence in the international sense.¹¹ The question of how indigenous

⁹ General Assembly Adopts Declaration on Rights of Indigenous Peoples; ‘Major Step Forward’ Towards Human Rights for All, Says President, General Assembly GA/10612 (Sept. 13, 2007), at 5 <<http://www.un.org/News/Press/docs/2007/ga10612.doc.htm>> (visited April 8, 2008).

¹⁰ *Id.* at 8.

¹¹ See, e.g., Jon M. Van Dyke, Carmen Di Amore-Siah, Gerald W. Berkley-Coats, *Self-Determination for Nonself-governing Peoples and for Indigenous Peoples: The Cases of Guam and Hawaii*, 18 UNIVERSITY OF HAWAII LAW REVIEW 623-43 (1996).

peoples should be involved in national decision-making remains as one of the unresolved issues. Control over indigenous cultural heritage, traditional knowledge, and other forms of intellectual property also remains deeply controversial.

This section of the commentary will discuss the negotiation process that led to the language in the final Declaration, explaining areas where consensus was reached and analysing those areas where ambiguity remains. It will also examine state practice in order to provide guidance on the principles that can now be viewed as customary international law.

Chapter 3 - Autonomy and Political Participation

Work on chapter 3 has identified a number of key issues. The sub-committee for this chapter proposes to first review the rights of autonomy and political participation of indigenous peoples in other international law instruments, including the CERD; ICCPR; ICESCR; UN Declaration on Minorities; the Framework Convention for the Protection of National Minorities; and ILO Convention 169. The report will examine the human right to political participation, and any specific rights of minorities, and indigenous peoples.

The sub-committee will then look at the rights of autonomy and political participation in the UNDRIP: (i) rights to self-government; (ii) rights to shared government; and (iii) rights to participation and consent.

Specific issues to be addressed include the scope and content of the right of self-government/self-determination (a distinction between territorial self-government and cultural self-government may be examined here, identifying the principles underlying the importance of political participation for indigenous peoples); the idea of “shared government” between the people of the state (including citizens who regard themselves as indigenous persons) and indigenous peoples; mechanisms of political participation; and the idea of constitutional authority (contrasting the coercive authority of the state, and the right of a veto recognised for indigenous peoples in UNDRIP). The report will also examine the extent to which Article 46 constitutes a ‘limitation clause’ in the context of autonomy and political participation.

The chapter will also examine the importance of indigenous law in the practice of self-government. The report will look at the nature of indigenous institutions, the relevance (if any) of the idea of democracy here (cf. Article 46(3)), and the acceptability on limits on membership in indigenous institutions. UNDRIP highlights the relationship between indigenous laws (customary and self-government) and state laws and international human rights laws raising problematic issues around (global) legal pluralism. The report will also examine the relevance of ‘justice’, ‘good governance’, and ‘good faith’ in the context of indigenous self-government (Article 46(3)).

Chapter 4 - Cultural Rights and Identity

The team developing chapter 4 has decided to divide the chapter into thematic sections. The chapter will first analyse the prohibition of genocide (article 7) against indigenous peoples; it will also analyse the prohibition of ethnocide (article 8 of UNDRIP) and will identify this prohibition as an innovative, evolving step in international law. The analysis will then turn to the right of indigenous peoples to belong to an indigenous community (article 9) and to be able to determine their membership in accordance with their customs and traditions (article 33).

In respect of the next specific issues arising with relation to cultural rights, members of the group will first analyse the prohibition of forced removal and relocation (article 10) before turning to the core cultural rights of the Declaration. They will analyse the right of indigenous peoples to their traditions and cultures and their manifestations, past, present and future (article 11); the indigenous right to their spiritual and religious cultures (article 12) and their right to histories, traditions, philosophies, writing systems and literatures (article 13). They will also look at the effective mechanisms that would ensure the realisation of these rights.

Possible avenues for redress of past violations of these rights, including compensation and restitution will then be examined. This issue was very controversial in the negotiation of the UNDRIP - the analysis will hopefully shed some light in respect of the realisation of the right.

The chapter will also examine indigenous intellectual property rights, as recognised in article 31. The analysis of this article will be linked with several other articles including 10, 13 and 24. Finally the indigenous right to cultural autonomy and its limitations as included in article 34 of UNDRIP will be analysed.

By analysing the language of each article on cultural rights included in the Declaration, it is expected that the strengths and weaknesses of the language will be identified. The standards set in UNDRIP will be compared with those in the general human rights instruments as well as the minority instruments and ILO Convention No 169. Particular emphasis must be given to the implementation routes of these articles. If space allows, some national examples may be given to highlight the arguments of the authors.

Chapter 5 – Lands, Resources and the Environment

The subcommittee preparing chapter 5 has elaborated its plan for progressing the development of the theme. In introducing the general principles and context of the land rights provisions, the following issues will be highlighted:

- the importance of lands, territories and resources to indigenous peoples;
- the general tenor of the provisions on lands, territories and resources, including the minimum standards set when reading the provisions as a whole;
- that the provisions on lands, territories and resources were not altered when the Declaration was in the General Assembly as they were considered non-negotiable by those states leading the negotiations;
- the inter-relationship between articles on the rights on lands, territories and resources; and
- the relationship between the rights on lands, territories and resources and other rights in the Declaration.

The group will also take into account the Vienna Convention on the Law of Treaties on the interpretation of treaties, highlighting the ordinary meaning, the history of the Declaration, the *travaux préparatoires*, the context and the purpose when providing interpretations of UNDRIP's land rights provisions. Among other factors, the group will:

- examine (briefly) the development of each article including analysis of earlier language (Sub-Commission text and amendments during the Working Group on the Draft Declaration) of the article;
- analyse the statements made on the article, if any, in states' explanations of vote (as a reflection, in part, of *opinio juris*);
- discuss the relationship between the article and other articles in the Declaration (a contextual reading of the Declaration);
- suggest appropriate interpretation of the article in the light of its development and context; and
- compare with other international treaties and jurisprudence on indigenous peoples' rights to lands, territories and resources (is the Declaration consistent with other standards?); and
- overview pertinent state practice and *opinio juris* in order to ascertain to what extent, if any, the Declaration's articles on land rights reflect pre-existing customary international law.

When comparing the article with other international legal jurisprudence, the commentary will consider, in particular ILO Convention 169; ILO jurisprudence; Organization of American States Proposed Declaration on the Rights of Indigenous Peoples; Inter-American Commission and Court jurisprudence; jurisprudence of the UN treaty bodies, in particular, by the UN Human Rights Committee and the UN Committee on the Elimination of Racial Discrimination; relevant jurisprudence from special rapporteurs, including the Special Rapporteur on the Situation of the Fundamental Freedoms and Human Rights of Indigenous People and the Special Rapporteur on Indigenous Peoples' Permanent Sovereignty over Natural Resources; and domestic jurisprudence on indigenous peoples' land rights under international law, including the 2007 Belize Supreme Court decision;

The group has discussed an approach that does not exclusively apply a positivist approach to the law but, instead, also focuses on elaborating proposals *de lege ferenda*. International law on the rights of indigenous peoples is fast evolving and consequently a more flexible and progressive approach is appropriate. The importance of UNDRIP for the reaffirmation and the evolution of customary international law on the rights of indigenous peoples will also be highlighted.

Chapter 6 - Education and the Media

Chapter 6 will discuss three independent, yet interrelated articles of the UNDRIP. The chapter will be divided into three parts, each part discussing a separate article of the Declaration. At the beginning of each part, there will be a brief discussion of the article's history and meaning. Understanding the origins and histories of the rights subsumed within these articles helps in understanding some of purposes and principles articulated in the Preamble of the Declaration. They include, among other things, the need to address 'historical injustices' (including 'doctrines, policies, and practices' that promote 'superiority of peoples or individuals'), to respect and promote cultural 'diversity and richness', to ensure that 'indigenous families and communities retained shared responsibility for the upbringing, training, education and well-being of their children', and to reaffirm 'the fundamental importance of the right of self-determination of all peoples'. History similarly provides context from which States and indigenous peoples can interpret and apply the various provisions of the Declaration. Each part will also include a detailed discussion of the international legal framework surrounding the article. Additionally, as a complement to and further articulation of international law, regional and domestic practices and laws will be briefly discussed and explored. Each part will end with a discussion of relevant issues that need to be more fully explored by international, regional, and domestic bodies.

Article 14 articulates individual and collective rights to education. This includes the right of indigenous peoples to develop and control educational systems that are consistent with their linguistic and cultural methods of teaching and learning. It also includes the right of indigenous individuals to have access to these or other similarly situated educational systems or programs. In addition to promoting and protecting indigenous ways of learning and teaching, the Article articulates a more general right of non-discriminatory access to all levels and forms of education within the State, thereby ensuring that indigenous pupils are placed on an equal footing with non-indigenous pupils. Finally, it ensures that any action that a State takes with respect to the education of indigenous individuals is done in partnership with indigenous communities.

Article 15 overlaps with Article 14 in that it speaks to the elimination of inaccurate, prejudicial, and distorted information in textbooks and other educational materials. In particular, it states that indigenous peoples have the right to have 'their cultures, traditions, histories, and aspirations . . . appropriately reflected in education.' Similar to Article 14, States are required under Article 15 to work with indigenous peoples to not only combat prejudice and discrimination in education, but to actively develop educational tools that 'promote tolerance, understanding, and good relations among indigenous peoples and all other segments of society.' Article 15 extends this duty of non-discrimination and promotion of cultural pluralism to all public information, not just educational materials.

Article 16 articulates a right to media within the context of such international norms as freedom of expression, access to information, and non-discrimination. Within these well established norms, States have a duty to ensure that indigenous cultural diversity is duly reflected in non-indigenous media. Since media is one primary way in which information concerning indigenous peoples is conveyed to other sectors of society, it serves as an important link to a State's duty of non-discrimination and the promotion of cultural pluralism under Article 15. Moreover, consistent with principles of self-determination, indigenous peoples have the right to establish their own media in their own language and the corollary right of non-discriminatory access to all forms of non-indigenous media. These aspects of Article 16 are consistent with Article 14 in that they ensure access to culturally relevant information and help to promote and protect indigenous languages and cultures.

All three articles reflect themes prevalent throughout UNDRIP, such as the understanding that universal human rights extend to both the individual and the collectivity. Moreover, these three articles suggest an important interpretation of 'rights' in which the ideas of equality and access in education and media within a State is consistent with indigenous peoples' rights to different ways of knowing and learning and speaking. States are duty bound not only to respect these differences, but to actively promote tolerance and understanding of these differences throughout societies generally.

All three articles are similarly aimed at correcting injustices against indigenous peoples in terms of their treatment in the educational process, in the media, and in the wider society generally. Throughout history,

education of indigenous peoples has been used by many countries as a tool of forced assimilation and cultural destruction. At the same time, stereotypic and even racist portrayals of indigenous peoples have been perpetuated throughout non-indigenous societies in the media and elsewhere, often by governments themselves or with the tacit approval of governments. Thus the articles in this section of the Declaration take on a special meaning and purpose in terms of redressing wrongs (such as in the form of forced assimilation or discrimination in education, media, and public life), as well as repairing, restoring, and strengthening indigenous communities and cultures. With respect to education and media, these aims can be achieved by States recognizing and advancing some basic human rights, including the right of self-determination, the right of non-discrimination and the right of cultural and linguistic integrity.

Chapter 7 - Social and Economic Improvement Rights

Chapter 7 covers a range of social and labour protection rights (articles 17, 21, 22 and 24). These are rights that have been extensively addressed in existing international instruments. Indeed protection of labour rights was one of the first international initiatives in respect of indigenous peoples, going back to ILO concerns about exploitation of indigenous workers in the 1920s and 1930s. Social and economic rights are in particular the subject of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

In examining the meaning scope and application of these provisions in UNDRIP, the content of existing instruments, the jurisprudence of treaty supervisory bodies in respect of the application of standards to indigenous peoples, and the policies, practices and programs of a range of international and regional organisations will be apposite. For example, article 17 mandates the application of applicable international and domestic labour law to indigenous individuals and peoples. It singles out indigenous children for protection from a range of specified potential dangers, and more broadly seeks to prevent economic exploitation and hazardous work conditions from impacting on their right to education. Lastly it proscribes discrimination in respect labour conditions, employment or salary. The work of the ILO, and agencies such as UNICEF in respect of child labour, will directly inform the understanding of this provision.

The right to improvement in economic and social conditions is given a wide application (article 21 (1)), and States are required to take effective, and where appropriate special measures, to improve the social and economic conditions of indigenous peoples (article 21(2)). Particular attention is given to vulnerable sections of the community viz indigenous elders, women youth, children and persons with disabilities (article 21(2)). Article 22(1) widens the focus on these sections of indigenous communities to include the implementation of the Declaration, that is all provisions not only the economic and social provisions.

The language ('States shall take measures...') mirrors to some extent the language of ICESCR and particularly the obligations on States parties as developed by the UN Committee on Economic, Social and Cultural Rights. ICESCR requires that a State party:

take steps...to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means...¹²

Further, the steps required to be taken under the Covenant must be deliberate, concrete and targeted towards ensuring the full realisation of rights and Governments must establish that they are progressively realising the enjoyment of rights.¹³ This requires that service delivery occur within an overall strategy that includes specific, time-bound and verifiable benchmarks and indicators¹⁴ to ensure that the enjoyment of rights improves over time.

The analysis will compare the UNDRIP provisions to such existing international standards and assess the extent to which they reflect existing law and practice and where they may represent progressive development of such understandings.

¹² International Covenant on Economic, Social and Cultural Rights, adopted 1966 993 UNTS 3, Article 2(1).

¹³ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No 3: The nature of States parties obligations*, contained in UN Doc: E/1991/23, 14/12/90.

¹⁴ See UNDP, *Human Development Report 2000 –Human rights and human development*, UNDP, New York 2000.

The situation of indigenous women and children is often of particular concern and their protection is highlighted in article 22(2). Women and children are particularly vulnerable to the stresses within indigenous society arising from dispossession and social and cultural breakdown. Whilst all sections of the society may be in situations of distress and trauma, women and children may often bear the brunt. Article 22 (2) takes a strong position in respect of State responsibilities to protect indigenous women and children against violence and discrimination. The chapter analysis will consider both international and, where appropriate, domestic law to provide guidance on the level of obligation and aspiration inhering in these provisions.

Article 24 dealing with health matters takes a broad view of health, encompassing traditional and modern health practices (article 24(1), and including both physical and mental health (article 24(2)). In respect of protections of traditional medicines and health practices the analysis will need to cross reference to the discussion of intellectual property issues in chapter 4. Many indigenous societies suffer significant disadvantage in health standards, and the spelling out of health rights in the UNDRIP is of critical importance to the protection of the social and economic rights of indigenous peoples. The language of article 24(2) in requiring progressive realisation of the right again closely reflects existing international standards. Indeed, article 12 of ICESCR recognises 'the right of everyone to the enjoyment of the highest attainable standard of physical and mental health'.

Where human rights institutions have been established by Governments to oversight and report on the domestic implementation of social and economic rights contained in instruments such as ICESCR and CERD, the group will examine closely the experience and interpretations developed by such institutions. An example is the Human Rights and Equal Opportunities Commission (HREOC) in Australia, a statutory body that has closely monitored the situation of social and economic rights of Australia's indigenous peoples in the context of relevant international standards and reports on an annual basis to the Parliament of the Commonwealth of Australia on progress in achieving these rights.

Chapter 8 - Treaty Rights

Chapter 8 will provide an analysis of the existing and the development of the desired treatment of treaties, agreements and other constructive arrangements between States and indigenous peoples under UNDRIP and general international law.

The pertinent provision in the 2007 UNDRIP is Article 37:

1. 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.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

In contrast, Article 36 of the 1993 Draft Declaration on the Rights of Indigenous Peoples, presented by the UN Working Group on Indigenous Populations, had proposed:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned.¹⁵

¹⁵ In comparison, the most recent version of the pertinent provision of the Draft American Declaration on the Rights of Indigenous Peoples, Article XXIII, reads as follows:

Indigenous peoples have the right to the recognition, observance, and application of the treaties, conventions, and other arrangements that the States or their successors

Background

Treaties between States and indigenous peoples have often been a means to facilitate colonization, especially on the North American continent; the Treaty of Waitangi is the key such arrangement in New Zealand.¹⁶ In contrast, today's agreements between States and indigenous peoples often serve as means to overcome the legacies of conquest.

The UNDRIP is intended to meet indigenous peoples' demands that States live up to their solemn commitments of the past, often 'honoured' only in the breach. Article 37, in essence, restates the general legal principle of *pacta sunt servanda*. Two important changes were, however, made between 1993 and 2007: the interpretive language 'according to their original spirit and intent' was eliminated as well as the recommended settlement of disputes arising under such treaties by 'competent international bodies'. These changes may already highlight key fault lines in the legal battles over these treaties; the chapter subcommittee will analyse these changes and other discussions in greater detail in its work on the *travaux préparatoires* of Article 37.

Issues to be discussed

A. The legal nature of treaties between States and Indigenous Peoples

Agreements between States and indigenous peoples may belong to the sphere of international law or purely domestic law. Consequences of such designation may be vast, including the legal regime of validity, interpretation, and termination.

International law character – arguments presented:

- (a) Indigenous people's retention of sovereignty (Maori position on Treaty of Waitangi [*rangatiratanga*]);
- (b) Conclusion of treaty between States and indigenous peoples as holders of international treaty-making power (*cf* International Court of Justice (ICJ) *Western Sahara* Opinion on 'derivative title'); and
- (c) Formal treatment as international 'treaty' under domestic law (eg US Senate review and approval of US treaties with American Indian Nations).

Purely domestic law character – arguments presented:

- (a) Essential argument: State sovereignty; treatment of indigenous peoples as 'domestic dependent nations' (Marshall) leading to the denial of treatment of agreements between states and indigenous peoples as treaties under international law (*Island of Palmas*, *Cayuga Indians Awards*); and

may have concluded, in keeping with their spirit and intent, and to have the same be respected and observed by the States.

It has now been bracketed, as "[t]he Chair has collected all the proposals but Delegations need further time to analyze them." ((Eleventh Meeting of Negotiations in the Quest for Points of Consensus (Washington D.C. – April 14 to 18, 2008), Record of the Current Status of the Draft American Declaration on the Rights of Indigenous Peoples, OEA/Ser.K/XVI, GT/DADIN/doc.334/08, 18 April 2008)).

¹⁶ Significant research on these treaties on a global scale has been compiled by UN Special Rapporteur Miguel Alfonso Martínez in four reports submitted from 1992 through 1999. See also Siegfried Wiessner, *American Indian Treaties and Modern International Law*, 7 ST. THOMAS L. REV. 567 (1995); and Claire Charters, Report on the Treaty of Waitangi 1840 Between Maori and the British Crown, Background Paper, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples Organized by the Office of the United Nations High Commissioner for Human Rights, Geneva, 15-17 December 2003, U.N. Doc. HR/GEBNEVA/TSIP/SEM/2003/BP.15.

(b) Effects of such designation, mostly offered by States, described as more beneficial to indigenous peoples (rule *contra proferentem* etc). On the other hand: reservation by States of power to abrogate such treaties in line with broader 'plenary' power to regulate relations with indigenous peoples.

The argument might be made that contemporary treaties between States and indigenous peoples (such as land settlement agreements in Canada and Australia or Treaty settlements in New Zealand) might be in a legal category different from treaties made in the distant past in the context of conquest. They are made within a constitutional framework that, in some cases, affords autonomy and full political participation to indigenous people and peoples.

The subcommittee will review and assess all of these claims *de lege lata* and *de lege ferenda*.

B. What are the legal consequences for the validity, interpretation and termination of such treaties?

1. Under International Law:

- (a) Distinct rules for **validity**. The Vienna Convention on the Law of Treaties, although, in itself, only applicable to treaties between states, largely reflects rules of customary international law applicable to all agreements under international law. If these rules are applied to certain treaties between States and indigenous peoples, some of these agreements might be considered invalid (void or voidable) due to certain defects in their creation (always taking into account, though, rules of intertemporal law).
- (b) Rules of **interpretation** are also international, which may lead to certain divergences with rules of domestic interpretation, including the downplaying (as subsidiary means of interpretation) of the shared expectations of the parties as elucidated by the *travaux préparatoires* in favour of subsequent practice. In the specific context of treaties with indigenous peoples, the rule *contra proferentem* and similar pro-indigenous interpretations offered under domestic law by domestic courts are arguably also part and parcel of existing international law as either customary international law or a general principle of law of civilized nations under Article 38(1)(c) of the ILC Statute (reflecting across-the-board acceptance in modern domestic contract law of interpretive restrictions on standard form contracts/contracts of adhesion).
- (c) **Breach** of treaties with indigenous peoples by States, a not uncommon occurrence, would also be evaluated under international law, engendering consequences recently spelled out by the 2001 ILC Articles on State Responsibility (UN GA Res. 56/83 (Dec. 12, 2001)). Other legitimate **grounds of termination** might also come into play, while unilateral abrogation outside the confines of these grounds would be considered a breach.

2. Under Domestic Law:

Some governments insisting on the domestic legal classification of their treaties with indigenous peoples appear to agree with the characterization of these agreements as legally binding undertakings, albeit under domestic law. Others do not (as in New Zealand). Sometimes, these treaties are constitutionally protected (as in Canada); often, they enjoy a particularly pro-indigenous construction as they were drafted predominantly by representatives of the government (as in the US). Sometimes, though, unilateral powers to abrogate such treaties are preserved. The subcommittee, with the invited help of other Committee members, will undertake further research beyond its present scope to analyse the present role and status of treaties in key countries not yet reviewed (Canada, etc.).

C. Dispute Settlement: Should disputes under treaties with indigenous peoples be decided solely by domestic governmental bodies, particularly domestic courts?

There is presently no intergovernmental or intergovernmentally authorised domestic institution empowered to settle disputes between the parties to treaties between States and indigenous peoples. The Waitangi Tribunal, for example, is a New Zealand domestic institution set up to address, not mandatorily decide, claims of breaches of the principles of the Treaty. The British Columbia Treaty Commission, though intergovernmental within Canada, and the US Indian Claims Commission are

domestic entities as well; thus Canadian and US domestic institutions exclusively decide claims of breaches between governments and indigenous peoples.

Whether controversies arising under those treaties, however, should be decided solely by domestic courts or, exclusively, concurrently, or upon exhaustion of domestic remedies, by international bodies, is another question. The answer to it does not necessarily depend on the characterization of the treaties as pertaining to the sphere of international law or domestic law, even though it would appear to be more 'natural' that an international legal agreement would be pronounced upon by an international body.

Private commercial agreements between parties of different States often see fit to provide for arbitration or adjudication in a third State. The reasons motivating businesspeople to avoid the domestic tribunals of their respective home countries - the prevention of, at least perceived, 'home court advantage' - would seem to apply equally to disputes between indigenous peoples and the States in which they reside. A body structured similarly to the Permanent Forum on Indigenous Issues could reinforce the domestic move toward negotiated solutions of festering problems by providing a neutral, international ground for the drafting of agreements on controversial bilateral disputes over land, claims of breach of treaty, and assertions of violations of indigenous rights. Such a 'good offices' or mediating function with respect to particular disputes between individual nation-states and indigenous peoples could, down the line, develop into an arbitral or adjudicative role if the world community gains trust in the good judgment of the body, and both potential parties to this possible conflict-settlement mechanism subject themselves to its jurisdiction. Such discussions would lead to recommendations *de lege ferenda*.

Chapter 9 - Development and International Cooperation

Chapter 9 deals with Articles 39, 41 and 42 (Article 38 is mentioned as well, but it will be dealt with in the Chapter 1). Based on a preliminary consideration of the articles the focus of this group will be on the following elements:

- the scope and content of the right of indigenous peoples to access financial and technical assistance from States and through international cooperation. Consideration of 'international cooperation' will require separate analysis; and
- the way the UN and its bodies and other selected intergovernmental organizations are already giving effect to the manifold rights of indigenous peoples, and what this contributes to the interpretation and application of international law in this area.

The core aim of the research is to find legal obligations (*de lege lata*) as well as trends that might be relevant for the sharpening of these obligations (*de lege ferenda*). The findings will feed into that issue, both in considering where there may be (unlikely though) settled legal obligations regarding international cooperation for development in the context of indigenous peoples and also where the findings regarding indigenous peoples contribute more generally to international (human rights) law in this area.

A preliminary inventory and evaluation of ongoing international activities in the specific fields covered by Articles 39, 41 and 42 has provided a basis for determining the scope of the work. Focal points so far are:

- What are the International Financial Institutions/development banks doing? While aiming for geographically balanced regional coverage by looking at regional development banks and particular countries, the group will focus on institutions with the most developed practice in this area;
- The activities of the International Labor Organization in the field of indigenous peoples. What follow-up is the ILO giving to ILO Convention No. 169 and to what extent does this create new obligations? This section will also consider any shortcomings in the way in which the ILO deals with these issues;
- Climate change mitigation and adaptation strategies in the context of indigenous rights and the content of international cooperation; and
- The link between the rights of indigenous peoples and general international (human rights) law as pertains to assistance and cooperation.

The Chapter will consider the outputs and case-law of existing international human treaty bodies overseeing the International Covenants on Civil and Political Rights and Economic Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination and the Convention on the Rights of the Child, as well as other relevant instruments such as the UN Declaration on the Right to Development.

IV Concluding Remarks

Although considerable progress has been made to date, the Committee sees itself at a relatively early stage of the development of a Commentary on the UN Declaration on the Rights of Indigenous Peoples. A number of methodological issues require some further consideration. The Committee expects to make significant progress at the 74th Conference in Rio de Janeiro in charting the course for the development and completion of the task by the time of the next Biennial Conference at The Hague in 2010.

Indigenous rights is an evolving and contested area of human rights law. Much progress has been made over the past 30 years or so, and the adoption of UNDRIP is a major milestone. The Committee's objective of developing a concise, objective and user-friendly Commentary presents challenges. However, the Committee believes that the achievement of such a Commentary can make a constructive and significant contribution to the recognition, development and implementation of international law standards in this area, and the achievement of justice for the world's indigenous peoples. This is consistent with the ILA's objectives of the study, clarification and development of international law.