

**OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS**

**ASSESSING THE INTERNATIONAL DECADE**

**URGENT NEED TO RENEW MANDATE  
AND IMPROVE THE U.N. STANDARD-SETTING PROCESS  
ON INDIGENOUS PEOPLES' HUMAN RIGHTS**

**Joint Submission by the following Indigenous organizations in Consultative Status with ECOSOC:**

**Grand Council of the Crees (Eeyou Istchee), Inuit Circumpolar Conference (ICC), International Organization of Indigenous Resource Development (IOIRD), Coordinadora de las Organizaciones Indígenas de la Cuenca Amazónica (COICA), National Aboriginal and Torres Strait Islander Legal Services Secretariat (NAILSS), Innu Council of Nitassinan, and Foundation for Aboriginal and Islander Research Action (FAIRA).**

**Supported by the following Indigenous Nations and Indigenous and non-Indigenous organizations:**

**Na Koa Ikaika Kalāhui Hawai'i, Traditional Kirati Peoples' Alliance, Nepal, Samson Cree Nation, Ermineskin Cree Nation, Montana Cree Nation, Louis Bull Cree Nation, Buffalo River Denè Nation, Fédération des Organisations Autochtones de Guyane (FOAG), Native Women's Association of Canada (NWAC), Nepal Indigenous Peoples Development and Information Service Centre (NIPDISC), First Peoples Human Rights Coalition, South African First Indigenous and Human Rights Organization (SAFIHRO), Forest Peoples Programme UK, International Work Group For Indigenous Affairs (IWGIA), Netherlands Centre for Indigenous Peoples (NCIV), Canadian Friends Service Committee, and KAIROS: Canadian Ecumenical Justice Initiatives.**

**March 2004**

## SUMMARY

The *International Decade of the World's Indigenous People* is coming to an end in December 2004. The U.N. standard-setting process relating to the draft *U.N. Declaration on the Rights of Indigenous Peoples* could also be terminated around the same time. **The adoption by the U.N. General Assembly of a declaration on the rights of Indigenous peoples is a major objective of the *Decade*. It is a grave and widespread concern among Indigenous peoples that this essential goal could be facing impending failure.**

In all regions of the world, Indigenous peoples have been subjected to colonialism, dispossession of lands and resources, discrimination, exclusion, marginalization, forced assimilation and other forms of cultural genocide, genocide and violations of treaty rights. All of these elements are inseparably linked to human rights violations. They cause and perpetuate our impoverishment.

**This Joint Submission demonstrates that, in regard to Indigenous peoples, the basic values and principles underlying international and domestic legal systems are not being applied fairly and in a non-discriminatory manner.** Impunity for human rights violations against Indigenous peoples is widely tolerated. This globally undermines interrelated values and principles, such as democracy, equality, justice, peace, security, environmental protection, development, the rule of law and respect for human rights.

The present Joint Submission examines in some depth the U.N. standard-setting process, including the UNCHR Working Group, and the impediments to achieving substantial progress. To a significant degree, the remarkable lack of progress within the Working Group is attributable to a lack of political will among a number of States. We identify the approaches or techniques used by some States to lower human rights standards pertaining to Indigenous peoples. We also describe those specific issues that are of critical importance to Indigenous peoples, but continue to be opposed by some States. We conclude that reform of the overall standard-setting process is needed.

**Our central message is that there is an urgent need to renew the mandate of the UNCHR Working Group on the draft Declaration and to improve the U.N. standard-setting process on Indigenous peoples' rights.**

Rather than penalizing over 300 Indigenous people worldwide by terminating the standard-setting process relating to our human rights, the U.N. should be examining ways to ensure that all participating States fulfill their responsibilities and respect their obligations under international law.

Clearly, we must all seek to strengthen the United Nations and ensure that the international human rights system is fully inclusive of and just to all peoples and States worldwide.

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## ASSESSING THE INTERNATIONAL DECADE

### URGENT NEED TO RENEW MANDATE AND IMPROVE THE U.N. STANDARD-SETTING PROCESS ON INDIGENOUS PEOPLES' HUMAN RIGHTS

#### Introduction

1. In an Information Note, dated February 9, 2004, the Office of the High Commissioner for Human Rights (OHCHR) indicated that the Economic and Social Council has decided to initiate a review of the International Decade of the World's Indigenous People (1995-2004). The Office of the High Commissioner was asked to prepare an initial report in this regard and submit it to the July 2004 session of ECOSOC. Therefore, the OHCHR has invited all Indigenous organizations to provide "an assessment of the implementation of the Programme of Activities of the International Decade". We are pleased to respond to this important and timely request.
2. As the United Nations General Assembly reaffirmed in 1998, **"the adoption of a declaration on the rights of indigenous peoples [is] a major objective of the Decade"**. Our principal focus will be on this key aspect, namely, human rights standard-setting concerning Indigenous peoples and the need for urgent reform of this process.

U.N. General Assembly, *International Decade of the World's Indigenous People*, Res. 52/108, 18 February 1998, para. 6.

3. In 1995, the elaboration of such a declaration was entrusted to an open-ended inter-sessional Working Group of the Commission on Human Rights established for this purpose.

U.N. Commission on Human Rights, *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 of 23 December 1994*, Res. 1995/32, 3 March 1995.

4. It is important to underline that the UNCHR Working Group did not have to create a new Declaration from the outset. The major focus of the UNCHR Working Group was, and continues to be, consideration of the draft *U.N. Declaration on the Rights of Indigenous Peoples*. During a prior period of about nine years, this draft *U.N. Declaration* had been carefully formulated and ultimately approved by the expert members of the Working Group on Indigenous Populations (WGIP). Indigenous peoples, States, specialized agencies and academics actively participated and exchanged views in this dynamic process. In 1994, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved the draft *Declaration* elaborated by the WGIP and submitted it for consideration to the Commission on Human Rights.

*United Nations Declaration on the Rights of Indigenous Peoples (Draft)*, in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/RES/1994/45, 26 August 1994, Annex, *reprinted in* (1995) 34 I.L.M. 541.

5. Since its inception in 1995, the UNCHR inter-sessional Working Group has only provisionally approved 2 of the 45 Articles of the draft *Declaration*. This lack of progress is simply not acceptable.

*Noting with particular concern* the delay in the work on the elaboration of the draft United Nations declaration on the rights of indigenous people, one of the main objectives of the Decade ...

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *International Decade of the World's Indigenous People*, Res. 2002/19, 14 August 2002, preamble.

6. The process in the UNCHR Working Group has been difficult in terms of achieving consensus or “making progress”. In part, this could be attributed to the complexity of the issues and the unique nature of the status and rights of Indigenous peoples. However, to a significant degree, it is evidence of a long-standing problem. There is a lack of political will among a number of States to redress past and ongoing violations of our human rights and prevent such intolerable acts in the future.

We note with concern that violations against the rights of indigenous peoples are universal; practised by the most developed States, and by developing countries which otherwise are recognized as having the highest regard for ... human rights .... We would point out that *a universal regard for human rights requires that these States refrain from blocking United Nations initiatives which could result in the improvement of the conditions for indigenous peoples within their own jurisdictions ...*

U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations: Statement delivered by Mr. Niall McDermot of the International Commission of Jurists on behalf of twenty-six non-governmental organizations in consultative status*, Sub-Commission, 40<sup>th</sup> session, Item 12, 30 August 1988, at p. 1. [emphasis added]

7. Presently, we are deeply concerned that the mandate of this inter-sessional Working Group may not be renewed after the end of the International Decade of the World's Indigenous People in December 2004. This would in effect terminate the principal and most far-ranging standard-setting process on the human rights of Indigenous peoples within the United Nations.
8. The inter-sessional Working Group is slated to hold only one more session this year. There is no assurance that this standard-setting process will be continued. Should no Declaration be adopted by the General Assembly on or prior to December 10, 2004, a major objective of the Decade will have been unsuccessful. This would constitute a major failure.

9. It is important to acknowledge that elsewhere within the United Nations and its specialized agencies some important norms relating to Indigenous peoples are being formulated on various specific issues, such as environment, health, etc. However, this piecemeal approach is simply not sufficient.

No universal standards on indigenous peoples guide the United Nations as a whole and, in practice, United Nations organizations are either not adopting any particular guidelines or else are developing guidelines on the basis of different procedures ...

U.N. General Assembly, *Programme of activities of the International Decade of the World's Indigenous People: Report of the Secretary-General*, A/54/487, 21 October 1999, p. 3, para. 8.

One critical issue is the lack of standards on the human rights of Indigenous Peoples which are needed to give cohesion to the work of the UN and States. Without such a framework, global approaches to common issues of Indigenous Peoples will continue to be piecemeal and self-serving and no workable solutions will be forthcoming.

“Review of the UN Decade of the World’s Indigenous People” in Netherlands Centre for Indigenous Peoples (NCIV), ed., *Final Report Indigenous Peoples’ Millennium Conference*, 7-11 May 2001, Panama, Republic of Panama, C.A., (Amsterdam: NCIV, 2001) 57 at p. 61.

10. As described in this Joint Submission, it remains urgent and critical for the U.N. to adopt a formal instrument that elaborates elevating human rights standards on the full range of basic issues concerning Indigenous peoples. Indigenous human rights must be safeguarded on a global basis.
11. Based on the record to date of the inter-sessional Working Group, it would be reasonable to anticipate that no Declaration on the rights of Indigenous peoples will be recommended for adoption by the General Assembly prior to the end of the Decade.
12. The reluctance of some States participating in the inter-sessional Working Group to reach consensus on explicit human rights norms has far-reaching consequences for over 300 million Indigenous people globally, of whom 180 million are children and youth. This huge deficiency has tremendous implications for all States and peoples, as well as the United Nations system itself.
13. Our Joint Submission will highlight the impacts of the continuing failure to adopt human rights norms. Our central point is that the United Nations must, as a first step, ensure the

adoption of relevant and uplifting standards through a strong Declaration on the Rights of Indigenous Peoples. In this way, human rights norms would be elaborated in the social, economic, cultural, political, environmental and historical context relating to Indigenous peoples.

As an examination of contemporary international instruments would suggest, basic indigenous rights are human rights. International instruments that explicitly address the fundamental rights of indigenous peoples, such as the Draft *United Nations Declaration on the Rights of Indigenous Peoples*, complement existing human rights standards in the *International Bill of Rights*. They do so, by providing the social, economic, cultural, political, and historical context relating to indigenous peoples.

P. Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec", (2000) 45 McGill L.J. 155, at p. 182.

International indigenous rights may be considered as a more specific body of human rights, which target a more defined group of people and are derived from the more general body of human rights principles.

J.P. Kastrop, "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l L.J. 97 at p. 106.

14. Therefore, we emphasize the urgent need to ensure an ongoing and productive standard-setting process relating to Indigenous peoples. This necessarily entails evaluating and improving the overall functioning of the inter-sessional Working Group.
15. Any decision to renew the mandate of the inter-sessional Working Group to consider further the *U.N. Declaration on the Rights of Indigenous Peoples* can and should be made independently of any decision relating to the proclamation of a second Decade of the World's Indigenous People. The human rights standard-setting process concerning Indigenous peoples is far too important to hinge upon the establishment of a second Decade.
16. In summary, this Joint Submission will examine the following key aspects:
  - i) Urgent need for a strong U.N. instrument on Indigenous human rights norms;
  - ii) human rights obligations of the U.N. and its Member States;
  - iii) "impediments" to the adoption of a strong and uplifting *U.N. Declaration*; and
  - iv) need to renew mandate and improve the U.N. standard-setting process.

However, we will begin first by highlighting the successes related to the draft *U.N. Declaration on the Rights of Indigenous Peoples*, since this instrument continues to play a significant role.

## I. Successes Related to the Draft *U.N. Declaration on the Rights of Indigenous Peoples*

17. When we refer to the impending failure of the U.N. to adopt a Declaration on the rights of Indigenous peoples within the International Decade, we are not characterizing the draft *U.N. Declaration on the Rights of Indigenous Peoples* as a failure.
18. Rather there are various positive developments associated with the draft *U.N. Declaration*. Similarly, there are notable successes pertaining to the standard-setting process that led to the draft *Declaration's* approval by both the Working Group on Indigenous Populations and the Sub-Commission on the Prevention of Discrimination and Protection of Minorities.
19. In formulating the draft *U.N. Declaration*, the WGIP set new high standards in “opening the doors” of the United Nations to Indigenous peoples and organizations from all regions of the world. The WGIP consistently ensured effective dialogue and democratic participation of Indigenous representatives at its annual sessions in Geneva.

The broad mandate and democratic process of the UNWGIP has nurtured the development of hundreds of experts and practitioners on indigenous peoples' human rights from the United Nations, governments, indigenous peoples, academia and NGOs. Indeed in its 20 years life, it has become a centre for authoritative international discourse on the rights of indigenous peoples, informing and educating many scholars and activists alike. Moreover, the meetings of the UNWGIP have provided opportunities for indigenous peoples and other participants to meet and deepen concrete partnerships and projects.

“Indigenous Caucus Statement”, Working Group on Indigenous Populations, 20<sup>th</sup> sess., 22-26 July 2002, (Agenda item 4(a), THE UNWGIP: Achievements in the United Nations system and a Vision for the Future), para. 2.

The United Nations Working Group's Draft Universal Declaration on Rights of Indigenous Peoples ... provides a powerful *and* empowering instance of the ways in which peoples of color, such as indigenous peoples, through their own stories, can seek to transform legal thought and doctrine about their human rights according to the terms of a different vision of justice in the world.

R. Williams, Jr., *Encounters of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, (1990) Duke L.J. 660 at p. 704.

20. Although the draft *U.N. Declaration* has not been adopted by the U.N. General Assembly, the human rights standards elaborated over many years and now included in the draft *Declaration* have assumed a normative value that has profoundly influenced organizations

and forums at the international level. For example, as the Aboriginal and Torres Strait Islander Social Justice Commissioner in Australia describes:

*While the draft Declaration has floundered in the Government controlled Working Group on the draft Declaration, it has already been of great normative value.* The consistent elaboration of Indigenous peoples' claims, particularly in relation to cultural identity, self-determination, informed consent and self-identification, has influenced the policy approaches of international agencies such as the World Bank, UNESCO, UNDP and World Health Organisation, and was a major influence in the International Labour Organisation's decision to revise ILO Convention 107 and develop ILO Convention 169, titled *Convention concerning Indigenous and tribal peoples in independent countries*, in 1989.

Human Rights and Equal Opportunity Commission (Australia), *Comments by the Aboriginal and Torres Strait Islander Social Justice Commissioner on the various mechanisms and programmes within the United Nations system on indigenous issues*, submitted to the Office of the High Commissioner for Human Rights, Geneva, December 2002. [emphasis added]

See also S.J. Anaya, "Canada's Fiduciary Obligation Toward Indigenous Peoples in Quebec under International Law in General", in *Canada's Fiduciary Obligation to Aboriginal Peoples in the Context of Accession to Sovereignty by Quebec* (Ottawa: Minister of Supply and Services Canada, 1995), vol. 1, International Dimensions, 9 at p. 24, where Anaya describes the draft *U.N. Declaration* as "an authoritative statement of norms concerning Indigenous peoples on the basis of generally applicable human rights principles".

21. Similarly, the human rights norms in the draft *U.N. Declaration* are being cited by courts at the national level.

*Mitchell v. Canada (Minister of National Revenue)* [2001] 1 S.C.R. 911, 3 C.N.L.R. 122 (Supreme Court of Canada), para. 82 (draft *U.N. Declaration*, Art. 35 (right to maintain and develop cross-border contacts))

*R. v. Powley*, [2000] 2 C.N.L.R. 233 (Ont. Sup. Ct. of Justice), para. 58 (draft *U.N. Declaration*, Art. 3 (right of Indigenous peoples to self-determination); Art. 8 (right to maintain and develop distinct identities and characteristics); Art. 25 (right to maintain and strengthen relationship with the land))

See also B. Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, [1994] Am. Soc. Int'l L. Proc. 1 at p. 7, where the author states that courts in Canada, New Zealand and Australia are beginning to make "shifts in their approaches" and are "rethinking relations between indigenous peoples and states", in view of international developments in such forums as the UNWGIP and the International Labour Organization.

22. In addition, the Inter-American Commission on Human Rights has indicated that, in addressing Indigenous peoples' complaints of human rights violations, it is necessary to consider "developing norms and principles governing the human rights of indigenous peoples":

... in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the *evolving rules and principles of human rights law in the Americas and in the international community more broadly*, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that *this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples*.

I/A Comm. H.R., *Mary and Carrie Dann v. United States*, Case N° 11.140, Report No. 113/01, at para. 124. [emphasis added]

23. Further, the draft *U.N. Declaration* and its human rights norms are fostering renewed relations between Indigenous peoples and States. The dynamic and ongoing dialogue concerning the draft *Declaration* at the international level is generating an increasingly important discourse at the domestic level with some States. Such constructive discussions promote mutual respect and understanding. They may also open the door to resolution of conflicts or disputes within States.
24. The United Nations and its Member States, specialized agencies and Indigenous peoples have invested considerable time, as well as human and financial resources, in contributing to the formulation of the draft *U.N. Declaration on the Rights of Indigenous Peoples*. As already described, this instrument has significant normative value.

Nineteen years have already elapsed, since I began the elaboration of the Draft Declaration and nine years have passed since the drafting was completed at the level of the Working Group on Indigenous Populations.

E.-I. Daes, "Article 3 of the Draft United Nations Declaration on the Rights of Indigenous Peoples: Obstacles and Consensus" in International Centre for Human Rights and Democratic Development, *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: ICHRDD, 2002) 8 at p. 10.

25. Therefore, it would be highly counter-productive for the United Nations to ignore the achievements to date and abandon its key objective of adopting a U.N. Declaration on the rights of Indigenous peoples. In this context, it is crucial to emphasize that the draft *U.N. Declaration on the Rights of Indigenous Peoples* is "the most important development within the framework of the United Nations system" concerning the safeguarding on a global basis of Indigenous peoples' human rights. Clearly, the U.N. must take steps to ensure a successful conclusion of the current UNCHR standard-setting process.

... the completion of the work of the draft Declaration at the level of the Working Group on Indigenous Populations and the Sub-Commission constitutes the most important development within the framework of the United Nations system concerning the protection of the basic rights and fundamental freedoms of the world's Indigenous Peoples.

E.-I. Daes, "Striving for Self-Determination of Indigenous Peoples" in Y.N. Kly & D. Kly, eds., *In Pursuit of the Right of Self-Determination: Collected Papers and Proceedings of the First International Conference on the Right of Self-Determination, Geneva 2000* (Atlanta, Georgia: Clarity Press, 2001) 50, at p. 56.

## II. Urgent Need for U.N. Instrument on Indigenous Human Rights Norms

26. In all regions of the world, Indigenous peoples have been subjected to colonialism, widespread dispossession of lands and resources, discrimination, exclusion, marginalization, forced assimilation and other forms of cultural genocide, genocide and rampant violations of treaty rights. All of these elements are inseparably linked to violations of human rights.

Wounded Knee, the Trail of Tears, the Siege of Cusco [Spanish killing of all captured Indian women] - these words, vessels of meaning, capture only a tiny fragment of the history of suffering, actual and cultural genocide, conquest, penetration, and marginalization endured by indigenous peoples around the world.

S. Wiessner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis", *supra*, at p. 57.

... noting that certain states have concluded treaties with indigenous peoples in the past and that some of those treaties have been shamelessly violated; whereas in this connection, in the context of increasing impoverishment, indigenous peoples are often the first to be dispossessed of rights, land and resources ...

European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, Eur. Parl. Doc. PV 58(II) (1994), adopted by the European Parliament in its plenary session, Strasbourg, 9 February 1994, preamble, para. F.

I am chairman of the Indian Affairs Committee, Mr. President ... This committee has to act upon 800 treaties--800 treaties--entered into by sovereign Indian nations and the sovereign Government of the United States. But, shamefully, 430 of these treaties were not even considered by this body. And of the 370 that we did consider and ratify, we violated provisions in every one of them.

*Congressional Record – Senate*, vol. 139, no. 147, S14880, 103d Congress, First Session, October 27, 1993 (U.S. Senator Daniel Inouye).

The Maasai land case [East Africa] is a typical example of the violations and the injustices caused by the treaty-making process. It is a classic instance of how colonial law was molded to suit the needs of British policy. The crown treated the Maasai as an independent state for the purposes of taking power, yet when the

Crown itself violated the terms of such treaties; no remedy was available to the indigenous people. ... The treatment of the Maasai was compounded by the racism of the colonial authorities.

J.O. Simel, "The Anglo-Maasai-Agreements/Treaties – a case of Historical Injustice and the Dispossession of the Maasai Natural Resources (Land), and the Legal Perspectives", Background paper, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, organized by OHCHR, Geneva, 15-17 December 2003, HR/GENEVA/TSIP/SEM/2003/BP.7, p. 3.

27. It is these past and continuing transgressions that have led Indigenous peoples globally to strive, as a first step, for human rights norms in a formal U.N. instrument that would reflect Indigenous rights, perspectives and values. The resulting human rights discourse at the WGIP gave rise to the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

The first truly intercivilizational critique of the prevailing human rights discourse and its world order implications emerged ... from the concerted struggle of indigenous peoples in the 1980s and 1990s. This struggle took shape against a background (and foreground) of exclusion, discrimination, and persecution, even extermination, assimilation, and marginalization – all factors expressive of confusing admixtures of arrogance, racism, and ignorance.

R. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World*, *supra*, at p. 151.

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*U.N. Declaration on the Rights of Indigenous Peoples* (Draft), Art. 42.

28. The historical context relating to Indigenous peoples is a valid and essential starting point, in establishing the nature and scope of State responsibilities. Globally, the widespread dispossession of Indigenous lands, territories and resources remains of central importance. In addition to Indigenous human rights, State obligations are an integral part of the standard-setting process.

*Genocide has been committed against indigenous, Indian or tribal peoples in every region of the world, and it is this context that any discussion of indigenous rights must occur.* The general perspective of the state toward indigenous peoples - that they are to be conquered or converted to the beliefs of the dominant, more "advanced" society - has *remarkable similarities, whether the state is found in North, Central, South America; the Caribbean; the Pacific; Asia, from Bangladesh to China; Africa, with respect to groups such as the pygmies; or northern Europe.*

H. Hannum, "New Developments in Indigenous Rights", (1988) 28 *Virginia J. Int'l L.* 649 at p. 649. [emphasis added]

Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered.*

R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations University Press, 1990), at p. 105. [emphasis added]

*The land is the physical and spiritual core that binds communities together. When indigenous peoples lose their land, they lose their language, their complex social and political systems, and their knowledge. At a deeper level traditions are eroded with their sacred beliefs. Although some may integrate and recover meaning to their lives, the removal of first peoples from their land can be likened to genocide in slow motion.*

J. Burger, *The Gaia Atlas of First Peoples* (New York: Anchor Books, 1990), at p. 122. [emphasis added]

29. The historical experience of Indigenous peoples is crucial in understanding the legacy of colonialism, dispossession, and repeated human rights violations that have resulted in, *inter alia*, our debilitating impoverishment. In turn, this acute poverty continues to largely inhibit, if not prevent, the enjoyment by Indigenous peoples of our basic human rights.

What are the causes of indigenous poverty? There are a number of explanations, which are often linked to each other. In some cases, it is the paucity of resources indigenous peoples have at their disposal for their own development processes, and the negative impacts of large-scale development projects on their lives and lands. In other cases it is the marginal role they play in the national development process and the exclusion from the market, which prevents indigenous peoples from enjoying the same opportunities as others. In yet other situations, it is direct discrimination and exclusion from society that keeps indigenous peoples in poverty.

Working Group on Indigenous Populations, “Principle Theme: Indigenous Peoples and the Their Right to Development, Including Their Right to Participate in Development Affecting Them”, *Note by the secretariat*, E/CN.4/Sub.2/AC.4/2001/2, 20 June 2001, para. 11.

Existing poverty in some highly developed countries ... [is] among the conditions that make the enjoyment of some civil and political rights for many people impossible, and thus, there still is some room for improvement in civil and political rights even in rich democratic countries in the sense of making the enjoyment of these rights real to everyone.

R. Müllerson, "Reflections on the Future of Civil and Political Rights" in B.H. Weston & S.P. Marks, eds., *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, 1999) 225, at p. 235.

30. The severe poverty facing Indigenous peoples does more than gravely affect our human rights. It also undermines our participatory and other democratic rights. Eradication of poverty is vital to the elimination of all forms of discrimination.

The existence of widespread absolute poverty inhibits the full and effective enjoyment of human rights and makes democracy and popular participation fragile ...

U.N. Commission on Human Rights, *Human rights and extreme poverty*, Res. 2003/24, 22 April 2003, para. 1(c).

REAFFIRMING that the fight against poverty, and especially the elimination of extreme poverty, is essential to the promotion and consolidation of democracy and constitutes a common and shared responsibility of the American states ...

*Inter-American Democratic Charter*, adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28<sup>th</sup> special session of the OAS General Assembly, Lima, Peru, September 11, 2001, preamble.

The experts recognized that the eradication of poverty was vital to the elimination of all forms of discrimination and concluded that greater efforts must be made by the international community to provide sufficient resources to that end ...

U.N. Commission on Human Rights, *Views of the independent eminent experts on the implementation of the Durban Declaration and Programme of Action: Note by the secretariat*, E/CN.4/2004/112, 10 February 2004, para. 6(i).

31. According to the World Health Organization, women living in poverty are "disproportionately affected" by violence from their partners. Thus, the widespread impoverishment inflicted upon Indigenous peoples increases the risk of such violence.

... while physical violence against partners cuts across all socioeconomic groups, women living in poverty are disproportionately affected ...

It is as yet unclear why poverty increases the risk of violence – whether it is because of low income in itself or because of other factors that accompany poverty, such as overcrowding or hopelessness. ... Whatever the precise mechanisms, it is probable that poverty acts as a "marker" for a variety of social conditions that combine to increase the risk faced by women ...

World Health Organization, *World Report on Violence and Health* (E.G. Krug, et al., eds.) (Geneva: World Health Organization, 2002), at p. 99.

See also Amnesty International, *It's in our hands: Stop violence against women* (London: Amnesty International Publications, 2004), p. 40 (Entrenched poverty, entrenched violence).

The Convention [on the Elimination of All Forms of Discrimination Against Women] in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman *or that affects women disproportionately*.

Committee on the Elimination of Discrimination Against Women, *Violence against women*, General Recommendation No. 19, A/47/38, 30 January 1992, para. 6.[emphasis added]

32. Violence against women constitutes a violation of the human rights of women and impairs or nullifies the enjoyment of those basic rights. If the United Nations and its Member States are truly committed to gender equality and other women's rights, they must also address the *root causes* of the appalling socio-economic and other conditions that Indigenous peoples suffer. This must include the adoption of a comprehensive U.N. instrument on Indigenous human rights standards.

The General Assembly ... Concerned that violence against women is an obstacle to the achievement of equality, development and peace ...

Affirming that violence against women constitutes a violation of the rights and fundamental freedoms of women and impairs or nullifies their enjoyment of those rights and freedoms, and concerned about the long-standing failure to protect and promote those rights and freedoms in the case of violence against women ...

*Declaration on the Elimination of Violence against Women*, G.A. res. 48/104, 48 U.N. GAOR Supp. (No. 49) at 217, U.N. Doc. A/48/49 (1993), preamble.

We [heads of State and Government] resolve therefore: ... To combat all forms of violence against women ...

*United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2, 8 September 2000, Art. 25.

The links between human rights and violence prevention are well established. *A lack of respect for human rights is often the root cause of violence, while specific acts of violence may themselves amount to a violation of human rights.* Introducing a human rights approach to violence prevention brings to bear States' international obligations concerning risk factors for violence such as poverty, gender discrimination, lack of equal access to education, and other social and economic inequalities.

U.N. Commission on Human Rights, *The right of everyone to the enjoyment of the highest attainable standard of physical and mental health: Report of the Special Rapporteur, Paul Hunt*, E/CN.4/2004/49, 16 February 2004, para. 82. [emphasis added]

33. Severe violations and ongoing denial of Indigenous peoples' human rights have a number of major adverse impacts. These debilitating actions severely undermine the integrity of Indigenous nations, communities and families and impair the mental and physical health and security of individuals.

The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension. In this respect, the Committee considers that development-related activities that lead to the displacement of indigenous peoples against their will from their traditional territories and environment, denying them their sources of nutrition and breaking their symbiotic relationship with their lands, has a deleterious effect on their health.

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, adopted 11 May 2000, 22<sup>nd</sup> sess., U.N. Doc. E/C.12/2000/4 (2000), para. 27.

The health of Indigenous Peoples is overwhelmingly affected by determinants outside the realm of the health sector, namely social, economic, environmental and cultural determinants. These are the consequences of colonization ...

*Geneva Declaration on the Health and Survival of Indigenous Peoples*, adopted at the International Consultation on the Health of Indigenous Peoples, organized by the World Health Organization, Geneva, 23-26 November 1999, Part IV.

...the factors contributing to ill health of Aboriginal people stem not from bio-medical factors, but from social, economic and political factors.

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 3, at p. 201.

34. These adverse health and related effects are especially prevalent when Indigenous peoples are denied the right of self-determination.

Healing, in Aboriginal terms, refers to personal and societal recovery from the lasting effects of oppression and systemic racism experienced over generations. Many Aboriginal peoples are suffering not simply from specific diseases and social problems, but also from a depression of spirit resulting from 200 or more years of damage to their cultures, languages, identities and self-respect ...

At least in part, it is to achieve whole health that Aboriginal peoples so vigorously seek self-determination. The relationship between self-determination and health is a circle ...

Royal Commission on Aboriginal Peoples, *supra*, vol. 3, at p. 109.

It is recognized that self-determination in social, political and economic life improves the health of Aboriginal peoples and their communities. Therefore, the CMA encourages and supports the Aboriginal peoples in their quest for resolution of self-determination and land use.

Canadian Medical Association, *Bridging the Gap: Promoting Health and Healing for Aboriginal Peoples in Canada* (Ottawa: Canadian Medical Association, 1994), at p. 14.

Self-determination, cultural, economic and political considerations are truly the central issues in health care. *That most of the problems which present themselves as 'medical' to the nursing station are the result of socio-political pathology is clear ...* Using any other than an extremely blinkered scientific medical perspective, it is difficult to deny the validity of this causal sequence.

R. Scott & S. Conn, "The Failure of Scientific Medicine: Davis Inlet as an Example of Sociopolitical Morbidity", (1987) 33 Can. Family Physician 1649 at p. 1653.

35. In particular, the impacts of human rights denial on Indigenous children and youth are heartrending and devastating.

...the evidence also shows that the hugely disproportionate rate at which Aboriginal and Torres Strait Islander children and young people are being incarcerated today is reflective of a systemic denial of Indigenous rights. These abuses include the failure to remedy the appalling levels of social and economic disadvantage which prevent the enjoyment of citizenship; they include the failure to ensure that the lives of Indigenous children and young people are free from direct and indirect racial discrimination; and they include the failure to provide conditions where Indigenous people might enjoy the right of self-determination, particularly in relation to decisions which affect their children and young people.

C. Cunneen, "Reforming Juvenile Justice and Creating Space for Indigenous Self-Determination", (1998) 21 U.N.S.W. L.J. 241, at p. 246.

It is crucial to appreciate that the persistent undermining and denial of indigenous peoples' human rights, including the right to self-determination, is a major root cause and contributing factor to the acute health and socio-economic problems in many Indigenous communities and nations. If not reversed, this negative dynamic will continue to severely undermine the integrity of our families, communities and nations.

American Indian Law Alliance, “Self-Determined Indigenous Children and Youth”, Second session of the Permanent Forum on Indigenous Issues, 12-23 May 2003, United Nations Headquarters, New York, preface.

One of the best ways to guarantee that an indigenous child receives adequate protection from violence, abuse and exploitation is to support and build on the strengths of his or her family, kinship network and community. *An indigenous community that lives in security (including land security), free from discrimination and persecution, and with a sustainable economic base has a solid foundation for ensuring the protection and harmonious development of its children.*

UNICEF Innocenti Research Centre, *Ensuring the Rights of Indigenous Children*, Innocenti Digest No. 11, February 2004, p. 17. [emphasis added]

## 2.1 ILO Convention No. 169 not a substitute for draft U.N. Declaration

36. Some observers may ask why the adoption of a *U.N. Declaration on the Rights of Indigenous Peoples* is so essential and urgent, when the International Labour Organization (ILO) has adopted the *Indigenous and Tribal Peoples Convention, 1989* (Convention No. 169). As described below, there continue to be a number of compelling reasons for adopting international human rights standards specifically relating to Indigenous peoples in a formal United Nations instrument.

*Indigenous and Tribal Peoples Convention, 1989*, I.L.O. Convention No. 169, I.L.O., 76th Sess., reprinted in (1989) 28 I.L.M. 1382.

37. First, in the Report of the Committee of the International Labour Organization (ILO) that dealt with the revision process leading to the adoption of the *Indigenous and Tribal Peoples Convention, 1989*, it is expressly stated that the issue of self-determination was “outside the competence of the ILO”. Since the right of self-determination should be a core element of any Declaration on the human rights of Indigenous peoples, the adoption of the draft *U.N. Declaration* assumes a much greater importance.

The Chairman considered that the text was distancing itself to a certain extent from a subject which was *outside the competence of the ILO*. In his opinion, *no position for or against self-determination* was or could be expressed in the Convention, *nor could any restrictions be expressed in the context of international law*.

International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76<sup>th</sup> Session, Geneva, 1989, No. 25, p. 8, para. 42. [emphasis added]

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.

*U.N. Declaration on the Rights of Indigenous Peoples (Draft), Art. 3.*

38. The right of self-determination is a “prerequisite” and “essential condition” for the effective enjoyment of all other human rights. It is also an “essential condition” for the guarantee and observance of individual human rights.

... human rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and as a prerequisite for the enjoyment of all the other rights and freedoms.

H. Gros Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, Study for the Sub-Commission on Prevention of Discrimination and Protection of Minorities, (New York: United Nations, 1980), U.N. Doc. E/CN.4/Sub.2/405/Rev.1 at 10, para. 59.

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants.

Human Rights Committee, *General Comment No. 12, Article 1*, 21<sup>st</sup> sess., A/39/40 (1984), para. 1.

39. Second, the human right of self-determination is indivisible, interdependent and interrelated with all other human rights. In the absence of an explicit self-determination context, the norms in the *Indigenous and Tribal Peoples Convention, 1989* could unjustly invite discriminatory and lesser interpretations. In particular, this might unfairly compromise the rights of Indigenous peoples to lands, territories and natural resources.

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. ... [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.

United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5.

The issue of extractive resource development and human rights involves a relationship between indigenous peoples, Governments and the private sector which must be based on the full recognition of indigenous peoples' rights to their lands, territories and natural resources, which in turn implies the exercise of their right to self-determination. ... Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector.

U.N. Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, submitted in accordance with Commission resolution 2001/65, E/CN.4/2003/90*, 21 January 2003, p. 23, para. 66 (Conclusions and Recommendations).

... it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having the legal authority to exercise control over their lands and territories and thereby enjoy the full economic and other benefits deriving from their natural resources.

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Preliminary report of the Special Rapporteur, Erica-Irene A. Daes, submitted in accordance with Sub-Commission resolution 2002/15, E/CN.4/Sub.2/2003/20*, 21 July 2003 (Advance edited edition), p. 2, para. 6.

40. Third, the ILO, as a specialized agency, has a "different purpose" from that of the United Nations. As indicated by Lee Swepston, Chief of the Equality and Human Rights Coordination Branch in the International Labour Office, there is an expectancy that the standards established by the U.N. would be higher than those in the *Indigenous and Tribal Peoples Convention, 1989*:

Convention No. 169 simply refers the decision on the content of this right [of self-determination] to the United Nations, where it rightly belongs. (p. 23)

This is not to say the U.N. draft Declaration and the draft OAS instrument must conform to the ILO Convention. ... [T]he three instruments have different purposes, different audiences and different people involved in their drafting. But *in no case must the latter instruments sink below the level of Convention No. 169, either in scope or in protection. This would be a betrayal of indigenous and tribal peoples around the world and a failure of the United Nations system itself.* (p. 36)

L. Swepston, "The Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption" in C. Price Cohen, *Human Rights of Indigenous Peoples*, ed. (N.Y.: Transnational Publishers, 1998) 17. [personal legal opinion, emphasis added]

41. The *Indigenous and Tribal Peoples Convention, 1989* includes some Indigenous human rights in an overall context of State government obligations. In contrast, consistent with a rights-based approach, the draft *U.N. Declaration* provides an extensive elaboration of the rights of Indigenous peoples.

**The rights-based approach must be the starting point for all our endeavours, whatever our spheres of operation ... in both the public and private sectors. In a sense, this is an approach that involves human rights strategies of governance, namely, that we take the basic human rights as the starting point for governmental programmes and the programmes of national, regional and international institutions.**

U.N. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, E/CN.4/2003/14, 26 February 2003, p. 14, para. 53. [emphasis in original]

The new debate on human rights emphasizes their relevance in all policy areas. A rights-based approach to development is making human rights an integral part of development policies and processes.

United Nations Development Program, *Human Development Report 2000* (Oxford: Oxford University Press, 2000), at pp. 29-30.

42. Fourth, in regard to the formulation of the draft *U.N. Declaration* by the Working Group on Indigenous Populations, the open and democratic participation of Indigenous representatives reinforces the legitimacy of the resulting human rights norms. However, in the case of the revision process leading to the adoption of the *Indigenous and Tribal Peoples Convention, 1989*, Indigenous representatives had extremely limited opportunities to speak on our own behalf. Rather, human rights norms relating to Indigenous peoples were determined by representatives of State governments, labour and business.

Such comparisons [between the U.N. and ILO processes] confirm the contention that participatory rights are integral to a legitimate political order, as well as to reliable clarification of grievance, demand, and aspiration.

R.A. Falk, *Human Rights Horizons: The Pursuit of Justice in a Globalizing World* (New York/London: Routledge, 2000), at p. 152.

As important as the substantive provisions of this draft [*U.N. Declaration*] are, the procedure through which it was produced was at least as significant.

S. Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv. H. Rts. J. 57, at p. 103.

See generally J. Burger, *The United Nations Draft Declaration on the Rights of Indigenous Peoples*, (1996) 9 St. Thomas L. Rev. 209.

## 2.2 Foundational values and principles continually undermined

43. In both international and domestic legal systems, there are a number of values and principles of a foundational nature. It is important to examine this aspect in the Indigenous context, since it underlines the urgency of the United Nations adopting a formal instrument relating to Indigenous peoples' human rights norms.

44. The U.N. and Member States unequivocally and consistently affirm these most basic values and principles. They are often expressed in the form of solemn commitments and responsibilities to uphold human dignity, equality and fairness; promote democracy, strengthen the rule of law and respect international human rights; fight poverty, injustice and racism; and ensure human and other forms of security.

...we have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level. As leaders we have a duty therefore to all the world's people, especially the most vulnerable ... (Art. 2)

We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development. (Art. 24)

We will spare no effort to make the United Nations a more effective instrument for pursuing all of these priorities: the fight for development for all the peoples of the world, the fight against poverty, ignorance and disease; the fight against injustice; the fight against violence, terror and crime; and the fight against the degradation and destruction of our common home. (Art. 29)

*United Nations Millennium Declaration, supra.*

Human rights provide a compelling normative underpinning for the formulation of national and international development policies towards achieving the millennium development goals. ... *As a consequence of the adoption of the concept of rights, the realization of the goals becomes a legal obligation.* It compels policy makers to focus on the most vulnerable and disadvantaged, those who are often excluded by "average progress".

Economic and Social Council, *Human Rights: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. Doc. E/2003/73, 25 June 2002, p. 3, para. 3. [emphasis added]

If we are to go forward to implement the vision of the Charter of the United Nations and the Universal Declaration of Human Rights of a world of peace and justice grounded in equality and respect for human rights and in economic and social justice, we must gather our strengths to tackle racism and racial

discrimination through positive and constructive action. ... *Protection, not rhetoric, is needed. We cannot shield gross violations of human rights - wherever they occur - behind the veneer of sovereignty or the chicanery of diplomatic procedures.* After all, what we are talking about is the lives, the welfare, and the rights of our fellow human beings. We should never forget this.

U.N. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, E/CN.4/2003/14, 26 February 2003, p. 4, para. 4. [emphasis added]

Respect for human rights, democratic principles and the rule of law, which underpin the ACP-EU Partnership, *shall underpin the domestic and international policies of the Parties* and constitute the essential elements of this Agreement.

*Cotonou Agreement* (Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part), signed in Cotonou on 23 June 2000, 2000/483/EC, Art. 9(2). [emphasis added]

The human security agenda ... is fundamentally about putting people first and enhancing our collective ability and capacity to protect human rights, and to ensure peace and stability which is a key pre-requisite for sustainable human development.

Canada, *Human Security in the Americas*, OAS/SER.P, AG/doc.3851/00, 26 April 2000, document presented at OAS General Assembly, 30<sup>th</sup> sess., at p. 1.

45. These universal values and principles are of far-reaching significance and relevance to Indigenous peoples. However, as described in the following paragraphs, these foundational elements are continually undermined to the detriment of the Indigenous peoples concerned.
46. In regard to Indigenous peoples, the basic values and principles underlying international and domestic legal systems are not being applied fairly and in a non-discriminatory manner.

Indigenous peoples the world over are usually among the most marginalized and dispossessed sectors of society, the victims of perennial prejudice and discrimination. Even when protective legislation is available, their rights are frequently denied in practice, a pattern that is of particular concern in the administration of justice.

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen* (Advance edited version), E/CN.4/2004/80, 26 January 2004, p. 2 (Summary).

47. This grave and recurring situation has far-reaching implications for all governments and peoples, as well as international institutions, that are concerned with such interrelated values and principles as democracy, equality, justice, peace, security, environmental protection, development, the rule of law and respect for human rights.
48. The principles of democracy, rule of law and respect for human rights are profoundly interrelated. Thus, the rule of law and democracy – as applied to Indigenous peoples – are also being seriously compromised when Indigenous rights are disrespected, ignored or denied.

Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the [U.N.] Charter ... This is not only a political matter.

B. Boutros-Ghali, *An Agenda for Peace: Report of the Secretary General*, U.N. Doc. A/47/277, 17 June 1992, at p. 22, para. 81.

The rule of law is ultimately enforced through the application of democratic principles and international human rights and humanitarian norms.

U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General*, A/56/326, 6 September 2001, p. 8, para. 15.

The interrelationship or relation of mutual dependence between human rights, the rule of law and democracy has also been given expression in the 1948 American Declaration of the Rights and Duties of Man (art. XXVIII), the 2001 Inter-American Democratic Charter (art. 7), the Convention for the Protection of Human Rights and Fundamental Freedoms adopted by the member States of the Council of Europe in 1950 (art. 11) and the American Convention on Human Rights, signed on 22 November 1969 (art. 29).

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Expanded working paper by Mr. Manuel Rodríguez Cuadros on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy, in accordance with the mandate contained in decision 2000/116 of the Sub-Commission on the Promotion and Protection of Human Rights*, E/CN.4/Sub.2/2002/36, 10 June 2002, para. 31.

The [European] Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States.

*Treaty on European Union*, February 7, 1992, Maastricht, O.J. No. C191/1 (1992), reprinted in 31 Int. Leg. Mat. 247, Art. 6, para. 1.

49. Justice (including social justice), democracy, peace and development are also interrelated and interdependent.

WE THE PEOPLES OF THE UNITED NATIONS DETERMINED:

...

to establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained ...

...

AND FOR THESE ENDS

...

to unite our strength to maintain international peace and security ...

*Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945, preamble.

... social development and social justice cannot be attained in the absence of peace and security or in the absence of respect for all human rights and fundamental freedoms. This essential interdependence was recognized 50 years ago in the Charter of the United Nations and has since grown ever stronger.

World Summit for Social Development, *Copenhagen Declaration on Social Development*, adopted at the 14<sup>th</sup> plenary meeting, 12 March 1995, U.N. Doc. A/CONF.166/9, Annex I, para. 5.

The participating States recognize the universal significance of human rights and fundamental freedoms, respect for which is an essential factor for the peace, justice and well-being necessary to ensure the development of friendly relations and co-operation among themselves as among all States.

*Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)*, signed by 35 States (including Canada and the United States) on August 1, 1975, reprinted in (1975) 14 I.L.M. 1295, Principle VII (Respect for human rights and fundamental freedoms).

... economic growth and social development based on justice and equity, and democracy are interdependent and mutually reinforcing ... (preamble)

... democratic values ... includ[e] liberty and social justice. (Art. 27)

*Inter-American Democratic Charter*.

50. In particular, “social justice” is a shared value and common objective of the international community. It is an essential element of democracy and the rule of law. Yet, as long as the U.N. fails to adopt a strong and uplifting Declaration on the human rights of Indigenous peoples, there is little hope that the pervasive social and other injustices inflicted upon us will

begin to be redressed. The collective security of Indigenous peoples is continually being jeopardized.

The rule of law is an important universal norm in modern democracies. ... Implicit in the doctrine is the notion of *social justice*. ... In contemporary “globalisation”, the re-affirmation of the rule of law principle and its connection with the promotion and protection of human rights is imperative.

S. Gutto, “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights”, Background paper prepared for the Office of the High Commissioner for Human Rights, Seminar on the Interdependence Between Democracy and Human Rights, Geneva, 25 – 26 November 2002, at p. 8, para. 17.

We welcome the commitment of all participating States to our shared values. Respect for human rights and fundamental freedoms, ... democracy, the rule of law, economic liberty, social justice and environmental responsibility are our common aims. They are immutable. Adherence to our commitments provides the basis for participation and co-operation in the CSCE and a cornerstone for further development of our societies.

Conference on Security and Co-operation in Europe, *Helsinki Summit Declaration*, in Helsinki Document, 1992 (“Challenges of Change”), para. 6.

See also *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, (1998) 161 D.L.R. (4<sup>th</sup>) 385, 228 N.R. 203, *reprinted in* (1998) 37 I.L.M 1342, para. 64, where the Supreme Court of Canada quoting *R. v. Oakes*, [1986] 1 S.C.R. 103, at p. 136 describes “some of the values inherent in the notion of democracy” as follows:

... respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.

... indigenous peoples have been the historical victims of persistent patterns of denial of justice over long periods of time. (p. 6, para. 9)

Here justice must be understood not simply as the effective application of the law and the operation of a good judiciary system, but also as a process whereby people who are persistently and severely disadvantaged may find ways to overcome different types of disadvantage through legitimate and socially acceptable means over the long run. Indigenous peoples are one segment of human society (but by no means the only one) that fits this description. (p. 7, para. 10)

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, 2004, *supra*.

51. New and existing concepts of security explicitly link peace, development, social justice, democracy and respect for and promotion of human rights. From an Indigenous perspective, the draft *U.N. Declaration on the Rights of Indigenous Peoples*, if adopted, would serve to reinforce the overall security of Indigenous peoples. In particular, the draft *Declaration* would help to safeguard our lands, territories and resources, as well as our sacred treaties and treaty rights.

Our new concept of security in the Hemisphere is multidimensional in scope, ... contributes to the consolidation of peace, integral development, and social justice, and is based on democratic values, respect for and promotion and defense of human rights, solidarity, cooperation, and respect for national sovereignty.

*Declaration on Security in the Americas*, adopted at the third plenary session of October 28, 2003, Special Conference on Security, Mexico City, OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1, 28 October 2003, at para. 2.

Human rights and fundamental freedoms, the rule of law and democratic institutions are the foundations of peace and security, representing a crucial contribution to conflict prevention, within a comprehensive concept of security. The protection of human rights ... is an essential foundation of democratic civil society.

Conference on Security and Co-operation in Europe, *Towards a Genuine Partnership in a New Era*, Budapest Document, 1994, Ch. VIII, para. 2.

... “indigenous peoples human security” ... encompasses many elements, *inter alia* physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects. In my opinion, the desirable human security situation exists when the people concerned and its individual members have adequate legal and political guarantees for their fundamental rights and freedoms, including the right of self-determination.

J.B. Henriksen, “Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security”, in M.C. van Walt van Praag & O. Serroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at p. 226.

52. Peace, development and environmental protection are interdependent and indivisible. Safeguarding the integrity of the environment is essential to the well-being of peoples and individuals, and to the enjoyment of human rights.

Peace, development and environmental protection are interdependent and indivisible.

*Rio Declaration on Environment and Development*, U.N. Doc. A/Conf. 151/5/Rev. 1, June 13, 1992, 31 I.L.M. 874 (1992), Principle 25.

Recognizing that adequate protection of the environment is essential to human well-being and the enjoyment of basic human rights, including the right to life itself ...

*Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters*, adopted on 25 June 1998, Århus, Denmark, entered into force on 30 October 2001, *reprinted in* 38 I.L.M. 515 (1999), preamble.

The promotion and observance of economic, social, and cultural rights are inherently linked to integral development, equitable economic growth, and to the consolidation of democracy in the states of the Hemisphere. (Art. 13)

The exercise of democracy promotes the preservation and good stewardship of the environment. It is essential that the states of the Hemisphere implement policies and strategies to protect the environment, including application of various treaties and conventions, to achieve sustainable development for the benefit of future generations. (Art. 15)

... democracy is a way of life based on liberty and enhancement of economic, social, and cultural conditions for the peoples of the Americas. (Art. 26)

*Inter-American Democratic Charter.*

The experience of indigenous peoples and development clearly demonstrated that *human rights and development are inseparable*, for the abuse of the rights of indigenous peoples is principally a development issue. Forced development has deprived them of their human rights, in particular the *right to life and the right to their own means of subsistence, two of the most fundamental of all rights*. Indigenous peoples have been, in fact, victims of development policies which deprive them of their economic base - land and resources ...

U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, U.N. Doc. E/CN.4/1990/9/ Rev. 1, 26 September 1990, para. 104. [emphasis added]

53. As illustrated above, as applied to Indigenous peoples, the foundational principles and values of international and domestic legal systems are currently being undermined. Yet these same values and principles provide additional reasons as to why the international community and

States must take affirmative measures in relation to Indigenous peoples and vigorously safeguard our human rights.

All human rights — civil, political, economic, social and cultural — are comprehensive, universal and interdependent. They are the foundations that support human dignity, and any violations of human rights represent an attack on human dignity's very core. Where fundamental human rights are not protected, States and their peoples are more likely to experience conflict, poverty and injustice.

U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General, A/56/326*, 6 September 2001, p. 36, para. 195.

54. The draft *U.N. Declaration on the Rights of Indigenous Peoples* does not expressly describe each of the interrelated and interdependent aspects referred to above. However, the draft *Declaration* is formulated in a manner that is consistent with all of these principles and values. In so doing, it establishes a principled legal framework that can help to maintain and reinforce the integrity of distinct Indigenous peoples and our rights, institutions, values and worldviews.

The United Nations draft declaration states the link between human rights and development, namely that the one is not possible without the other. Thus, economic improvements cannot be envisaged without protection of land and resource rights. Rights over land need to include recognition of the spiritual relation indigenous peoples have with their ancestral territories. And the economic base that land provides needs to be accompanied by a recognition of indigenous peoples' own political and legal institutions, cultural traditions and social organizations. Land and culture, development, spiritual values and knowledge are as one. To fail to recognize one is to fail on all.

M. Robinson, U.N. High Commissioner for Human Rights, "Bridging The Gap Between Human Rights and Development: From Normative Principles To Operational Relevance", Presidential Fellows Lecture, 3 December 2001, World Bank, Washington D.C.

55. In light of these foundational values and principles and related commitments and responsibilities, it would be contradictory for the U.N. and its Members to terminate the UNCHR standard-setting process concerning Indigenous peoples' human rights.

### **2.3 Impunity for human rights violations against Indigenous peoples**

56. Clearly, the legal vacuum resulting from the failure of the United Nations to adopt a strong *Declaration on the Rights of Indigenous Peoples* contributes to the perpetuation of grave and recurring problems and prejudices.

57. Serious harms include the continuing impunity for human rights violations against Indigenous peoples. This ongoing human rights crisis is a stark reminder that, in relation to Indigenous peoples, the international human rights system is woefully inadequate and incomplete.
58. In view of the debilitating legacy of colonialism, dispossession and discrimination confronting Indigenous peoples, the importance of adopting human rights norms consistent with Indigenous peoples' status, rights, perspectives and values retains a real urgency. Examples in the 2004 Report of the Special Rapporteur on Indigenous peoples' human rights include:

In March 2000, the Nairobi High Court ruled that the eviction of between 5,000 and 10,000 members of the Ogiek tribe from Tinet forest in Kenya was legal even though it affected the rights of hundreds of families to their ancestral lands. (p. 9, para. 18)

Some national laws maintain the alienation and exclusion of indigenous peoples from the justice system altogether. For example, the Constitution of Nepal declares the State to be a Hindu kingdom and Nepali language the official language; there is no recognition of the indigenous peoples and discriminatory legislation prohibits indigenous peoples from carrying out their own traditional activities, including hunting and fishing, and other expressions of their cultural identity. For the same reasons, no indigenous person may become an official in any capacity of the country's judiciary. (p. 9, para. 20)

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, 2004, *supra*.

59. In addition, the universal human rights standard-setting process that was initiated internationally by the United Nations, with the adoption of the *Universal Declaration on Human Rights* and the two human rights Covenants, remains unfinished. International human rights law generally applies to Indigenous peoples. However, the General Assembly has yet to adopt a U.N. instrument that explicitly, accurately and comprehensively elaborates upon our human rights.

*Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Adopted by the U.N. General Assembly on December 10, 1948.

... [Indigenous peoples'] distinctive outlook has been overlooked or distorted by most understandings of human rights, and their ways disvalued and cast aside by the modernization consensus embraced by every sovereign state. The specific identities and grievances of indigenous peoples played literally no role in the

influential formulations of the provisions of the Universal Declaration of Human Rights. Amazing as it may seem, indigenous peoples were simply not treated as “human” by the Universal Declaration, despite its drafters being among the most eminent idealists of their day.

R. Falk, “Forward” in M.C. Lãm, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, N.Y.: Transnational Publishers, 2000), at p. xiii.

60. We are not suggesting that the adoption by the General Assembly of a *U.N. Declaration on the Rights of Indigenous Peoples* would, by itself, resolve the multitude of human rights violations suffered globally by Indigenous peoples. Undoubtedly, however, it is a crucial and significant step.
61. The promotion and protection of “all human rights”, including those of Indigenous peoples, is a priority objective of the United Nations. It is also a primary responsibility of the international community, especially in the face of ongoing, severe and repeated human rights violations within States. Failure to adopt comprehensive human rights norms relating to Indigenous peoples signifies that this key objective and responsibility of the U.N. and Member States remain unfulfilled.

The promotion and protection of *all human rights* and fundamental freedoms must be considered as a priority objective of the United Nations in accordance with its purposes and principles, in particular the purpose of international cooperation. In the framework of these purposes and principles, the promotion and protection of all human rights is a legitimate concern of the international community.

*Vienna Declaration and Programme of Action*, Part I, para. 4. [emphasis added]

It is evident that the poor and the disadvantaged, including indigenous communities, constitute the most vulnerable sections of the global community that are most affected by the consequences of environmental harm. Alleviating their lot is a primary responsibility of the international community and a primary role of international law, especially human rights law.

Statement by Klaus Töpfer, Executive Director of UNEP, in Office of the High Commissioner for Human Rights/United Nations Environment Programme, *Conclusions of the Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment*, 14-16 January 2002, Geneva, U.N. Doc. HR//PUB/02/2, p. 7.

The participating States emphasize that issues relating to *human rights, fundamental freedoms, democracy and the rule of law are of international concern*, as respect for these rights and freedoms constitutes one of the foundations of the international order. They *categorically and irrevocably declare* that the commitments undertaken in the field of the human dimension of the

CSCE are *matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned.*

Conference on Security and Co-operation in Europe, *Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding*, October 3, 1991, (1991) 30 I.L.M. 1670, at 1672, preamble. [emphasis added]

62. Failure of the U.N. to adopt Indigenous human rights norms in a formal instrument serves to perpetuate impunity for human rights violations against Indigenous peoples in all regions of the world.

The authorities [in Brazil] at all levels have failed to protect the Indians effectively or to bring to justice those responsible for killing, abducting, harassing and threatening them. As a result, human rights abuses continue with impunity. (p. 7)

... documented atrocities [in Guatemala] such as mass killings, rapes, kidnappings, and forced relocations were left uninvestigated and unpunished by a biased judiciary, effectively reinforcing impunity, and the discrimination felt by the Mayan people. (p. 16)

Amnesty International, "Indigenous Rights Are Human Rights: Four Cases of Rights Violations in the Americas", Just Earth! Program, Amnesty International USA, May 2003.

... the adoption of the draft *U.N. Declaration* could act as a positive catalyst in demonstrating the urgency of taking concrete action and providing a principled approach. Conversely, in the absence of such minimum human rights standards, it in effect allows individual States to act with virtual impunity. The international community can unjustly remain complacent.

Netherlands Centre for Indigenous Peoples, "Impending Failure of the International Decade of the World's Indigenous People", Written statement submitted to the U.N. Commission on Human Rights, 60<sup>th</sup> Sess., 15 March-23 April 2004 (Items 15 and 18 of the provisional agenda).

The European Parliament ... Calls on the [Economic and Social] Council and the Commission to give due attention to the question of impunity in respect of violations of international human rights and humanitarian law ...

*European Parliament resolution on the EU's rights, priorities and recommendations for the 60th Session of the UN Commission on Human Rights in Geneva (15 March to 23 April 2004)*, adopted 10 February 2004, para. 20.

63. Ongoing impunity for widespread and severe human rights violations in effect denies Indigenous peoples the *human right to an effective remedy*. Impunity weakens respect for human rights, the rule of law and democracy and must not be tolerated.

*Violence against indigenous people, and particularly women and youth, is widespread in numerous countries, and only in some States are judicial inquiries held to investigate accusations of such violence.* In the countries he has visited on official missions, the Special Rapporteur has received numerous reports about violence and physical abuse of indigenous people by local authorities, law enforcement agencies, military units, vigilante groups, paramilitaries and private armed squads. Similar complaints are presented regularly by indigenous and human rights organizations to the relevant international bodies. They express a serious pattern of human rights violations of indigenous people that must be addressed ...

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, 2004, *supra*, p. 11, para. 32. [emphasis added]

The Committee is concerned about the lack of appropriate measures to investigate crimes allegedly committed by State security forces and agents, in particular those committed against human rights defenders, journalists and leaders of indigenous peoples, and the lack of measures taken to prosecute and punish the perpetrators. Furthermore, the Committee is concerned at reports of intimidation and threats of retaliation impeding the right to an effective remedy for persons whose rights and freedoms have been violated.

Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines*, UN Doc. CCPR/CO/79/PHL, 1 December 2003, para. 8.

... accountability of perpetrators, including their accomplices, for grave human rights violations is one of the central elements of any effective remedy for victims of human rights violations and a key factor in ensuring a fair and equitable justice system and, ultimately, reconciliation and stability within a State ...

U.N. Commission on Human Rights, *Impunity*, Res. 2003/72, 25 April 2003, preamble.

The right to a remedy against violations of human rights and humanitarian norms includes the right of access to national and international procedures for their protection.

U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Revised set of basic principles and guidelines on the right to reparation for victims of gross violations of human rights and humanitarian law prepared by Mr. Theo van Boven pursuant to Sub-Commission decision 1995/117*, Forty-eighth session, E/CN.4/Sub.2/1996/17, 24 May 1996, Annex, para. 4.

In the exercise of human rights and fundamental freedoms, including the promotion and protection of human rights as referred to in the present Declaration, everyone has the right, individually and in association with others, to benefit from an effective remedy and to be protected in the event of the violation of those rights.

*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N.G.A. Res. 53/144, U.N. Doc. A/RES/53/144, 8 March 1999, Annex, Art. 9, para. 1.

The Commission on Human Rights ... *reaffirms* that any form of impunity condoned by public authorities for crimes motivated by racist and xenophobic attitudes plays a role in weakening the rule of law and democracy and tends to encourage the recurrence of such acts ...

U.N. Commission on Human Rights, *The incompatibility between democracy and racism*, Res. 2003/41, 23 April 2003, para. 4.

64. The failure of the U.N. to adopt international human rights norms explicitly pertaining to Indigenous peoples serves to perpetuate an “ominous trend”. Rather than take measures to ensure respect for the fundamental rights of Indigenous peoples, some States are criminalizing those Indigenous human rights defenders who protest or take other collective action to safeguard Indigenous lands, territories and resources.

An ominous trend in current affairs is that human rights abuses occur not only during states of emergency or in authoritarian non-democratic regimes, but also within the framework of the rule of law in open transparent societies ... *Rights abuses committed against indigenous people often happen in the context of collective action initiated to press the legitimate social claims of marginalized, socially excluded and discriminated against indigenous communities*. ... The Special Rapporteur strongly urges that legitimate social protest activity of indigenous communities not be so penalized by the arbitrary use of criminal legislation designed to punish crimes that endanger the stability of democratic societies. He urges States to use non-judicial means to solve social conflicts through dialogue, negotiation and consensus.

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, 2004, *supra*, p. 15, para. 53. [emphasis added]

Human rights defenders require increased protection domestically and internationally. Human rights defenders are on the front lines of democratic

development, striving for the recognition of the rights of the marginalized and the excluded. The process of formulation, demand, recognition and enforcement of rights is at the very heart of democratic development.

N. Thede, "Civil society and democracy", Background paper prepared for the Office of the High Commissioner for Human Rights, Seminar on the Interdependence Between Democracy and Human Rights, Geneva, 25 – 26 November 2002, para. 32.

65. In view of the rampant human rights violations against Indigenous peoples and the continuing impunity in this regard, it is important to examine the relevant obligations of the U.N. and Member States. These legally binding duties are described under the heading below.

### **III. Human Rights Obligations of U.N. and Member States**

66. In regard to the human rights obligations of the United Nations and Member States, the Purposes and Principles in the *U.N. Charter* are explicit and clear.
67. The Purposes and Principles require actions "promoting and encouraging respect" for human rights and not undermining them. According to the *U.N. Charter*, the duty to promote respect for human rights is to be based on "respect for the principle of equal rights and self-determination of peoples".

The Purposes of the United Nations are:

...

3. To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion ... (Art. 1, para. 3)

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

...

c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. (Art. 55, para. c)

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. (Art. 56)

*Charter of the United Nations.*

68. In addition, the international obligation to respect human rights, including the right of self-determination, is of an *erga omnes* character. An *erga omnes* obligation refers to a duty that is binding upon all States. It is also a duty owed to the international community as a whole.

This international obligation [to respect human rights] ... is *erga omnes*; it is incumbent on every State in relation to the international community as a whole, and every State has a legal interest in the protection of human rights. This obligation further implies a duty of solidarity among all States to ensure as rapidly as possible the effective protection of human rights throughout the world.

International Law Institute, "The Protection of Human Rights and the Principle of Non-Intervention in Internal Affairs of States" (1990) 63 *Annuaire de l'Institut de droit int'l* 338.

"*Erga omnes*" literally means "against everyone." Thus an *erga omnes* right is a right in which all states have a legal interest in its protection. Similarly, an *erga omnes* obligation is an obligation owed by a state toward the international community as a whole and *thus all states have a legal interest in its fulfilment*. In this way, an *erga omnes* obligation differs from an ordinary legal obligation whose breach engages only the state that is the direct and immediate victim.

H.M. Kindred *et al.*, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 6<sup>th</sup> ed. (Toronto: Emond Montgomery Publications, 2000), at p. 59. [emphasis added]

... that the right of peoples to self-determination as it evolved from the Charter and from United Nations practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognized by the United Nations Charter and in the jurisprudence of the Court ... ; it is one of the essential principles of contemporary international law.

*Case Concerning East Timor (Portugal v. Australia)*, [1995] I.C.J. Rep. 90 at 102, para. 29, *per* Judge Weeramantry.

69. All Member States of the United Nations are legally bound to uphold at all times the Purposes and Principles of the *Charter*.

The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

...

2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter. (Art. 2, para.2)

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55. (Art. 56)

*Charter of the United Nations.*

70. Upholding the Purposes and Principles of the *U.N. Charter*, as well as international law generally, is critical for all States, peoples and individuals in the international community.

We recall that non-compliance with obligations under the Charter of the United Nations constitutes a violation of international law.

*Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity*, November 21, 1990, reprinted in (1991) 30 I.L.M. 190.

The participating States will respect human rights and fundamental freedoms, including the freedom of thought, conscience, religion or belief, for all without distinction as to race, sex, language or religion.

...

In the field of human rights and fundamental freedoms, the participating States will act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights. They will also fulfil their obligations as set forth in the international declarations and agreements in this field, including inter alia the International Covenants on Human Rights, by which they may be bound.

*Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)*, signed by 35 states (including Canada and the United States) on August 1, 1975, reprinted in (1975) 14 I.L.M. 1295, Principle VII (Respect for human rights and fundamental freedoms).

We [African Heads of State and Government] ... reaffirm our commitment to the United Nations principles and objectives as set forth in the Charter and condemn any violation of these principles.

*Declaration on a Code of Conduct for Inter-African Relations, Assembly of Heads of State and Government*, 1994, 30th Ordinary Session, Tunis, Tunisia, 13 - 15 June 1994, para. 3.

None of the provisions of this Charter shall be construed as impairing the rights and obligations of the Member States under the Charter of the United Nations.

*Charter of the Organization of American States*, 119 U.N.T.S. 3, entered into force December 13, 1951, amended 721 U.N.T.S. 324, entered into force Feb. 27, 1990, Art. 131.

71. Clearly, it would not be in the interests of the international community for the U.N. and its Member States to undermine their own credibility. They must not fail to fully respect the *U.N. Charter* and fundamental principles of justice, fairness, democracy and respect for human rights. Otherwise, they could hardly insist that other States, peoples and individuals must adhere to these same precepts and respect the rule of law. As U.N. Secretary-General Kofi Annan has emphasized:

... every government that is committed to the rule of law at home, must be committed also to the rule of law abroad. And all States have a clear interest, as well as clear responsibility, to uphold international law and maintain international order.

U.N. Secretary-General, “When Force is Considered, There is No Substitute for Legitimacy Provided by United Nations, Secretary-General Says in General Assembly Address”, *Press Release*, SG/SM/8378/GA/10045, 12 September 2002.

72. In regard to promoting respect for and observance of human rights, it would be a violation of the legal duty of States under Arts. 55 and 56 of the *U.N. Charter* to substantially undermine human rights, fail to cooperate with the U.N. or be otherwise obstructive. This is especially the case, if a class of persons or peoples – such as the world’s Indigenous peoples – are the affected subjects.

As treaty provisions applicable to the Organization and its members these prescriptions [in Arts. 55 and 56 of the U.N. Charter] are of paramount importance. Article 55 is perhaps oblique – the United Nations “shall promote”. However, Article 56 is stronger and involves the members; and the political and judicial organs of the United Nations have interpreted the provisions as a whole to constitute legal obligations. ... Thus, while it may be doubtful whether states can be called to account for every alleged infringement of the rather general Charter provisions, *there can be little doubt that responsibility exists under the Charter for any substantial infringement of the provisions, especially when a class of persons, or a pattern of activity, are involved.*

I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed. (Oxford: Clarendon Press, 1998), at p. 574. [emphasis added]

... Art. 56 not only requires co-operation among the member states but between the member states and the Organization. ... Art. 56, however, does require that member states co-operate with the UN in a constructive way; obstructive policies are thus excluded.

R. Wolfrum, “Article 56” in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 793, at p. 794.

73. In particular, State acts of discrimination based on race, sex, etc. would be a violation of international law, including the Purposes and Principles of the *U.N. Charter*.

In accordance with the wording of Art. 55(c), the [General Assembly] has frequently emphasized that discrimination based upon race, sex, language, or religion is inconsistent with the pledges of the member states under Art. 56. ... In Res. 1248 (XIII) of October 30, 1958, for example, the GA states that ‘governmental policies of Member States which are designed to perpetuate or increase discrimination are inconsistent with the pledges of the Members under Article 56 of the Charter of the United Nations’.

R. Wolfrum, “Article 56” in B. Simma, ed., *The Charter of the United Nations: A Commentary*, *supra*, at p. 795.

The principle of the equality in dignity and rights of all human beings and all peoples, irrespective of race, colour and origin, is a generally accepted and recognized principle of international law. Consequently any form of racial discrimination practised by a State constitutes a violation of international law giving rise to its international responsibility.

*Declaration on Race and Racial Prejudice*, E/CN.4/Sub.2/1982/2/Add.1, Annex V (1982). Adopted and proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its twentieth session on 27 November 1978, Art. 9, para. 1.

[Commonwealth] members ... share a commitment to certain fundamental principles. ...

- we recognise racial prejudice and intolerance as a dangerous sickness and a threat to healthy development, and racial discrimination as an unmitigated evil;
- we oppose all forms of racial oppression, and we are committed to the principles of human dignity and equality ...

*Harare Commonwealth Declaration, 1991*, issued by Heads of Government in Harare, Zimbabwe, 20 October 1991, para. 4.

74. State actions that are based on race would also violate the peremptory norm prohibiting racial discrimination. For example, States could not validly agree to discriminatory double standards through a new Declaration on the rights of Indigenous peoples or other U.N. instrument.

The major distinguishing feature of such rules [i.e. peremptory norms] is their relative indelibility. They are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect. The least controversial examples of the class are the prohibition of the use of force, the law of genocide, *the principle of racial non-*

*discrimination*, crimes against humanity, and the rules prohibiting trade in slaves and piracy.

I. Brownlie, *supra*, at p. 515. [emphasis added]

Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.

...

Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail.

*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971). Reprinted in (1970) 9 I.L.M. 1292.

In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.

*Charter of the United Nations*, Art. 103.

Similarly, in regard to the superiority of the U.N. Charter, see *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969), Art. 30, para. 1; and Nguyen Quoc Dinh, P. Daillier, & A. Pellet, *Droit international public*, 5th ed. (Paris: L.G.D.J., 1994), at p. 269, para. 177.

75. In considering the human rights obligations of the United Nations and Member States, there are additional values and principles that are of universal importance and relevance. In relation to Indigenous peoples, we have already illustrated how these values and principles are continually undermined (see sub-heading 2.2 above).

#### **IV. “Impediments” to the Adoption of a Strong and Uplifting U.N. Declaration**

76. Major “impediments” to the adoption by the United Nations of a strong and uplifting Declaration on the rights of Indigenous peoples may be described under two broad categories. The first relates to approaches or techniques by some States that serve to lower human rights standards pertaining to Indigenous peoples. The second describes those specific issues that are of critical importance to Indigenous peoples, but continue to be opposed by some States.

77. **In using the term “impediments”, we are referring here solely to those State approaches, techniques or arguments that we find have little or no validity under international law.** Whether intentional or not, these illegitimate approaches, etc. serve to prevent the achievement of consensus in the UNCHR inter-sessional Working Group that is considering the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

#### 4.1 State approaches or techniques that lower human rights standards

78. There are several approaches or techniques used by some States that, if embraced by the Working Group, would lead to unfairly lowering the human rights norms relating to Indigenous peoples in the draft *U.N. Declaration*. These approaches or techniques are hindering progress in the Working Group and are illustrated below.

79. First, there is a tendency of some States not to approve any Article in the draft *U.N. Declaration* that differs from their own domestic policies or laws. However, in regard to Indigenous peoples, the purpose of the international human rights standard-setting process is not to alter international law so as to mirror each State’s domestic or municipal laws. Rather, it is to elaborate the human rights of Indigenous peoples in a manner consistent with international law and its progressive development.

An adequate national protection system is one in which international human rights norms are reflected in the national constitution and in national legislation; in which the courts can apply international human rights norms and jurisprudence ...

U.N. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-up to the World Conference on Human Rights*, E/CN.4/2003/14, 26 February 2003, para. 11.

... some effort must be given to highlighting the progressive aspects of human rights standard setting exercises, one objective of which is clearly to elaborate upon and further articulate existing human rights standards in order to set the benchmarks by which domestic legislation can and should be judged. The nature of domestic standards should be a minor concern in this process. In other words, *ensuring compatibility with domestic legislation is not a fundamental, or even a relevant, part of setting standards in the field of international human rights; if it were, the Universal Declaration of Human Rights and its progeny would not exist today.*

F. MacKay, “Report on the Organisation of American States’ Working Group on the Proposed Inter-American Declaration on the Rights of Indigenous Peoples”, Forest Peoples Programme, Washington, D.C., 8-12 November 1999, Conclusion. [emphasis added]

The General Assembly shall initiate studies and make recommendations for the purpose of:

- a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification ...

*Charter of the United Nations*, Art. 13, para. 1(a).

80. The current standard-setting process must ensure that the resulting human rights norms reflect Indigenous rights, perspectives and values, in a manner consistent with international law. As the draft *U.N. Declaration* makes clear, the rights contained therein “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world” (Art. 42).

It is important to underline that the draft *U.N. Declaration* does not “manufacture” new human rights standards. Rather, from an Indigenous Peoples' perspective, it elaborates upon international human rights law consistent with the principles of democracy, equality and non-discrimination. In this way, the *U.N. Declaration* fosters the progressive development of international law as contemplated in the *U.N. Charter* (Arts. 13, para. 1 and 73). As authorized by the Economic and Social Council (Res. 1982/34, 7 May 1982), the draft *U.N. Declaration* is intended to give:

"special attention to the evolution of standards concerning the rights of indigenous peoples, taking account of both the similarities and the differences in the situations and aspirations of indigenous peoples throughout the world." (E/CN.4/Sub.2/1993/29, 23 August 1993, p. 4, para. 1).

Netherlands Centre for Indigenous Peoples, “Impending Failure of the International Decade of the World’s Indigenous People”, Written statement submitted to the U.N. Commission on Human Rights, *supra*.

81. Second, States cannot (mis)interpret international human rights treaties so as to conform to their domestic laws. This is not a valid approach and would lead to the creation of extremely low standards in regard to the human rights of Indigenous peoples. Nor is this a good faith application of the treaties concerned.

The terms of an international human rights treaty have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law. Furthermore, such human rights treaties are live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.

I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C No. 76 (2001), para. 146.

Unlike most traditional branches of law, international human rights law is not intended merely to recapitulate the wishes and practices of States. It arises from the positive consent of nations; yet, once born, it is not necessarily constrained by those nations' individual objectives. It does, so to speak, take on a life of its own.

E. Heinze, "Beyond Parapraxes: Right and Wrong Approaches to the Universality of Human Rights Law", (1994) 12 Netherlands Q. H. Rts. 369, at p. 381.

These [human rights Covenants] are treaties that legally bind those states that accede to them. The human rights principles they protect become a legal commitment; that is, an obligation under international law, requiring acceding states to 'perform' in accordance with these treaties in 'good faith', in order to comply with their norms. In accordance with the international legal maxim of *pacta sunt servanda*, a violation of their articles would be a violation of international law.

T.S. Orlin & M. Scheinin, "Introduction" in T.S. Orlin, A. Rosas & M. Scheinin, eds., *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 1, at p. 6.

82. Third, States participating in the UNCHR Working Group cannot invoke their constitutions or other domestic laws in order to avoid including human rights norms in a U.N. Declaration consistent with their international obligations.

International law provides that States cannot invoke the legal procedures of their municipal system as a justification for not complying with international rules. This principle has been firmly stated by both the [Permanent Court of International Justice] (in *Polish Nationals in Danzig* and in *Free Zones*) and other courts (for example, in *Georges Pinson* and in *Blaškić*), and is now laid down, with regard to treaties, in the 1969 Vienna Convention on the Law of Treaties, Article 27 of which provides that 'A party [to a treaty] may not invoke the provisions of its internal law as justification for its failure to perform a treaty'.

A. Cassese, *International Law* (Oxford/N.Y.: Oxford University Press, 2001), at pp. 166-167.

It should ... be observed that ... according to generally accepted principles ... a State cannot adduce as against another State its own constitution with a view to evading obligations incumbent upon it under international law or treaties in force.

*Polish Nationals in Danzig*, (1931), P.C.I.J., Ser. A/B, No. 42, at p. 24.

... it is certain that France cannot rely on her own legislation to limit the scope of her international obligations ...

*Free Zones Case (France v. Switzerland)*, (1932), P.C.I.J., Ser. A/B, No. 46, at p. 167.

See also *Georges Pinson* case, France-Mexico Claims Commission, decision of 18 October 1928, in RIAA, 5, at pp. 393-394; and *Prosecutor v. Blaškić*, International Criminal Tribunal for the Former Yugoslavia, decision of the President, 3 April 1996, para. 7.

While noting the principle set forth in article 41 of the Constitution [of Suriname] that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that *this principle must be exercised consistently with the rights of indigenous and tribal peoples*.

It recommends legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources.

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9, 12 March 2004, para. 11[emphasis added]

83. Fourth, the United Kingdom and the United States have repeatedly proposed converting some of the basic rights in the draft *U.N. Declaration* to “freedoms”. We find this approach highly objectionable and would lead for the most part to lower Indigenous human rights norms. In light of the pervasive human rights violations suffered by Indigenous peoples worldwide, it is unacceptable that some States seek to weaken our fundamental rights in the draft *Declaration*.

The term ‘human rights and fundamental freedoms’ combines two different concepts, which are distinguishable according to their literal meanings. ‘Rights’ may refer to any kind of claims, either in a positive or negative sense, used in an offensive or defensive manner. ‘Freedoms’ do not encompass demands for positive action. Rather, they demand exemptions from burdens or from intervention in a sphere. The historical origin of these concepts confirms this difference. The cry for human rights was heard in revolutions; ‘fundamental freedom’ is a term used primarily in state constitutions to denote norms protecting individuals against interference by public authorities. Thus, ‘human rights’ is apparently the broader term.

K.-J. Partsch, “Article 55(c)” in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 776, at p. 778.

84. Fifth, in regard to the draft *U.N. Declaration*, some States are willing to accept much lower standards “in the interests of achieving consensus” among States. We wish to emphasize that consensus contrary to the Purposes and Principles of the *Charter of the United Nations*, as well as of the mandate concerning the draft *Declaration*, would not be a valid basis for agreement. This would also be a serious breach of the principles of international cooperation and multilateralism contemplated in the *Charter*.
85. These and other approaches, techniques and proposals by some States in the UNCHR Working Group continue to be of grave concern (see also heading 4.2 below). As Indigenous representatives have repeatedly indicated, such approaches, etc. would seriously undermine the integrity of the existing text of the draft *U.N. Declaration* in a manner inconsistent with international law. As a result, numerous Indigenous delegations have sought to establish a principled approach.

Numerous indigenous delegations made interventions stating that the proposals of State delegations had not refuted the firm presumption of the integrity of the existing text; furthermore, such refutation would have to take the form of proposals that would be reasonable and necessary, and improve and strengthen the existing text, and be consistent with the fundamental principles of equality, non-discrimination and the prohibition of racial discrimination.

U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/1999/82, 20 January 1999 (Chairperson-Rapporteur: Mr. José Urrutia (Peru)), para. 81.

## 4.2 Key Indigenous issues opposed by some States

86. There are a number of issues that are considered to be essential by Indigenous peoples, but are viewed as “impediments” to making progress on the draft *U.N. Declaration*. These key matters include: i) affirmation of the collective rights of Indigenous peoples; ii) use of the term “peoples” or “Indigenous peoples”; iii) affirmation of the right of Indigenous peoples to self-determination under international law; and iv) affirmation of Indigenous rights to lands, territories and resources.
87. A further issue of contention is the insistence by some States to include in the draft *U.N. Declaration* the principle of territorial integrity. Indigenous representatives in the UNCHR Working Group agree that this principle already exists in international law. However, most Indigenous representatives in the Working Group are opposed to singling out “territorial integrity” in the draft *Declaration* for the diverse reasons indicated below (sub-heading 4.2.5).
88. Each of these issues will be elaborated briefly below.

#### 4.2.1 Collective rights of Indigenous peoples

89. Some States still appear to be opposed to affirming that Indigenous peoples have collective human rights. In our respectful view, this position is inconsistent with human rights law. It also constitutes an unnecessary and unjustifiable “impediment” to the adoption of a U.N Declaration on the rights of Indigenous peoples.

There is no common EU position on the use of the term indigenous peoples. Some Member States are of the view that indigenous peoples are not to be regarded as having the right of self-determination for the purposes of Article 1 of the ICCPR and the ICESCR, and that *use of the term does not imply that indigenous people or peoples are entitled to exercise collective rights.*

Council of the European Union, “Council Conclusions on Indigenous Peoples”, Document 13466/02, 18<sup>th</sup> of November 2002, n. 1. [emphasis added]

... the situation of indigenous people must surely prompt us to ponder more deeply human rights as they are today. Henceforth, *we must realize that human rights are not only the rights of individuals. They are also collective rights - historic rights.*

B. Boutros-Ghali, Statement to U.N. General Assembly, in “Living History: Inauguration of the ‘International Year of the World’s Indigenous People’”, (1993) 3 Transnat’l L. & Contemp. Probs. 168, at p. 170.

It can be said that by now all, or nearly all, States agree on the following essential points. First, the dignity of human beings is a basic value that every State should try to protect, regardless of considerations of nationality, race, colour, gender, etc. Second, *it is also necessary to aim at the achievement of fundamental rights of groups and peoples.* Third, racial discrimination is universally considered one of the most repulsive and unbearable conditions.

A. Cassese, *International Law, supra*, at p. 373. [emphasis added]

90. Regardless of intention, the denial of Indigenous peoples’ collective rights constitutes a serious and pervasive form of racial discrimination.

... because ... the most important demands of Indigenous Peoples relate to collective rights, our aspirations remain misunderstood and unrecognized by the international human rights regime.

Therefore, it is important that issues concerning Indigenous Peoples ... are fully integrated into the discourse on racism and racial discrimination.

B. Butler, "Sydney Meeting: Neglecting Collective Rights is Racism" in Netherlands Centre for Indigenous Peoples (NCIV), ed., *Final Report Indigenous Peoples' Millennium Conference*, *supra*, 31at p. 33.

We condemn the continued denial of the recognition of Indigenous Peoples as having the rights of all other Peoples. We consider the continued denial of this recognition an act of racial discrimination by the States within the United Nations itself, as this refusal is a distinction based on race or ethnic origin which has the purpose of nullifying or impairing all other human rights of Indigenous Peoples.

"Statement on the World Conference Against Racism of the Indigenous Peoples' Millennium Conference", Panamá City, Panamá, 7-11 May 2001", U.N. Doc. E/CN.4/Sub.2/AC.4/2001/8. This document is reproduced in Netherlands Centre for Indigenous Peoples (NCIV), ed., *Final Report Indigenous Peoples' Millennium Conference*, *supra*, at pp. 51-52.

91. The notion of collective human rights clearly exists in international and domestic law, with resulting obligations or responsibilities for States.

Some rights are purely collective, such as the right to self-determination or the physical protection of the group as such through the prohibition of genocide ...

M. Shaw, *International Law*, 4<sup>th</sup> ed. (Cambridge: Cambridge University Press, 1997), at p. 209.

The right to development is related to the right to self-determination, which has many aspects, both individual and collective.

U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, *supra*, p. 42, para. 151.

The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing in dignity and rights for all individuals and all groups.

*Declaration on Race and Racial Prejudice*, Art. 6, para. 1.

Apart from the two categories of "civil and political" and "economic, social and cultural", modern human rights also recognise and incorporate what some label as "collective or "solidarity" rights. Environmental and ecological rights, the right to peace and security and the right to political or cultural and economic self-determination belong to this category.

S. Gutto, “Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights”, *supra*, pp. 11-12, para. 26.

The Parties refer to their international obligations and commitments concerning respect for human rights. *They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples.* Human rights are universal, indivisible and inter-related. *The Parties undertake to promote and protect all fundamental freedoms and human rights*, be they civil and political, or economic, social and cultural.

*Cotonou Agreement, supra*, Art. 9 (2). [emphasis added]

92. In particular, the right of all peoples to self-determination, including natural resource rights, is clearly a collective right under international law.

Self-determination was a right of peoples, but if it was the first to be accepted it was by no means the only such right. For example, the principle of permanent sovereignty over natural resources could be seen as a right of peoples to long-term control over their own resources ...

J. Crawford, “The Right of Self-Determination in International Law: Its Development and Future”, in P. Alston, ed., *Peoples’ Rights* (Oxford: Oxford University Press, 2001) 7, at p. 21.

93. In the *African Charter of Human and Peoples’ Rights*, a wide range of collective rights are specifically included.

See Art. 19 (equality); Art. 20 (self-determination); Art. 21 (free disposal of natural resources); Art. 22 (economic, social and cultural development); Art. 23 (peace and security); and Art. 24 (satisfactory environment).

*African Charter of 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.

94. Moreover, Indigenous peoples’ human rights are widely recognized internationally as collective in nature.

... specific “group rights” such as those applicable to ... “indigenous peoples”, ... also form an integral part of modern human rights. This does not imply that the general norms and standards applicable to the general masses of people do not apply to groups and persons falling within the “group rights” categories. Self-determination and environmental rights are also regarded as forming part of the category of collective or group rights and solidarity rights.

S. Gutto, *supra*, p. 12, para. 27.

... the indigenous peoples' movement's emphasis on collective rights, including collective land rights, enriches, rather than undermines, international human rights law.

A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 *Transnat'l L. & Contemp. Probs.* 89, at p. 108.

Together with expansion of civil rights to minorities and women, there evolved a new willingness to recognize the place of indigenous peoples in the modern nation. It is here that the extension of the principle of equality to groups previously denied such treatment has, first, expanded the notion of who deserves individual human rights and, second, reformulated these rights to include group rights.

E. Barkan, *The Guilt of Nations: Restitution and Negotiating Historical Injustices* (New York/London: W.W. Norton, 2000), at p. xxvi.

95. In the *Indigenous and Tribal Peoples Convention, 1989*, the collective rights of Indigenous peoples are generally recognized. Throughout the Convention, reference is made to the rights of the “[Indigenous and tribal] peoples concerned”. The term “members of the peoples concerned” is used solely when the Convention specifically addresses the rights of individuals. In addition, in emphasizing the integral importance of the relationship that Indigenous peoples have with our lands or territories, reference is made to the “collective aspects” of this relationship.

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female members of these peoples. (Art. 3, para. 1)

In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship. (Art. 13)

*Indigenous and Tribal Peoples Convention, 1989.*

Several governmental representatives pointed out that collective indigenous rights were already recognized in a legally binding international instrument, International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. As signatories to that convention, *the Governments concerned had recognized collective indigenous rights in various areas.*

U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2002/98, 6 March 2002 (Chairperson-Rapporteur: Mr. Luis-Enrique Chávez (Peru)), p. 8, para. 36. [emphasis added]

96. Indigenous rights have been recognized as collective rights by the Inter-American Court of Human Rights.

*Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.*

I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra*, para. 149. [emphasis added]

97. Treaties entered into by Indigenous peoples with States or their predecessors or agents include a wide range of collective rights. The right to collective security as distinct Indigenous peoples or nations is often an especially important element in such treaties.

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand and to the respective families and individuals thereof the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession ...

*Treaty of Waitangi*, 1840, Aotearoa/New Zealand (English version), Article the Second.

98. Indigenous rights have also been recognized as collective rights by domestic courts in Canada, South Africa and elsewhere. It would be illogical and invalid for any State to presently insist that these rights be described as solely “individual” rights when they are addressed at the international level

A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community. This is another feature of aboriginal title which is sui generis and distinguishes it from normal property interests.

*Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4<sup>th</sup>) 193, (1998) 37 I.L.M. 268, at para. 115.

Fishing rights are not traditional property rights. They are held by a collective and are in keeping with the culture and existence of the group.

*R. v. Sparrow*, [1990] 1 S.C.R. 1075, at p. 1078.

... the real character of the title that the Richtersveld Community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the Community. The Community had the right to use its water, to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface.

*Alexkor Ltd. and Another v. Richtersveld Community and Others*, Case CCT 19/03, judgment rendered by Constitutional Court of South Africa, 14 October 2003, para. 62.

99. Diverse international instruments refer to the right of Indigenous peoples to the “full measure” or “full and effective enjoyment” of human rights. It is highly contradictory for States to oppose affirming the essential collective human rights that Indigenous peoples have exercised over countless centuries. It also runs directly counter to the objectives, purposes and principles of the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

*Indigenous and Tribal Peoples Convention, 1989*, Art. 3.

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law. (Art. 1)

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world. (Art. 42)

*U.N. Declaration on the Rights of Indigenous Peoples* (Draft).

Indigenous peoples have the right to the full and effective enjoyment of the human rights and fundamental freedoms recognized in the Charter of the OAS, the American Declaration of the Rights and Duties of Man, the American Convention on Human Rights, and other international human rights law ...

*Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser/L/V/II.95, Doc. 6, 26 February 1997 (approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 95<sup>th</sup> regular session, 1333<sup>rd</sup> meeting), Art. II, para. 1.

Indigenous people and their communities shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination.

*Agenda 21: Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992*, A/CONF.151/26 (vol. III), c. 26 (Recognizing and Strengthening the Role of Indigenous People and Their Communities), para. 26.1.

100. Full and effective enjoyment of our human rights must be considered from our own historical, cultural, social, economic, spiritual and political context.

... a review of pertinent treaties, legislation and jurisprudence reveals the development over more than 80 years of particular human rights norms and principles applicable to the circumstances and treatment of indigenous peoples. Central to these norms and principles is a recognition that ensuring the full and effective enjoyment of human rights by indigenous peoples requires consideration of their particular historical, cultural, social and economic situation and experience.

I/A Comm. H.R., *Mary and Carrie Dann v. United States*, *supra*, at para. 125.

... Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.

I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra*, para. 149.

Identity of origin in no way affects the fact that human beings can and may live differently, nor does it preclude the existence of differences based on cultural, environmental and historical diversity nor the right to maintain cultural identity.

*Declaration on Race and Racial Prejudice*, Art. 1(3).

101. Indigenous peoples have the right to be different. This is an essential aspect of our human rights. It precludes States and others from denying us the diversity or uniqueness of our collective human rights.

All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial

prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever ...

*Declaration on Race and Racial Prejudice*, Art. 1(2).

... indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such ...

*U.N. Declaration on the Rights of Indigenous Peoples (Draft)*, preambular para. 1.

102. In order to achieve substantive equality, it is often necessary to treat different peoples differently. Conversely, treating everyone the same can result in inequality and unjust treatment.

The right of an Aboriginal or Torres Strait Islander person to protect and enjoy his or her culture, for example, cannot be exercised if an indigenous culture is struggling to survive within the majority culture and the indigenous community has no right to protect and develop its culture. If rights are not granted collectively to indigenous peoples which enable them to defend their culture, the practice of their religion and the use of their languages, the result is unequal and unjust treatment.

Race Discrimination Commissioner, "Alcohol Report", Human Rights and Equal Opportunity Commission, 1995, Canberra, Australia, p. 27.

Equality has both a negative aspect (non-discrimination) and a positive aspect (special measures of protection). 'Equality in law' no longer means purely formal or absolute equality, but relative equality, which often requires differential treatment.

W. McKean, *Equality and Discrimination Under International Law* (Oxford: Clarendon Press, 1983) at p. 51.

The effective protection of individual human rights and fundamental freedoms of indigenous peoples can not be fully attained without the recognition of their collective rights ...

*Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States*, Geneva, Switzerland, 16-20 January 1989, U.N. Doc. E/CN.4/1989/22, 8 February 1989, Conclusions, p. 8, para. (iv).

103. Denial of Indigenous peoples' collective rights would be a gross violation of our human rights. It would be a form of forced assimilation or cultural genocide. History has amply demonstrated that such acts are devastating to Indigenous peoples and nations.

Having dispossessed aboriginal nations, settler nations then set out to civilize them. Assimilation was to be the solution for aboriginal inferiority. ...

This policy had catastrophic results, and these results are plain to see not just in Canada, but also in Australia, New Zealand, the United States, and Brazil – wherever aboriginal peoples were denied the right to rule themselves. This is more than a story of the damage done by racist contempt and imperialist arrogance. It is also a terrible demonstration of why rights matter.

M. Ignatieff, *The Rights Revolution* (Toronto: Anansi, 2000), at pp. 60-61.

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including 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;
- ...
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures ...

*U.N. Declaration on the Rights of Indigenous Peoples* (Draft), Art. 7.

104. Some States may be opposed to recognizing Indigenous peoples' collective rights because they believe that it might adversely affect the basic rights of Indigenous individuals. Such a view fails to appreciate the important role of collective rights in Indigenous nations and societies, in ensuring the effective enjoyment of individual rights.

The claim that collective rights jeopardise traditional individual rights misunderstands the interdependent relationship between group and individual rights. The apparent tension between individual and collective rights is partially resolved once it is recognised that certain individual rights cannot be exercised in isolation from the community. This is particularly the case in indigenous communities ... It is often the case that the protection and promotion of collective rights is a pre-requisite for the exercise and enjoyment of individual rights.

Race Discrimination Commissioner, "Alcohol Report", Human Rights and Equal Opportunity Commission, 1995, Canberra, Australia, p. 27.

See also J. Raz, *The Morality of Freedom* (New York: Oxford University Press, 1994), at pp. 193-216 (groups rights are often a pre-condition of enjoyment of individual rights).

105. It is universally recognized that all cultures form part of the common heritage of humankind. It would therefore be contradictory for States to deny, in international human rights instruments, the central collective aspects of Indigenous peoples' cultures.

In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage of mankind.

*Declaration of Principles of International Cultural Cooperation*, proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, fourteenth session, 4 November 1966, Art. 1, para. 3.

... cultural diversity is as necessary for humankind as biodiversity is for nature. In this sense, it is the common heritage of humanity and should be recognized and affirmed for the benefit of present and future generations.

*UNESCO Universal Declaration on Cultural Diversity*, Resolution 25 adopted by the General Conference at its 31st session, (2001), Art. 1.

The European Parliament ... Reaffirms the positive contribution of indigenous peoples' civilizations to mankind's common heritage and the essential role which they have played and which they must continue to play in the conservation of their natural environment ...

European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, Eur. Parl. Doc. PV 58(II) (9 February 1994), para. 11.

106. Based on the above, we respectfully conclude that the United Nations and its Member States and regional agencies have no authority to deny Indigenous peoples our collective human rights.

*The United Nations is a creature of a treaty, and as such it exercises authority legitimately only insofar as it deploys powers which the treaty parties have assigned to it.* Or, to borrow a phrase from the jurisprudence of the United States Supreme Court, the Charter creates a governance of limited enumerated powers. These may be modestly augmented by a "penumbra" of other powers which are necessarily incidental to the effective implementation of the enumerated ones.

*If the Organization were to stray beyond this perimeter – the limits of the specifically delegated powers and their "penumbra" – then its actions would cease to be legitimate.*

T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), at p. 219. [emphasis added]

107. In order to cease the perpetuation of racial discrimination in this regard, the U.N. and its Member States have an affirmative obligation to be vigilant and affirm the inherent collective rights of Indigenous peoples.

*Reaffirms* that it is a purpose of the United Nations and the task of all Member States, in cooperation with the Organization, to promote and encourage respect for human rights and fundamental freedoms and to remain vigilant with regard to violations of human rights wherever they occur ...

U.N. General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, Res. 54/174, 15 February 2000, para. 2.

108. These conclusions are reinforced by a wide range of values and principles in international law, including the Purposes and Principles of the *U.N. Charter* that require respect for, and observance of, human rights.

#### 4.2.2 Use of the term “peoples” or “Indigenous peoples”

109. Some States can accept the term “peoples” or “Indigenous peoples” in the draft *U.N. Declaration*. However, other States appear to be seeking a variety of ways to avoid equal application of the right of self-determination to Indigenous peoples *under international law*:

Some States can accept the use of the term “indigenous peoples” pending consideration of the issue in the context of discussions on the right to self-determination. Other States cannot accept the use of the term “indigenous peoples”, in part because of the implications this term may have in international law, including with respect to self-determination and individual and collective rights. Some delegations have suggested other terms in the declaration, such as “indigenous individuals”, “persons belonging to an indigenous group”, “indigenous populations”, “individuals in community with others”, or “persons belonging to indigenous peoples”.

“Compilation of Amendments Proposed by Some States for Future Discussions Based on the Sub-Commission Text” in U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2002/98, 6 March 2002 (Chairperson-Rapporteur: Mr. Luis-Enrique Chávez (Peru)), Annex I, p. 22.

110. States that seek to restrict or deny Indigenous peoples our status as “peoples”, in order to restrict or deny the our right of self-determination, are violating the *International Convention on the Elimination of All Forms of Racial Discrimination* and the *International Covenant on Civil and Political Rights*.

... any distinction, *exclusion, restriction* or preference based on race, colour, descent, or national or ethnic origin which has the *purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing*, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

*International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. *Adopted by U.N. General Assembly on December 21, 1965, opened for signature on March 7, 1966, and entered into force on January 4, 1969, Art. 1. [emphasis added]*

... the term "*discrimination*" as used in the Covenant should be understood to imply *any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.*

Human Rights Committee, General Comment No. 18, *Non-discrimination*, 37<sup>th</sup> sess., (1989), at para. 7.

[The right of self-determination] now applies to all peoples in all territories, not just colonial territories, and to all peoples within a state.

R. McCorquodale, "Human Rights and Self-Determination" in M. Sellers, ed., *The New World Order [:] Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford/Washington, D.C.: Berg, 1996) 9, at p. 9.

There are no longer any scientific or historical grounds to doubt that the lands and territories settled by Europeans in the New World were, and continue to be, occupied by organized societies of indigenous peoples who have their own cultures, laws, languages, lands, beliefs and other attributes which characterize them as peoples and nations.

R.J. Epstein, "The Role of Extinguishment in the Cosmology of Dispossession" in G. Alfredsson & M. Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Kluwer Law International, 2002) 45, at p. 47.

111. In the past, a similar approach against women was attempted unsuccessfully by Canada. In the 1920s, the Canadian government sought to deny all women in Canada the status of "persons" under the law since "persons" were eligible for appointment to the Senate. This action was ultimately held to be invalid by the Privy Council in London. Women were held to be "persons" and could take part in Canadian political life as Senators.

*Edwards v. A.-G. Canada*, [1930] A.C. 124 (P.C.)

112. Neither international institutions nor States have any valid authority to withhold from, or deny, Indigenous peoples our status as “peoples”, in order to restrict or deny us our right to self-determination or other human rights. Yet this is what some States are continuing to do in the UNCHR inter-sessional Working Group. Unconscionably, similar approaches are tolerated within the European Union and the Organization of American States.

There is no common EU position on the use of the term indigenous peoples. Some Member States are of the view that indigenous peoples are not to be regarded as having the right of self-determination for the purposes of Article 1 of the ICCPR and the ICESCR, and that use of the term does not imply that indigenous people or peoples are entitled to exercise collective rights.

Council of the European Union, “Council Conclusions on Indigenous Peoples”, Document 13466/02, 18<sup>th</sup> of November 2002, n. 1.

... note that the use of the term "peoples" in this document cannot be construed as having any implications as to the rights that attach to the term under international law and that the rights associated with the term "indigenous peoples" have a context-specific meaning that is appropriately determined in the multilateral negotiations of the texts of declarations that specifically deal with such rights ...

Summit of the Americas, 2001, *Plan of Action*, adopted at the Third Summit of the Americas, Québec City, Canada, April 22, 2001 (Implementation of International Obligations and Respect for International Standards).

113. As renowned international law professor James Crawford has concluded in a recent law article, to define the term “peoples” for international purposes “in such a way that it reflects neither normal usage nor the self-perception and identity of diverse and long-established human groups ... That would make the principle of self-determination into a cruel deception”.

J. Crawford, “The Right of Self-Determination in International Law: Its Development and Future”, *supra*, at p. 64.

114. Some Member States are seeking to include in the draft *U.N. Declaration* a reference to Art. 1, para. 3 of the *Indigenous and Tribal Peoples Convention, 1989*. Apparently, the intention and effect of inserting such a reference in the draft *Declaration* would be to limit or deny the status and right of self-determination of Indigenous peoples under international law, unless States agreed otherwise in the future.

Some delegations have suggested that if the term “indigenous peoples” is used, reference should also be made to article 1.3 of ILO Convention No. 169.

“Compilation of Amendments Proposed by Some States for Future Discussions Based on the Sub-Commission Text” in U.N. Commission on Human Rights, *Report of the*

*working group established in accordance with Commission on Human Rights resolution 1995/32, supra, Annex I, p. 22.*

The use of the term "peoples" in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.

*Indigenous and Tribal Peoples Convention, 1989 (No. 169), Art. 1, para. 3.*

115. However, Art. 1, para. 3 was included in the *Indigenous and Tribal Peoples Convention, 1989* for a wholly different purpose. In the Report of the Committee of the International Labour Organization (ILO), it is expressly stated that this clause was inserted because the matter of self-determination was "outside the competence of the ILO". As a result, the clause was added to maintain the neutrality of the ILO on this matter.

The Chairman considered that the text was distancing itself to a certain extent from a subject which was *outside the competence of the ILO*. In his opinion, *no position for or against self-determination* was or could be expressed in the Convention, *nor could any restrictions be expressed in the context of international law*.

International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76<sup>th</sup> Session, Geneva, 1989, No. 25, p. 8, para. 42. [emphasis added]

116. One of the most outrageous State strategies to limit Indigenous peoples' status and human rights under international law continues to emanate from the United States. The National Security Council, which is headed by the President of the United States, has in effect targeted the world's 300 million Indigenous people as some kind of security risk. While there is one national security strategy for all of the United States, there is another very specific one to limit the human rights of all Indigenous peoples globally – in the absence of any factual, legal or political context.

The President of the United States shall preside over meetings of the [National Security] Council ...

The function of the Council shall be to advise the President with respect to the integration of domestic, foreign, and military policies relating to the national security so as to enable the military services and the other departments and agencies of the Government to cooperate more effectively in matters involving the national security.

*National Security Act, 50 U.S.C. 401, at s. 402 (National Security Council).*

National Security Council (U.S.), "The National Security Strategy of the United States of America", September 2002

National Security Council (U.S.), "Position on Indigenous Peoples", January 18, 2001.

117. Without exception, the U.S. seeks to categorically deny the world's Indigenous peoples full and equal application of the right of self-determination under the international human rights Covenants. This global strategy is being directed by means of a U.S. National Security Council document entitled, "Position on Indigenous Peoples", dated January 18, 2001. No other peoples in the world are singled out, as a class of people, for such wholesale discriminatory treatment.
118. In the U.S. National Security Council's "Position on Indigenous Peoples", specific instructions are issued to all U.S. delegations in international affairs. Directives are given as to how Indigenous peoples' status as "peoples" and our right to self-determination, including our right to natural resources, must be expressed. The intention and effect is to subject Indigenous peoples to a standard that is less than and different from that of other peoples under international law.

The US delegation should support use of the term "internal self-determination" in both the UN and OAS declarations on indigenous rights, defined as follows:

"Indigenous peoples have a right of *internal* self-determination. By virtue of that right, they *may negotiate their political status within the framework of the existing nation-state* and are free to pursue their economic, social, and cultural development. ..." (para. 3, emphasis added)

... the US delegation to both the UN and OAS working groups on the indigenous declarations will read a prepared statement that expresses the US understanding of the term "internal self-determination" and indicates that it does not include a right of independence or permanent sovereignty over natural resources. (para. 4)

While the US domestic concept of self-determination is similar to the rights articulated in the draft declaration, *it is not necessarily synonymous with more general understandings of self-determination under international law.* (para. 4, emphasis added)

... although the purpose of the UN and OAS declarations is to set forth the rights enjoyed by indigenous peoples, other international declarations, actions plans, etc., that do not define the rights of indigenous peoples with regard to self-determination and sovereignty over natural resources may nonetheless make reference to indigenous groups. In such instances, the United States would be able to support the use of the term indigenous "peoples" but only with a footnote that states as follows:

"The use of the term "peoples" in this document shall not be construed as having any implications as regards the rights that may attach to the term under international law." (para. 5)

National Security Council (United States), "Position on Indigenous Peoples", January 18, 2001.

119. Rather than ensuring our security, the U.S. National Security Council Position generally promotes the insecurity of the world's Indigenous peoples by undermining our fundamental status and human rights. The U.S. position also constitutes a clear violation of the principle of "equal rights and self-determination of peoples".

*The term "equality of peoples" [in Art. 1(2) of the U.N. Charter] was meant to underline that no hierarchy existed between the various peoples. To this extent, the prohibition of racial discrimination was transferred from the national level to the international level of international relations. Apart from that, the principle of equality of peoples and the right to self-determination are united. With this, it is assured that no peoples can be denied the right to self-determination on the basis of any alleged inferiority.*

R. Wolfrum, "Chapter 1. Purposes and Principles" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 49, at p. 53. [emphasis added]

120. At the same time, U.S. Senators are indicating to Indigenous leaders and others that Indigenous peoples have internationally renowned skills that are being used to enhance global security and U.S. "Indian tribes" should be a "full partner in the development of tactical and strategic homeland security plans":

As part of the "Shadow Wolf" initiative, Native American Customs agents are instrumental in tracking and apprehending smugglers and criminals in parts of the American Southwest that no one else can penetrate. They represent a large number of tribes including the Tohono O'Odham, Pima, Omaha, Lakota, Navajo, Sac and Fox, Yurok, and Otoe- Missouri.

...

Their skills are so valued that they've been dispatched to several former Soviet states and the Baltics, where they train officers there to identify and track people who cross international borders on foot, often smuggling weapons.

"Prepared Remarks by Senator Ben Nighthorse Campbell Vice Chairman - Committee on Indian Affairs To the National Tribal Summit on Homeland Security Organized by the National Native American Law Enforcement Association", Reno, Nevada, October 23, 2002.

... we believe that Indian tribes ought to be made a full partner in the development of tactical and strategic homeland security plans with particular emphasis on border security, the protection of critical infrastructure on Indian lands, integrated law enforcement, and emergency response and medical capacity planning and implementation.

Letter, dated July 23, 2002, to Chairman Joseph Lieberman and Senator Fred Thompson, Government Affairs Committee, U.S. Senate, from Chairman Daniel K. Inouye and Vice-Chairman Ben Nighthorse Campbell, Senate Committee on Indian Affairs.

121. In regard to Indigenous peoples' right of self-determination (including the right to natural resources), the United States seeks to evade its affirmative obligation under the *International Covenant on Civil and Political Rights*. Yet, in ratifying the *Covenant*, the U.S. Senate urged other States "wherever possible [to] refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the *Covenant*, even when such restrictions and limitations are permissible ...."

That it is the view of the United States that States Party to the *Covenant* should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the *Covenant*, even when such restrictions and limitations are permissible under the terms of the *Covenant*.

...

That the United States declares that the right referred to in Article 47 [inherent right of all peoples to their natural wealth and resources] may be exercised only in accordance with international law.

*U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights*, 138 Cong. Rec. S4781-01 (daily ed., April 2, 1992), para. III.

#### 4.2.3 Right of Indigenous peoples to self-determination

122. Indigenous peoples have repeatedly emphasized that our right of self-determination is a core element of the draft *U.N. Declaration* and must be affirmed in a manner consistent with principles of equality and non-discrimination. We have also reminded States that the right of self-determination is a democratic entitlement and that racial discrimination is incompatible with democratic principles.

... *self-determination is the oldest aspect of the democratic entitlement* ... Self-determination postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.

T. Franck, "The Emerging Right to Democratic Governance", (1992) 86 Am. J. Int'l L. 46, at p. 52. [emphasis added]

... the denial of self-determination is essentially incompatible with true democracy. Only if the peoples' right to self-determination is respected can a democratic society flourish ...

R. Stavenhagen, "Self-Determination: Right or Demon?" in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 1, at p. 8.

... political platforms based on racism ... or doctrines of racial superiority and related discrimination must be condemned as incompatible with democracy ..., and that racial discrimination condoned by governmental policies violates human rights ...

U.N. Commission on Human Rights, *The Incompatibility Between Democracy and Racism*, E/CN.4/RES/ 2000/40, preamble.

...any doctrine of superiority based on racial differentiation is ... scientifically false, morally condemnable, socially unjust and dangerous, and ... there is no justification anywhere for racial discrimination, in theory or in practice, anywhere ...

*International Convention on the Elimination of All Forms of Racial Discrimination*, preamble.

123. In addition, the principle of equal rights and self-determination of peoples and the right of self-determination are considered to be essential elements in strengthening international peace and understanding.

The Purposes of the United Nations are:

...  
2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace ...

*Charter of the United Nations*, Art. 1.

The Committee considers that history has proved that the realization of and respect for the right of self-determination of peoples contributes to the establishment of friendly relations and cooperation between States and to strengthening international peace and understanding.

Human Rights Committee, General Comment No. 12, *Article 1*, 21<sup>st</sup> sess., A/39/40 (1984), para. 8.

124. Yet, despite these interrelated values and principles, some States still seek to avoid affirming that the right of self-determination *under international law* applies to “all peoples” including Indigenous peoples.

Literal as well as more comprehensive interpretation supports the evidence that the words “*all* peoples have the right ...,” in Article 1 refer to any people irrespective of the international political status of the territory it inhabits. It

applies, then, not only to the peoples of territories that have not yet attained independence, but also to those of independent and sovereign states.

A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 92, at p. 94.

125. Although not all agree, many jurists characterize the right of self-determination as a peremptory norm (*jus cogens*) under international law. As a peremptory norm, the right of self-determination cannot be derogated from by States in the draft *U.N. Declaration*.

The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law. However, this evaluation is also rejected by some. It can nevertheless be proved that such a qualification is correct.

K. Doehring, "Self-Determination" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 56, at p. 70.

[N]o one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*.

H. Gros Espiell, Special Rapporteur, *The Right to Self-Determination: Implementation of United Nations Resolutions*, *supra*, at p. 12.

This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.

R. McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. L.Q. 857, at p. 858.

126. Some States are also ignoring the conclusions of U.N. treaty bodies. For example, the U.N. Human Rights Committee has confirmed that the right of self-determination of Indigenous peoples, like all peoples, is affirmed in Art. 1 of the human rights *Covenants*.

... the Committee expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article.

Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112, 5 November 1999, para. 17.

See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 8.

127. It is universally recognized that human rights are indivisible, interdependent and interrelated. Nevertheless, some States in the UNCHR Working Group are still attempting to only affirm a portion of the human right of self-determination in any draft U.N. Declaration.

Peoples' right of self-determination takes a prominent place in the International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights respectively. This right remains relevant in today's international context and deserves further the attention of the international community.

The right of self-determination, by virtue of which peoples can freely determine their political status and freely pursue their economic, social and cultural development, clearly illustrates the interdependence, indivisibility and interrelation of all human rights recognized in the 1993 Vienna Declaration on Human Rights.

“Statement by Mrs. Hanne Fugl Eskjaer, First Secretary, Permanent Mission of Denmark to the UN on behalf of the European Union”, UNGA, 57<sup>th</sup> Sess., Third Committee, Item 107 and 108 (Elimination of Racism and Racial Discrimination and the Right of Peoples to Self-Determination), New York, 23 October 2002.

128. In today's complex world, aspects of “internal” and “external” self-determination are interrelated and interdependent. In many essential ways, they are indivisible elements of the human right to self-determination.

Both the internal and external aspects of the right to self-determination of peoples and nations are constitutive and inseparable elements of this basic collective human right.

F. Przetacznik, “The Basic Collective Right to Self-Determination of Peoples and Nations as a Pre-Requisite to Peace” (1990) 8 N.Y.L.Sch. J. of H. Rts. 49, at p. 55.

It would be artificial and illogical to argue that in the case of external self-determination the Covenants grant an international right, whilst in the case of internal self-determination this right would only exist and manifest itself within the municipal system of each Contracting State. The better view is that Article 1 common to the Covenants addresses itself directly to peoples, whatever the ‘dimension’ (internal or external) of the legal entitlement it provides for.

A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, *supra*, at p. 144.

129. In an era of globalization, Indigenous peoples are necessarily expanding the exercise of our self-determination beyond State borders. We are substantially expanding our role in standard-setting and other international forums. We are utilizing international complaints processes. We are engaging in international relations with a wide range of State governments and Indigenous peoples. Regardless of transnational boundaries, we are using and managing

our lands, territories and resources. These are positive contributions to the international community, as well as to our own nations and people. These are also essential manifestations of our external right of self-determination.

*Today, the distinction between domestic and foreign affairs is diminishing. In a globalized world, events beyond America's borders have a greater impact inside them.*

National Security Council (U.S.), "The National Security Strategy of the United States of America", September 2002, at p. 31. [emphasis added]

As stated by the Special [Parliamentary] Joint Committee, "*Domestic policy is foreign policy...foreign policy is domestic policy.*" For example, international trade rules now directly impact on labour, environmental and other domestic framework policies, previously regarded as the full prerogative of individual states.

Canada, *Canada in the World*, Canadian Foreign Policy Review, 1995 in [http://www.dfait-maeci.gc.ca/foreign\\_policy/cnd-world/menu-en.asp](http://www.dfait-maeci.gc.ca/foreign_policy/cnd-world/menu-en.asp).

This false dichotomy [of "internal" and "external" self-determination] has been set up by States in order to confine indigenous peoples right to self-determination to one of domestic or State prescription. ... The expressions of indigenous peoples in this seminar, at the UN, the Arctic Council and other international fora are examples of the external exercise of the right to self-determination. We, ourselves, are expressing our worldviews and perspectives on the international plane, and making our voices heard outside of or external to our own communities. And, this is one aspect of the right to self-determination.

D. Sambo Dorough, "Indigenous Peoples and the Right to Self-Determination: The Need for Equality: An Indigenous Perspective" in International Centre for Human Rights and Democratic Development, *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: ICHRDD, 2002) 43 at p. 44-45.

130. State objections to affirming this collective human right of indigenous peoples have no justifiable basis. Should this inalienable right not be recognized under international law for Indigenous peoples with the same emphasis and on an equal footing as for non-Indigenous peoples, States would be violating the peremptory norm that prohibits racial discrimination.

Failure to recognize indigenous peoples' right to self-determination, when this right is readily accorded to other, non-indigenous peoples, is clearly racism.

International Centre for Human Rights and Democratic Development, *Libertas*, Summer 2001, vol. 11, No. 1, p. 3 (quoting its then President, the Hon. Warren Allmand).

... I believe that discrimination and racism are at the heart of the indigenous issue, whether this is expressed in the reluctance of many States to recognize the right of self-determination of indigenous peoples - a right recognized for all other peoples - or in the absurd denial of the use of the term "indigenous peoples", contradicting all logic of language and pretending in so doing that the different indigenous peoples of the world do not have a language, history or culture unique to them, or in the insistence by the dominant world that indigenous peoples do not have their own long-established and dynamic systems of knowledge and law.

*Working Paper on discrimination against indigenous peoples submitted by Mrs. Erica-Irene Daes in accordance with Sub-Commission resolution 1999/20, E/CN.4/Sub.2/2001/2, 18 August 2001, para. 11.*

The exclusion of an indigenous people from the status of being a "people" has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination.

C. Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, (1996) 18 Human Rts. Q. 814, at p. 817.

The refusal of governments to acknowledge the unqualified right of self-determination for Indigenous Peoples indicates a deep-seated racism at the heart of the international human rights system. It has enormous negative consequences across a range of areas that directly affect the lives and well-being of Indigenous Peoples ...

B. Butler, "Sydney Meeting: Neglecting Collective Rights is Racism" in Netherlands Centre for Indigenous Peoples (NCIV), ed., *Final Report Indigenous Peoples' Millennium Conference, supra*, at p. 32.

131. Such an act would also run counter to the existing affirmative obligations of states under the *Charter of the United Nations*, Arts. 1, 2 and 55c), namely, to promote universal respect for, and observance of, human rights and freedoms, based on respect for the principle of equal rights and self-determination of peoples. States would also fail to honor their legal obligations in Art. 1, para. 3, of the two international human rights Covenants to "promote the realization of the right of self-determination, and ... respect that right, in conformity with the provisions of the Charter of the United Nations".
132. It is important to note that Canada has explicitly recognized and committed itself to the basic international law principles that we are raising in regard to the right of self-determination:

[The right of self-determination] ... is fundamental to the international community, and its inclusion in the UN Charter, and in the *International Covenant on Civil and Political Rights*, and the *International Covenant on*

*Economic, Social and Cultural Rights* bears witness to the important role that it plays in the protection of human rights of all peoples. ... **Canada is therefore legally and morally committed to the observance and protection of this right. We recognize that this right applies equally to all collectivities, indigenous and non-indigenous, which qualify as peoples under international law.**

Canada, "Statements of the Canadian Delegation", U.N. Commission on Human Rights, 53rd Sess., Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 2nd Sess., Geneva, 21 October - 1 November 1996, cited in *Consultations Between Canadian Aboriginal Organizations and DFAIT in Preparation for the 53rd Session of the U.N. Commission on Human Rights, February 4, 1997* (statement on Art. 3, right to self-determination, on October 31, 1996, emphasis added).

133. While Canada supports the current text on the right of self-determination in the draft *U.N. Declaration*, it is insisting upon adding additional language either within or outside the same Article. This was made clear at an OAS Working Group meeting in November 2003.

134. The additional texts proposed by Canada (see Options 1 and 2 quoted below) imply the requirement of an agreement with the State concerned on the "realization" or "implementation" of the right of Indigenous peoples to self-determination. If so, this would in effect confer on States a veto on the exercise of Indigenous peoples' human right of self-determination. It would also constitute a significant derogation from Article 1 of the international human rights Covenants and create a discriminatory double standard under international law.

**Option 1:**

States and indigenous peoples shall work together towards the realization of this right, recognizing the jurisdictions and responsibilities of governments, the needs, circumstances, aspirations and identity of the indigenous peoples concerned, and the importance of achieving harmonious relations.

or:

**Option 2:**

Implementation of the right is a matter for resolution between the state and indigenous peoples, respecting the jurisdiction and competence of governments and the needs, circumstances and aspirations of the indigenous peoples involved.

Canada, "Canadian Proposal: Article III, Proposed American Declaration on the Rights of Indigenous Peoples", Organization of American States, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Washington, D.C., November 10, 2003.

#### 4.2.4 Rights to lands, territories and natural resources

135. In all regions of the world, the rights to lands, territories and natural resources are of critical importance to Indigenous peoples. Indigenous lands, territories and resources have also always been prime targets for dispossession by States.

In their interventions on the provisions of the declaration concerning lands, territories and natural resources, all indigenous representatives emphasized the critical importance of their relationship with their lands, territories and resources for their survival, their spiritual, economic, social and cultural well-being, and the effective exercise of indigenous self-determination.

U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2002/98, 6 March 2002 (Chairperson-Rapporteur: Mr. Luis-Enrique Chávez (Peru)), p. 8, para. 38.

...[indigenous peoples] are surrounded by other, more powerful nations that desperately want our lands and resources and for whom we pose an irritating problem. This is just as true for the Indians of the Americas as it is for the tribals of India and the aborigines of the Pacific. This economic reality is also a political reality for most if not all indigenous peoples. The relationship between ourselves and those who want control of us *and* our resources is not a *formerly* colonial relationship but an *ongoing* colonial relationship.

H.-K. Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i*, revised ed. (Hawai'i: University of Hawai'i Press, 1999), at p. 103. [emphasis in original]

*Concerned* that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonization and dispossession of their lands, territories and resources ...

*U.N. Declaration on the Rights of Indigenous Peoples* (Draft), preamble.

136. The right to natural resources is an integral part of the right of self-determination under international law. This is explicitly confirmed in the two international human rights Covenants.

All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

*International Covenant on Civil and Political Rights*, Art. 1, para. 2.; *International Covenant on Economic, Social and Cultural Rights*, Art. 1, para. 2.

This paragraph [in Art. 1], however, is not merely a reaffirmation of the right of every state over its own natural resources; it clearly provides that the right over natural wealth belongs to *peoples*.

A. Cassese, "The Self-Determination of Peoples", in L. Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights, supra*, 92 at p. 103. [emphasis in original.]

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

*Declaration on the Right to Development*, adopted by General Assembly resolution 41/128, 4 December 1986, Art. 1, para. 2.

137. The U.N. Human Rights Committee has clearly applied to Indigenous peoples the natural resource provision in Article 1, para. 2 of the *International Covenant on Civil and Political Rights*. Moreover, the U.N. Committee on the Elimination of Racial Discrimination has emphasized that Indigenous peoples have the "right to own, develop, control and use their communal lands, territories and resources".

... the [Human Rights] Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2). ... The Committee ... recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant.

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada, supra*, para. 8.

The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources (art. 1, para. 2).

Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, U.N. Doc. A/55/40, paras. 498-528, 28 July 2000.

Similarly, see Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway, supra*, para. 17.

The Committee [on the Elimination of Racial Discrimination] especially calls upon States parties to *recognise and protect the rights of indigenous peoples to*

*own, develop, control and use their communal lands, territories and resources* and, where they 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 these lands and territories.

Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted at the Committee's 1235<sup>th</sup> meeting on 18 August 1997), para. 5. [emphasis added]

138. Even in regard to complaints filed under the ICCPR *Optional Protocol* – where the Human Rights Committee has interpreted its mandate as limited to human rights violations of individuals – the Committee is using the collective right of Indigenous peoples to self-determination as a normative standard. This is increasingly apparent in complaints concerning violations of other human rights under the *International Covenant on Civil and Political Rights*.

*Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976 (communications from individuals for alleged human rights violations under the *Covenant*).

As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights [ICCPR, arts. 6 to 27 inclusive]. Furthermore, *the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27* [right to enjoy one's culture, etc. in community with others in one's group].

*Mahuika et al. vs. New Zealand* (Communication No. 547/1993, 15/11/2000), Human Rights Committee, UN Doc. CCPR/C/70/D/547/1993 (2000), para. 9.2. [emphasis added]

*... the right of self-determination ... is implied and used as a normative standard in the application of Article 27.* Together with the recent pronouncements by the Human Rights Committee explicitly on Article 1 in relation to Canada and Norway, the development under Article 27 points towards the following conclusion: Indigenous peoples and their representatives should put more emphasis on the economic or resource dimension of the right of self-determination as a justification for their more general claims on self-determination and in their everyday struggle for a stronger say in decision-making that affects their lives.

M. Scheinin, "The Right to Self-Determination Under the Covenant on Civil and Political Rights" in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 179, at p. 198. [emphasis added]

139. Failure to fully recognize the right of Indigenous peoples to natural resources under Article 1 of the international human rights Covenants would be clearly discriminatory. It would also severely impede our right to development, which is an interrelated and interdependent human right.

The Committee is also concerned over allegations of forced relocation and violations of the indigenous peoples' right to own, develop, control and use their traditional homelands and resources in the name of wildlife preservation.

The Committee recommends that the State party take stricter measures to combat discrimination against indigenous peoples, in line with its General Recommendation XXIII on Indigenous Peoples. It requests the State party to include in the next report information on actions taken, especially on its efforts to reconcile indigenous peoples' land rights with the preservation of wildlife.

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Nepal*, CERD/C/64/CO/5, 12 March 2004, para. 13.

Failure to respect the right of peoples to self-determination, and their right to permanent sovereignty over their natural resources is a serious obstacle to the realization of the right to development as a human right.

U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, U.N. Doc. E/CN.4/1990/9/ Rev. 1, 26 September 1990, p. 43, para.161.

We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.

*United Nations Millennium Declaration, supra*, Art. 24.

The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights.

United Nations World Conference on Human Rights, *Vienna Declaration, supra*, (Part I), para. 10.

140. The lands, territories and natural resources of Indigenous peoples are essential elements of our right of self-determination, including self-government. Without adequate lands and resources, Indigenous peoples will be “pushed to the edge of economic, cultural and political extinction”.

With reference to the conclusion by [the Royal Commission on Aboriginal Peoples] that *without a greater share of lands and resources institutions of aboriginal self-government will fail*, the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence. The Committee recommends that *decisive and urgent action be taken towards implementation of the RCAP recommendations on land and resource allocation*.

Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada, supra*, para. 8. [emphasis added]

Aboriginal nations need much more territory to become economically, culturally and politically self-sufficient. If they cannot obtain a *greater share of the lands and resources* in this country, their institutions of self-government will fail. Without adequate lands and resources, Aboriginal nations will be unable to build their communities and structure the employment opportunities necessary to achieve self-sufficiency. Currently, on the margins of Canadian society, they will be *pushed to the edge of economic, cultural and political extinction*.

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(2), at p. 557. [emphasis added]

We have the right to benefit from the resources of the land as an expression of our right of self-determination. We may not be denied a means of subsistence; moreover, we may not be denied our *own* means of subsistence. We have the right to use our lands and waters to live by our own means as we always have, and by whatever means we deem necessary to address contemporary challenges. *Self-determination protects our right to subsist, and it protects as well our right to subsist based on our own values and perspectives*. In view of the profound relationship we have with our lands, resources and environment, subsistence for indigenous peoples has vital economic, social, cultural, spiritual and political dimensions.

T. Moses, "The Right of Self-Determination and Its Significance to the Survival of Indigenous Peoples", in P. Aikio & M. Scheinin, eds., *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 155, at p. 161. [emphasis added]

*Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government*. This territorial and resource base must be guaranteed to these peoples for their subsistence and the ongoing development of indigenous societies and cultures ...

United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1, at para. 4. [emphasis added]

141. Denial of the right to lands, territories and natural resources under international law will perpetuate the impoverishment and injustices that most Indigenous peoples suffer. Violations of our human right to lands, territories and natural resources “represent an attack on [our] human dignity’s very core”.

... the Committee [on the Elimination of Racial Discrimination] recommends that the State party adopt urgent measures to recognize and protect, in practice, the right of indigenous peoples to own, develop, control and use their lands, territories and resources.

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Brazil*, CERD/C/64/CO/2, 12 March 2004, para. 15.

The Committee notes with concern complaints by indigenous and tribal peoples in the interior about the deleterious effects of natural-resource exploitation on their environment, health and culture.

The Committee wishes to point out that development objectives are no justification for encroachments on human rights, and that along with the right to exploit natural resources there are specific, concomitant obligations towards the local population ...

Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9, 12 March 2004, para. 15.

All human rights — civil, political, economic, social and cultural — are comprehensive, universal and interdependent. They are the foundations that support human dignity, and any violations of human rights represent an attack on human dignity’s very core. Where fundamental human rights are not protected, States and their peoples are more likely to experience conflict, poverty and injustice.

U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General*, A/56/326, 6 September 2001, p. 36, para. 195.

If we mean to live by this approach of abiding by the international minimum standards, we must address the affront to human dignity posed by widespread poverty.

U.N. Commission on Human Rights, *Report of the United Nations High Commissioner for Human Rights and Follow-Up to the World Conference on Human Rights*, E/CN.4/2003/14, 26 February 2003, p. 8, para. 24.

142. Clearly denials and other violations of Indigenous peoples' rights to lands, territories and natural resources continue to be primary root causes of disadvantage that must be fully redressed.

**No policy or strategy for improving the access to justice by indigenous peoples or for eliminating the abuses in the justice system can ultimately be successful in the long term if the root causes of disadvantage are not also addressed.**

U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, 2004, *supra*, p. 22, para. 83 (Conclusion) [bold in original]

143. In September 2003, a major problem arose at the ninth session of the UNCHR Working Group when Canada and Australia tabled a proposal to seek wholesale changes to all of the lands and resources provisions in the draft *U.N. Declaration*. If adopted, their suggested changes would severely undermine the careful contextual bases for Indigenous land and resource rights that have been developed at the U.N. during the past two decades.

Australia and Canada, "Australia-Canada Proposal for Alternate Language for Articles 25, 26, 27, 28 and 30", Working Group on the Draft Declaration on the Rights of Indigenous Peoples, September 2003.

144. It is difficult to understand why Australia and Canada would propose, in effect, to deny Indigenous peoples our *inherent* rights to lands, territories and resources in a manner inconsistent with international law. These *substantive* rights affirmed in the draft *U.N. Declaration* cannot simply be replaced with a *possibility* that States might recognize some rights in the future through vague and discretionary State-established processes. Nor can our rights be otherwise limited in international law to what exists under any particular State's domestic law (see also sub-heading 4.1 above).

Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

*International Covenant on Civil and Political Rights*, Art. 47; and *International Covenant on Economic, Social and Cultural Rights*, Art. 25.

States should provide fair and equitable processes to recognise, determine, adjudicate or agree upon the rights or interests of indigenous peoples in relation to lands and resources to which they have a traditional connection. (para. 3)

States should, as appropriate provide for the identification, recording or registration of such rights and interests. (para. 4)

... indigenous peoples, through the processes provided under paragraphs 3 and 4 or otherwise under domestic law, have ownership, exclusive use or possession of lands or resources as a result of their traditional connection ... (para. 6)

Australia and Canada, "Australia-Canada Proposal for Alternate Language for Articles 25, 26, 27, 28 and 30", *supra*.

145. In our respectful view, there are no justifiable reasons for such an extreme Australia-Canada proposal. Both States have ratified the two human rights *Covenants* and the relevant ICCPR *Optional Protocol*. Their proposal is not consistent with the duty to fulfill in good faith the obligations assumed by States in accordance with the Purposes and Principles of the *U.N. Charter*. It is not compatible with the conclusions and decisions of the Human Rights Committee and the Committee on the Elimination of Racial Discrimination. Nor does the proposal respect the prohibition against racial discrimination and other key aspects of international law.
146. It is not a valid starting point for either State to deny Indigenous peoples our resource rights under Art. 1, para. 2 of the *Covenants*. From both an international and domestic law perspective, Australia and Canada should act consistently with the clarifications, conclusions and decisions of U.N. treaty bodies.

In many areas international law has made significant inroads into national legal systems, piercing their 'armour'. It no longer constitutes a different legal realm from the various municipal systems, but has a huge daily *direct* impact on these systems. It conditions their life in many areas and even contributes to shaping their internal functioning and operation. In addition, many international rules address themselves directly to individuals, without the intermediary of national legal systems ...

A. Cassese, *International Law*, *supra*, at p. 166.

The activities of human rights treaty monitoring bodies contribute to the implementation of the [U.N. Millennium] goals. ... *The treaty bodies through their general comments contribute to the clarification of the legal and policy ramifications of the implementation of the human rights standards* and thus provide an invaluable input to the concretization and realization of the goals.

Economic and Social Council, *Human Rights: Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. Doc. E/2003/73, 25 June 2002, p. 3, para. 4. [emphasis added]

147. For example, in terms of Canada's domestic law, the Supreme Court of Canada relies significantly on the interpretation of international human rights instruments by the U.N. Human Rights Committee and other treaty bodies. Most recently, in examining the constitutionality of the use of reasonable force by parents and teachers against children, the majority and dissenting opinions of the Supreme Court cite the findings of the Committee in its various Reports and Conclusions:

Neither the *Convention on the Rights of the Child* nor the *International Covenant on Civil and Political Rights* explicitly require state parties to ban all corporal punishment of children. In the process of monitoring compliance with the *International Covenant on Civil and Political Rights*, ... the Human Rights Committee of the United Nations has expressed the view that corporal punishment of children in schools engages Art. 7's prohibition of degrading treatment or punishment: see for example, Report of the Human Rights Committee, Vol. I, ... (1995), at paras. 426 and 434; Report of the Human Rights Committee, Vol. I, ... (1999), at paras. 358; Report of the Human Rights Committee, Vol. I, ... (2000), at paras. 306 and 429. The Committee has not expressed a similar opinion regarding parental use of mild corporal punishment. (para. 33, McLachlin C.J. for the majority)

The Chief Justice has referred, at paras. 33, to the Report of the Human Rights Committee, Vol. I, ... (1995) with respect to corporal punishment of children in schools. I would also make reference to the Concluding Observations of the Committee on the Rights of the Child. (para. 186, Arbour J. dissenting on other grounds)

*Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, [2004] S.C.J. No. 6, online:QL, 2004 SCC 4.

See also *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, para. 73 (U.N. Committee against Torture); *Gosselin v. Québec (Attorney General)*, [2000] 4 S.C.R. 429, at paras. 146-147 (Committee on Economic, Social and Cultural Rights); and *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 821 (Human Rights Committee).

148. These actions by Australia and Canada continue to be heavily criticized by Indigenous peoples and human rights organizations. Such acts illustrate how States should not conduct themselves, if substantial progress in Indigenous human rights standard-setting is to be made.

We are quite concerned over what appears to be serious inconsistencies in Canada's positions and strategies. In its public statements, Canadian officials have been relatively supportive of the draft Declaration, however in negotiations at the UN working group Canada persists in allying with the States that have shown the greatest resistance to recognition of a strong Declaration: Australia, the United Kingdom, and the United States of America.

It is very difficult to understand why Canada, instead of working on consensus by pursuing dialogue with the Canadian Indigenous experts and organizations that are taking an active part in the debate, ... has chosen to join Australia in

supporting a revision of the part of the Declaration concerning lands, territories, and resources. This was presented at the working group meeting held in September 2003. Such a revision, whose only other supporters were the United Kingdom and the United States of America, would lower the standards proposed in the document currently being discussed.

Rights and Democracy, *et al.*, "A New Course on Indigenous Rights Is Urgently Needed: Major Canadian Human Rights Groups Make a Joint Appeal to the Canadian Government Concerning the Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Ottawa, 2 February 2004, available at <http://www.ichrdd.ca/frame2.iphtml?langue=0&menu=m01&urlpage=/english/commdoc/publications/jointAppealUN.html>.

149. As human rights defenders, we urge the U.N. and its Member States and regional agencies to ensure consistency with the principles of international cooperation and the duty to respect human rights. In the present context, this would entail explicit affirmation under international law of our right of self-determination, including our land and resource rights.

*Acknowledging* the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals, including ... from the refusal to recognize the right of peoples to self-determination and the right of every people to exercise full sovereignty over its wealth and natural resources ...

*Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, 4<sup>th</sup> preambular para.

To strengthen democracy, create prosperity and realize human potential, our Governments will:

...  
Seek to promote and give effect to the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms* [also referred to as the United Nations ... Declaration on Human Rights Defenders] ...

Summit of the Americas, 2001, *Plan of Action*, adopted at the Third Summit of the Americas, Québec City, Canada, April 22, 2001, heading 2 (Human rights and fundamental freedoms).

... one may ask whether the self-determination clause in the Declaration on the Rights of Indigenous Peoples should not be based on Article 1, *paragraph 2*, of the two Covenants, instead of only paragraph 1 as in the present draft. For most indigenous peoples, what self-determination is *really* about is their right to 'freely dispose of their natural wealth and resources' and a negative guarantee of not to 'be deprived of their own means of subsistence'.

M. Scheinin, "The Right to Self-Determination Under the Covenant on Civil and Political Rights", *supra*, at p. 198. [emphasis in original]

#### 4.2.5 Principle of territorial integrity

150. In regard to the UNCHR inter-sessional Working Group on the draft *U.N. Declaration on the Rights of Indigenous Peoples*, one of the main impediments to progress and consensus has been the insistence of some States to add specific language to the draft *Declaration* relating to the territorial integrity of States. The inclusion of such language is presented, in some instances, as a precondition for States' agreement to Art. 3 of the draft *Declaration* recognizing Indigenous peoples' right of self-determination.

151. In order to bridge existing differences, at the September 2003 session of the Working Group, the Nordic countries submitted a proposal suggesting the following amendment (underlined portion) to preambular paragraph 15 of the draft *U.N. Declaration*:

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right of self-determination, and further emphasizing that nothing in this Declaration shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples, and thus possessed of a government representing the peoples belonging to the territory without distinction of any kind ...

152. Upon carefully examining the Nordic proposal, a large number of Indigenous representatives in the Working Group concluded that the proposed Nordic amendment would create discriminatory double standards. In regard to Indigenous peoples, the interrelationship between the human right of self-determination and the principle of territorial integrity under international law would be significantly altered to our detriment. Our other human rights could also be severely undermined, in ways not yet fully determined.

American Indian Law Alliance *et al.*, "An Indigenous Proposed Alternative to the Nordic States' Proposal on Self-Determination", submitted by 20 Indigenous organizations and nations to the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 9<sup>th</sup> sess., Geneva, 15-26 September 2003 (Agenda item: Arts. 3 and 31)

153. States in the UNCHR Working Group generally claim that, in referring to the principle of territorial integrity, they are only seeking to reflect the 1970 *Declaration on Friendly Relations* and existing international law.

*Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 U.N. GAOR, Supp. (No. 28) 121, U.N. Doc. A/8028 (1971).

154. However, in sharp contrast to the Nordic States' proposed amendment, the 1970 *Declaration* does not subject all of the human rights of peoples and individuals to the principle of territorial integrity.

155. Rather the 1970 *Declaration* refers to "States conducting themselves in compliance with the principle of equal rights and self-determination of peoples *as described above*". The phrase "as described above" clearly refers to the principle of equal rights and self-determination *under international law*. In the 1970 *Declaration*, this principle is explicitly and inseparably linked to the right of all peoples to self-determination *under international law*:

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

...

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

*Declaration on Friendly Relations, supra*, ("principle of equal rights and self-determination of peoples"). [emphasis added]

156. Curiously, some States are seeking to include in the draft *U.N. Declaration* explicit reference to either the 1970 *Declaration* or a portion of its actual text, but they are not prepared to first fully recognize the right of Indigenous peoples to self-determination *under international law*. Therefore, these State proposals would significantly depart from the 1970 *U.N. Declaration*. They would also create in effect a discriminatory double standard.

157. Further, in our respectful view, it would be misleading and unjust to highlight in the draft *U.N. Declaration* solely the principle of territorial integrity. This could erroneously imply that the principle of territorial integrity has some special status or significance above a host of other international law principles – such as democracy, rule of law, respect for human rights, non-discrimination, and justice – which apply in the context of self-determination. Clearly, there is no hierarchy that would place the principle of territorial integrity above

respect for human rights or other international law principles identified in international instruments.

The Helsinki Final Act acknowledges as one of its 10 guiding principles the “(r)espect for human rights and fundamental freedoms ...” ... There is no hierarchy among these principles, and no government can claim they have to establish political or economic security before addressing human rights and democracy.

Organization for Security and Co-operation in Europe, *OSCE Human Dimension Commitments: A Reference Guide* (Warsaw, Poland: OSCE Office for Democratic Institutions and Human Rights, 2001), at xiii-xiv.

All OSCE commitments, without exception, apply equally to each participating State. Their implementation in good faith is essential for relations between States, between governments and their peoples, as well as between the organizations of which they are members.

Organization for Security and Co-operation in Europe, *Charter for European Security*, Istanbul, 1999, para. 7.

158. In regard to the draft *U.N. Declaration*, there are other reasons for not singling out the principle of territorial integrity for inclusion. First, the text of the 1970 *Declaration* is viewed as “incomplete” and that it covers too many issues in a “vague manner”. Second, it is said that the approach to self-determination in the Covenant is “much broader” and “the 1970 Declaration can be used only with caution”.

The text of the Declaration on Friendly Relations is incomplete if viewed as a blueprint for world order. Too many issues are not covered; too many of those that are covered are dealt with in a vague manner.

R. Rosenstock, “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey”, (1971) 65 Am. J. Int’l L. 713, at p. 735.

The approach to self-determination in the Covenant ... is much broader as regards both external and internal self-determination. As to the latter, under the Covenant political self-determination requires the observance by all contracting states of the principal civil and political rights proclaimed in later articles of the Covenant; under the Declaration on Friendly Relations, the only requirement is that the government represent “the whole of the people belonging to the territory without distinction as to race, creed or colour”. (p. 109)

The 1970 Declaration on Friendly Relations might also be used to some extent in interpreting Article 1 of the Covenant. ... [H]owever, the 1970 Declaration can be used only with caution, for it includes concepts that are at great variance with some basic conceptions of Article 1. *In particular, since its views of internal political*

*self-determination is much narrower than that of Article 1 of the Covenant, it would be unsound and improper to interpret Article 1 in the light of the narrower concept of the Declaration.* (p. 110)

A. Cassese, "The Self-Determination of Peoples" in L. Henkin (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights, supra.* [emphasis added]

159. Third, it is disturbing that States view the territorial integrity of States as a key element to be safeguarded against the status and rights of Indigenous peoples. Consistent with principles of diversity, justice, equality, and non-discrimination, the principle of territorial integrity should be viewed and used as one that also benefits the rights and interests of the Indigenous peoples concerned.

*... the ultimate purpose of territorial integrity is to safeguard the interests of the peoples of a territory.* The concept of territorial integrity is therefore meaningful so long as it continues to fulfill that purpose to all the sections of the people.

U. Umzurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972), at p. 234. [emphasis added]

160. Fourth, a central focus in the draft *U.N. Declaration* must be the integrity of Indigenous territories that has been severely undermined or destroyed by states or third parties. In both historical and contemporary times, this has occurred through colonialism, dispossession, discrimination, forced assimilation, genocide and outright theft.

Before colonisation of our lands, we have been fully functioning nations of Peoples with land, language, spirituality, governance and an ability to enter into international relations with neighbouring nations. Today we are reduced to a struggle for survival under the subjugation of colonial powers, which usurp our own sovereignty and territorial integrity. UN member States are adding insult to injury, by denying our proper status as Peoples under international law.

"Statement from the Pacific Region of the Indigenous Caucus", World Conference Against Racism (WCAR), Durban, 3 September 2001.

We know some states are concerned about separation and so-called territorial integrity. But, whoever considers the territorial integrity of Indigenous Peoples ... Our lands and resources are the most threatened of any peoples. For the world's Indigenous Peoples, the loss of land is the prelude to extinction. That is why we need special protection and the recognition of our right to exercise self-determination within our own lands.

National Chief Matthew Coon Come, Assembly of First Nations (Canada), "Statement to the United Nations Working Group on the Draft Declaration on the Rights of Indigenous Peoples", 2-13 December 2002.

Indian nations have been denied their most basic rights to sovereignty and territorial integrity simply because, at the time of Christendom's arrival in the Americas, they did not believe in the God in the Bible ...

S.T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power" 20 N.Y. U. Rev. Law & Social Change 303 (1993), at p. 309.

In regard to doctrines of dispossession imposed on Indigenous peoples, see generally:

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, U.N. Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, paras. 21-32.

P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, A study prepared for the Royal Commission on Aboriginal Peoples, vol. 1, 1995, c. 5.

161. Fifth, evidence of blatant abuses of the principle of territorial integrity against Indigenous peoples is already apparent in different parts of the world. As described below, this principle is being invoked in vague yet far-reaching ways in respect to Indigenous status, Indigenous traditions, and treaty negotiations with Indigenous peoples relating to a wide range of key issues, such as self-government, lands and resources, taxation powers, and Indigenous institutions.

Activists in Boa Vista said Venezuela was a century behind in recognizing Indian rights. Its laws seek to assimilate indigenous people and any attempt to give them special status is seen as a threat to the nation's territorial integrity.

M. Christie, "Amazon Indians Demand Development Rights", 31 August 1997, <http://forests.org/archive/brazil/indammt.htm>.

Creative solutions will have to be worked out in a number of key issues, including the need to ensure respect for indigenous traditions without resorting to crystalized concepts that might be construed as an open door to impairing the territorial integrity of States.

"Indigenous People", Statement by the Brazilian Delegation, New York, 1 November 1999, UNGA, 54<sup>th</sup> sess., Third Committee (Item 113).

See also Québec's current policy on Aboriginal affairs: Secrétariat aux affaires autochtones, *Partnership, Development, Achievement* (Québec: Gouvernement du Québec, 1998). In relation to future Aboriginal self-government negotiations (which include a wide range of related issues), the Québec government stipulates at p. 12 that

there are “fundamental reference points: territorial integrity, sovereignty of the National Assembly, legislative and regulatory effectivity”.

162. At international law, the principle of “territorial integrity” clearly does not apply to provinces, such as Québec. Nevertheless, a law was adopted in December 2000 that applies the principle of “territorial integrity of Québec” to potentially all matters within the province, regardless of whether it relates to secession or non-secession issues. In treaty negotiations on Indigenous land, resource and self-government rights, the government of Québec is increasingly imposing respect for the “territorial integrity of Québec” as a precondition for any agreement.

...this principle [of territorial integrity] applies only with respect to limits established between existing States, not to administrative boundaries within a State.

T. Bartoš, *Uti Possidetis, Quo Vadis?*, (1997) 18 Australian Yearbook of International Law 37, at p. 73.

The Government must ensure that the territorial integrity of Québec is maintained and respected.

*An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State* (Bill 99), S.Q. 2000, c. 46, s. 9.

According to [Aboriginal Affairs] Minister Benoît Pelletier, the actual participation of the Innu in the management of the territory, their governmental autonomy and revenue-sharing will all be subjected to the territorial integrity of Quebec.

M. Cloutier, “Le ministre Pelletier se questionne toujours sur l’entente”, *La Presse* (13 March 2004) p. A8. [unofficial translation]

[Aboriginal Affairs Minister] Pelletier said he wants assurances the territorial integrity of Quebec is not limited by the agreement, which would give Innu self-government and power to levy taxes in their territory.

K. Dougherty, “Province Backtracking on Innu Deal”, *The [Montreal] Gazette* (20 August 2003) p. A12. See also P. Breton, “L’entente avec les Innus remise en question”, *La Presse* (20 août 2003) p. A6.

163. Indigenous representatives have already stated that, if basic international values and principles are strictly adhered to without discrimination, consensus can be reached on “self-determination” and “territorial integrity”. States’ concerns regarding secession, as well as Indigenous concerns with actual and potential State abuses of “territorial integrity”, can be addressed in a manner consistent with international law.

... the ICC would like to appeal to the state government members of the Commission on Human Rights and the observer governments present to shift your focus away from the unnecessary fixation on the principle of territorial integrity that has hindered the progress of the Declaration. ... [T]here is no question in our minds that the nation state members of the UN know the underlying principles of international law which continue to be the framework for the maintenance of peace and security, and international cooperation. *These principles include far more than the principle of territorial integrity and by singling this concept out in the Declaration, it is likely to invite abuses or distortions of our right to self-determination.*

Inuit Circumpolar Conference, “Statement of Aqqaluk Lyngø”, U.N. Commission on Human Rights, Working Group on the draft Declaration, 24 September 2003. [emphasis added]

164. At the September 2003 meeting of the UNCHR Working Group, as a fair and balanced alternative, an overwhelming majority of the Indigenous Peoples’ Caucus submitted the following proposed amendments (underlined portion):

*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 affirm the fundamental importance of the right of self-determination of all peoples, and that this right applies equally to indigenous peoples. [preambular para. 14]

Bearing 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. [preambular para. 15]

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. [Art. 3]

“Statement of the Indigenous Peoples’ Caucus”, Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995, 9<sup>th</sup> sess., Geneva, September 23, 2003.

165. In regard to preambular para. 15, this proposed amendment would confirm that the right of self-determination of Indigenous peoples is exercised “in accordance with principles of international law”. This would ensure that the right of self-determination is exercised in a fair and balanced manner. **It would affirm the ability of States and others to freely invoke any principles of international law in the context of Indigenous peoples’ right to self-determination. Therefore, there would be no need to explicitly highlight the principle of territorial integrity in uncertain and potentially misleading ways.**

## V. Need to Renew Mandate and Improve U.N. Standard-Setting Process

166. As illustrated throughout this Joint Submission, the human rights situations confronting Indigenous peoples globally constitute a continuing crisis. However, as self-determining peoples, we will not play the role of victims. As international actors, we will continue to contribute to human rights standard-setting in a most positive manner.

167. In particular, we will continue to strive to ensure that the international human rights legal system is made fair and inclusive of all peoples, including Indigenous peoples.

168. This Joint Submission demonstrates that there are diverse and compelling reasons for the United Nations and its Member States not to terminate or otherwise abandon the human rights standard-setting process concerning Indigenous peoples. Rather it is urgent that the mandate of this process be renewed and the process itself improved. Our reasons include:

- i) The draft *U.N. Declaration on the Rights of Indigenous Peoples* that was approved by the Sub-Commission is a significant success, both in terms of its normative value and the democratic process that led to its formulation.
- ii) The United Nations and its Member States, specialized agencies and Indigenous peoples have invested considerable time, as well as human and financial resources, in contributing to the formulation of the draft *U.N. Declaration on the Rights of Indigenous Peoples*. This valuable investment and important precedent must not be discarded or otherwise abandoned by the U.N.
- iii) The adoption by the U.N. General Assembly of a Declaration on the rights of Indigenous peoples is a major objective of the International Decade. This objective has not yet been achieved.
- iv) The severe impoverishment of most Indigenous peoples worldwide – which to an overwhelming degree is the result of the discriminatory, colonial, exclusionary, assimilative, and genocidal policies and actions of States – clearly entails State responsibility. This damaging legacy must be effectively redressed.
- v) Grave violations and denials of Indigenous peoples' human rights have resulted in the severe undermining of Indigenous nations, communities and families and impairment of the mental and physical health of individuals – which in turn results in further obstacles to the enjoyment of our human rights. This debilitating cycle is intolerable, is affecting new generations of children and youth, and must be remedied.

- vi) In accordance with the Purposes and Principles of the *U.N. Charter*, the U.N. and Member States have strict, legally binding obligations to promote the respect and observance of human rights.
- vii) In relation to Indigenous peoples, the duty to respect human rights and other foundational values and principles of international and domestic legal systems continues to be seriously undermined.
- viii) The U.N. and Member States unequivocally affirm their support for and commitment to these values and principles. Therefore, it would be contradictory for them to terminate the UNCHR standard-setting process concerning Indigenous peoples' human rights.
- ix) The U.N., Member States and regional organizations have unequivocally committed themselves to combating impunity for violations of human rights. Impunity remains rampant in terms of contraventions of Indigenous peoples' human rights.
- x) This ongoing human rights crisis impacting upon Indigenous peoples is a stark reminder that the international human rights system is woefully inadequate and incomplete. In relation to Indigenous peoples, this system can and must be made more responsive, inclusive and effective.

169. The major "impediments" to making progress in the UNCHR Working Group and approving a draft *U.N. Declaration on the Rights of Indigenous Peoples* have repeatedly been the opposition by some States to the issues that are the most central to Indigenous peoples. These key subjects include: affirmation of the collective rights of Indigenous peoples; use of the term "peoples" or "Indigenous peoples"; right of Indigenous peoples to self-determination under international law; and rights of Indigenous peoples to lands, territories and resources.

170. In regard to all of these issues, the positions taken by these opposing States have one common consequence. Regardless of intention, the result in effect of these State positions would be to create a discriminatory and lesser standard for Indigenous peoples as compared with non-Indigenous peoples under international law (see heading IV above).

171. Similarly, a discriminatory double standard is being proposed by some States in regard to the principle of territorial integrity (see heading IV above).

172. The prohibition of racial discrimination is a peremptory norm (*jus cogens*). It also creates obligations of an *erga omnes* character (obligations owed to the international community as a whole). This provides further reason why the United Nations and Member States must take positive action to eliminate this unacceptable and persistent problem.

... the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted ...

Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism*, A/57/18 (Chapter XI)(C.), 11 January 2002, para. 4.

[*Erga omnes*] obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

*Barcelona Traction, Light, & Power Co. (Belgium v. Spain)*, [1970] I.C.J. Rep. 3 at p. 32, para. 34.

*Jus cogens* rules and *erga omnes* rules seek to protect and promote the common interests of States to a much more obvious degree than most rules of international law. They are constitutional rules which help define the fundamental characteristics of the international legal system: they play an important role in determining how rules of international law are developed, maintained and changed, and in protecting those human rights or civil liberties which are considered essential to the self-identity of the international legal system, and the international society it serves.

M. Byers, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, (1997) 66 *Nordic J. Int'l L.* 211, at p. 239.

173. Rather than penalizing over 300 million Indigenous people worldwide by terminating the human rights standard-setting process, the U.N. should be examining ways to ensure that all participating States fulfill their responsibilities and fully respect their obligations under international law.

The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues.

*Vienna Declaration and Programme of Action*, Part I, *supra*, para. 32.

*Reaffirms* that the promotion, protection and full realization of all human rights and fundamental freedoms, as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends (para. 5)

*Requests* all human rights bodies within the United Nations system, as well as the special rapporteurs and representatives, independent experts and working groups,

to take duly into account the contents of the present resolution in carrying out their mandates (para. 6)

*Expresses its conviction* that an unbiased and fair approach to human rights issues contributes to the promotion of international cooperation as well as to the effective promotion, protection and realization of human rights and fundamental freedoms (para. 7)

U.N. General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, *supra*, 15 February 2000.

174. The adoption of relevant and uplifting human rights norms in a U.N. instrument will not, in itself, prevent or resolve the wide range of human rights violations that Indigenous peoples face. However, in our respectful view, the United Nations and Member States must demonstrate the will, determination and ongoing commitment to achieve this first, significant step. Our basic status and rights must be explicitly embraced within a principled international framework.

*Deeply concerned* about the precarious levels of economic and social development that indigenous people endure in many parts of the world, and the disparities in their situation in comparison to the overall population, as well as about *the persistence of grave violations of their human rights ...*

U.N. Commission on Human Rights, *Human rights and indigenous issues*, Res. 2003/56, 24 April 2003, preamble. [emphasis added]

175. **Based on the above, it is critical that the U.N. and Member States renew the mandate of the inter-sessional Working Group.** Failure within the U.N. to continue this process could serve to undo the important work accomplished to date. In particular, most or all of the efforts of Indigenous peoples throughout the years in regard to the draft *U.N. Declaration* could be wiped out or severely diminished.

176. At the same time, we must recognize that the current operations and procedures in the UNCHR Working Group are inadequate and ineffective. **Thus the U.N. should also significantly improve these and other important aspects of the overall standard-setting process, in a manner consistent with the unique status and essential role of Indigenous peoples.**

*Strongly recommends* that, in accordance with General Assembly resolution 50/157 of 21 December 1995, the draft United Nations declaration on the rights of indigenous peoples be adopted as early as possible ... and, to this end, appeals to all participants in the intersessional working group of the Commission on Human Rights and to all others concerned to put into practice *new, more dynamic ways and means of consultation and consensus-building, in order to accelerate the preparation of the draft declaration ...*

U.N. Sub-Commission on the Promotion and Protection of Human Rights, *International Decade of the World's Indigenous People*, Res. 2002/19, 14 August 2002, para. 6. [emphasis added]

We must acknowledge the contributions of indigenous peoples not only in areas such as environmental protection, where those contributions are well established and widely known, but also in other vital areas on the international agenda.

U.N. Secretary-General (K. Annan), "Indigenous Peoples Continue to be Excluded from Power, Denied Identities, Displaced from Lands Says [U.N.] Secretary-General to the Permanent Forum", *Press Release*, SG/SM/8695, HR/4660, 12 May 2003.

*Calling attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of humankind and to international co-operation and understanding ...*

*Indigenous and Tribal Peoples Convention, 1989*, preamble.

177. The initiatives that we propose to improve the current standard-setting process, including the operations of the UNCHR Working Group, would be consistent with current objectives to reform and strengthen the operations of the United Nations. Moreover, the need for an enhanced participatory role for Indigenous peoples is increasingly being emphasized by the U.N., its Member States and regional organizations.

We will spare no effort to make the United Nations a more effective instrument for pursuing all of these priorities: the fight for development for all the peoples of the world, the fight against poverty, ignorance and disease; the fight against injustice; the fight against violence, terror and crime; and the fight against the degradation and destruction of our common home.

*United Nations Millennium Declaration, supra*, Art. 29.

Takes the view that the UN must take advantage of its 50th anniversary to make its bodies more democratic and more effective by enabling peoples without a state, in particular indigenous peoples, to be better represented, especially by involving them in the work of the General Assembly ...

European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, 1994, *supra*, para. 3.

Calls on the Council, the Member States and the Commission to strengthen the activities of the UN Commission on Human Rights as well as those of the UN

Sub-Commission on the Promotion and the Protection of Human Rights dedicated to indigenous issues ...

*European Parliament resolution on the EU's rights, priorities and recommendations for the 60th Session of the UN Commission on Human Rights in Geneva (15 March to 23 April 2004), supra, para. 15.*

To strengthen democracy, create prosperity and realize human potential, our Governments will:

...

further develop processes to ensure broad and full participation of indigenous peoples throughout the inter-American system, including in the discussions on the *Proposed American Declaration on the Rights of Indigenous Peoples* ...

Summit of the Americas, 2001, *Plan of Action, supra*, heading 16 (Indigenous peoples).

178. In regard to improving the performance of the UNCHR Working Group, there are a number of specific changes or innovations that would be worthy of serious and timely consideration. These include:

- i) Introduction of specific criteria within the Working Group, so as to ensure strict adherence to the Purposes and Principles of the *U.N. Charter* when proposing new or modified human rights norms;
- ii) in particular, proposals to undermine the human rights of Indigenous peoples or create discriminatory double standards should not be permitted or tolerated within the Working Group;
- iii) alteration of existing rules so as to allow the appointment of two co-chairs (one of whom would be an Indigenous person);
- iv) fair and balanced consideration of Indigenous and State positions in preparing the Chair's yearly report;
- v) consensus within the Working Group should be explicitly confirmed as not requiring unanimity, but consensus must include both participating States and Indigenous representatives;
- vi) improved translations procedures so that representatives of Indigenous peoples and States could have timely Spanish, French, Russian, etc. versions of proposed revisions to the draft *Declaration*;
- vii) increased encouragement of *joint submissions* with a view to reaching consensus on specific Articles in the draft *Declaration*;

- viii) use of U.N. web site to make available Indigenous and State positions on the various Articles of the draft Declaration;
- ix) increased financial assistance to ensure equitable and democratic participation of Indigenous peoples from all regions of the globe;
- x) live transmission of UNCHR Working Group sessions;
- xi) use of expert panels or committees to address specific human rights issues relating to Indigenous peoples;
- xii) ensuring an effective role for the Permanent Forum and its members in advancing the goals of human rights standard-setting; and
- xiii) encouraging greater participation by the specialized agencies in the Working Group.

179. With regard to the overall U.N. human rights standard-setting process concerning Indigenous peoples, the following additional changes or innovations should also be considered:

- i) Increased attention and priority should be accorded by the U.N. General Assembly and Commission on Human Rights to the adoption of a strong and uplifting *U.N. Declaration on the Rights of Indigenous Peoples*;
- ii) At all stages of the standard-setting process, no Declaration should be provisionally approved or adopted by the U.N. unless it has the strong support of Indigenous representatives participating in such process;
- iii) new strategies should be developed to increase State commitment to the objectives of the human rights standard-setting process relating to Indigenous peoples;
- iv) there should be greater coordination between such standard-setting processes at the United Nations and those at a regional level (such as the Organization of American States); and
- v) public education and awareness of the importance of developing international human rights standards relating to Indigenous peoples should be increased.

180. In regard to Indigenous peoples, measures have been taken on an *ad hoc* basis to enhance our participation at the highest levels of the United Nations on special occasions. While appreciated, such involvement is simply insufficient in the standard-setting context.

... it may be noted that in recent years indigenous people have been invited to make presentations at the highest levels of the United Nations.

Thus, an indigenous representative was given the opportunity to address the United Nations Conference on Environment and Development, held at Rio de Janeiro in June 1992, the first time that an indigenous person had been given such an opportunity. Indigenous people from many regions also spoke at the plenary of the World Conference on Human Rights (Vienna 1993) and at a special session of the General Assembly at the inaugurations of the International Year and the International Decade of the World's Indigenous People.

U.N. General Assembly, *Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people: Report of the Secretary-General*, U.N. Doc. A/51/493, 14 November 1996, para. 36.

181. A basic problem is that the U.N. has been trying to accommodate the participation of Indigenous peoples and our representatives in human rights and other important forums in the existing context, rules and procedures relating to non-governmental organizations (NGOs) and civil society. As a result, we are “largely absent from the meetings of the legislative bodies of the United Nations system”. Some reasons for this absence are described in a 1996 Report of the U.N. Secretary-General:

Indigenous people are largely absent from the meetings of the legislative bodies of the United Nations system. In part this is because very few indigenous organizations enjoy consultative status with the Economic and Social Council, a prerequisite for participation in the majority of United Nations public meetings. As noted in the response of UNDP, NGOs generally are not always aware of the existing opportunities nor perhaps are they in a position for financial reasons to attend the meetings of the decision-making bodies in the United Nations system. As indigenous non-governmental organizations are far fewer in number and often have less staff and financial resources than non-indigenous NGOs, they are not necessarily in a position to follow all relevant meetings. (para. 37)

Furthermore, there are sometimes practical difficulties for indigenous organizations in complying with the United Nations provisions for consultative status. For example, although the aims and purposes of indigenous organizations may be in conformity with the spirit, purposes and principles of the Charter of the United Nations, they cannot always fulfil the United Nations conditions for consultative status, such as having an established headquarters with an executive officer, especially in regions where communities are widely dispersed. (para. 39)

U.N. General Assembly, *Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people: Report of the Secretary-General*, *supra*.

182. However, it is important to underline that the legal status of Indigenous peoples far exceeds that of NGOs or members of civil society. Indigenous peoples are distinct and self-determining peoples. As the 1996 Report of the Secretary-General points out:

Another factor which may be noted is the political, social and cultural specificity of indigenous people themselves. Traditionally, indigenous people do not organize themselves in non-governmental structures, which is a precondition for achieving consultative status. *In many countries, indigenous people maintain flourishing governments or administrations of their own, often pre-dating the Governments of the States in which they live.* It has been stated by many indigenous people at the sessions of the Working Group on Indigenous Populations that establishing non-governmental entities is incompatible with their history of self-government. This may explain the reluctance of certain indigenous people to form non-governmental organizations for the purposes of participating in United Nations meetings. (para. 38, emphasis added)

U.N. General Assembly, *Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people: Report of the Secretary-General, supra.* [emphasis added]

183. In addition, many of the States participating in the UNCHR Working Group constitute the past or present perpetrators of some of the worst misdeeds and crimes against Indigenous peoples. While these States certainly need to be involved, they must not be *dominating* the current process. They must not be entrusted to *determine* the international standards that would be submitted to the General Assembly. It is evident that, in order to achieve a more balanced and objective standard-setting process, a greater role for Indigenous representatives must be ensured.

... we must reaffirm our founding purposes. But we must also think imaginatively how to strengthen the United Nations so that it can better serve states and people alike in the new era.

Today, global affairs are no longer the exclusive province of foreign ministries, nor are states the sole source of solutions for our small planet's many problems. Many diverse and increasingly influential non-state actors have joined with national decision makers to improvise new forms of global governance.

K.A. Annan, *'We the Peoples': The Role of the United Nations in the 21<sup>st</sup> Century* (New York: United Nations, 2000), at p. 67.

184. Consequently, we propose that the U.N. carefully examine the question of the status and role of Indigenous peoples within this crucial international organization. In this regard, it is essential to ensure democratic and effective involvement by Indigenous representatives at all levels of the U.N. consistent with our unique legal status and rights. This vital examination should only be carried out with the full and effective participation of Indigenous peoples' representatives on an equitable global basis.
185. Clearly, we seek to strengthen the United Nations and ensure that the international human rights system is fully inclusive of and just to all peoples and States worldwide. All actors in this most essential system must strictly adhere to and consistently apply the Purposes and

Principles of the *U.N. Charter*, as well as democracy, equality, human dignity, justice, non-discrimination and other foundational principles and values of international law.

The Commission on Human Rights ... *Reaffirms* that the promotion, protection and full realization of all human rights and fundamental freedoms should be guided by the principles of universality, non-selectivity, objectivity and transparency, in a manner consistent with the purposes and principles of the Charter; (para. 3)

*Recognizes* that, in addition to their separate responsibilities to their individual societies, States have a collective responsibility to uphold the principles of human dignity, equality and equity at the global level; (para. 4)

*Urges* all actors on the international scene to build an international order based on inclusion, justice, equality and equity, human dignity, mutual understanding and promotion of and respect for cultural diversity and universal human rights, and to reject all doctrines of exclusion based on racism, racial discrimination, xenophobia and related intolerance ... (para. 5)

U.N. Commission on Human Rights, *Enhancement of international cooperation in the field of human rights*, Res. 2003/60, 24 April 2003.

186. Selective application of the *Charter's* Principles – whether by developed or developing States – substantially weakens the United Nations and the international human rights system as a whole.

The principles of the Charter must be applied consistently, not selectively, for if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of the instrument.

B. Boutros-Ghali, *An Agenda for Peace: Report of the Secretary General*, *supra*, at p. 23.

... *UN membership is not a right, but a commitment to uphold the principles and purposes of the organization.* ... The time has come to revisit the basis upon which membership in [UN] bodies is determined. And as Article Six [of the *U.N. Charter*] envisions, the UN must consider suspending or expelling member states that have failed in their obligation to the organization and violated the basic principles of the Charter.

B. Graham, "Notes for an Address by the Honourable Bill Graham, Minister of Foreign Affairs [Canada], at the 16<sup>th</sup> Annual Meeting of the Academic Council of the United Nations System", New York, New York, June 13, 2003. [emphasis added]

187. Currently, Indigenous peoples globally are caught in legal systems, where a significant number of Member States discriminate against Indigenous peoples both within the United

Nations and within their own States. In particular, States should not be permitted to block progress from being achieved in the UNCHR standard-setting process.

*Calls upon* all Member States to base their activities for the protection and promotion of human rights, including the development of further international cooperation in this field, on the Charter of the United Nations ... and other relevant international instruments, and to *refrain from activities that are inconsistent with that international framework ...*

U.N. General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity, supra*, 15 February 2000, para. 3. [emphasis added]

- 188.** Consistent with the *Charter of the United Nations* and the progressive development of international law, we strongly and respectfully urge the United Nations to make the necessary and urgent changes.

## Conclusions and Recommendations

### Major objective of International Decade – an impending failure

- A. The International Decade of the World's Indigenous People will be terminating on December 10, 2004. As declared by the U.N. General Assembly, "the adoption of a declaration on the rights of indigenous peoples [is] a major objective of the Decade". This key objective is highly unlikely to be realized prior to the end of the Decade.
- B. From 1984-1993, a draft *U.N. Declaration on the Rights of Indigenous Peoples* had been carefully formulated and ultimately approved by the expert members of the Working Group on Indigenous Populations (WGIP). Indigenous peoples, States, specialized agencies and academics actively participated and exchanged views in this dynamic process. Then, in 1994, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved the current text of the draft *Declaration*. Therefore, there is no legitimate reason for the impending failure of the U.N. to adopt such a Declaration within the International Decade.
- C. Yet, during the past nine years, the UNCHR intersessional Working Group – that was created to consider and recommend a draft Declaration for adoption by the General Assembly – has only provisionally approved 2 of the 45 Articles of the draft *U.N. Declaration on the Rights of Indigenous Peoples*. This remarkable lack of progress is unacceptable.
- D. The process in the UNCHR Working Group has been difficult in terms of achieving consensus or "making progress". In part, this could be attributed to the complexity of the issues and the unique nature of the status and rights of Indigenous peoples. However, to a significant degree, it is evidence of a long-standing problem. There is a lack of political will among a number of States to redress past and ongoing violations of our human rights and prevent such intolerable acts in the future.
- E. The reluctance of some States participating in the inter-sessional Working Group to reach consensus on explicit human rights norms has far-reaching consequences for over 300 million Indigenous people in all parts of the world. This huge deficiency has tremendous implications for all States and peoples, as well as the United Nations system itself.

- F. The present Joint Submission examines in some depth the U.N. standard-setting process, including the UNCHR inter-sessional Working Group, and the impediments to achieving substantial progress. We generally conclude that reform of the overall standard-setting process is urgently needed. In regard to the draft *U.N. Declaration*, the International Decade clearly should have had a more successful outcome.
  
- G. We are especially concerned that the mandate of this inter-sessional Working Group may not be renewed after the end of the International Decade in December 2004. This would in effect terminate the principal and most far-ranging standard-setting process on the human rights of Indigenous peoples within the United Nations.

**Successes related to draft *U.N. Declaration on the Rights of Indigenous Peoples***

- H. In referring to the impending failure of the U.N. to adopt a Declaration on the rights of Indigenous peoples within the International Decade, it is important not to characterize the draft *U.N. Declaration on the Rights of Indigenous Peoples* as a failure.
  
- I. Although the draft *U.N. Declaration* has not been adopted by the U.N. General Assembly, the human rights standards elaborated over many years and now included in the *Declaration* have assumed a normative value that has profoundly influenced organizations and forums at the international level.
  
- J. The human rights norms in the draft *U.N. Declaration* are being cited by courts at the national level. In addition, the Inter-American Court of Human Rights has indicated that, in addressing Indigenous peoples' complaints of human rights violations, it is necessary to consider "developing norms and principles governing the human rights of indigenous peoples".
  
- K. The draft *U.N. Declaration* and its human rights norms are fostering renewed relations between Indigenous peoples and States. The dynamic and ongoing dialogue concerning the draft *Declaration* at the international level is generating an increasingly important discourse at the domestic level with some States. Such constructive discussions promote mutual respect and understanding. They may also open the door to resolution of conflicts or disputes within States.
  
- L. The United Nations and its Member States, specialized agencies and Indigenous peoples have invested considerable time, as well as human and

financial resources, in contributing to the formulation of the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

- M. Therefore, it would be highly counter-productive for the United Nations to ignore the achievements to date and abandon its key objective of adopting a U.N. Declaration on the rights of Indigenous peoples.

**Urgent need for adoption of *U.N. Declaration on the Rights of Indigenous Peoples***

- N. It remains urgent and critical for the U.N. General Assembly to adopt a formal instrument that elaborates elevating human rights standards on the full range of basic issues concerning Indigenous peoples. This necessarily entails a comprehensive rights-based approach.
- O. In all regions of the world, Indigenous peoples have been subjected to colonialism, widespread dispossession of lands and resources, discrimination, exclusion, marginalization, forced assimilation and other forms of cultural genocide, genocide and rampant violations of treaty rights. All of these elements are inseparably linked to violations of human rights.
- P. This historical and ongoing contemporary situation underlines the urgency of adopting, as a first step, a strong and uplifting *U.N. Declaration on the Rights of Indigenous Peoples*. The legacy of colonialism, dispossession and repeated human rights violations has resulted in the debilitating impoverishment of Indigenous peoples. In turn, this acute poverty continues to largely inhibit, if not prevent, the enjoyment of our basic human rights. Severe poverty also undermines our participatory and other democratic rights. With renewed commitment and concrete assistance from the United Nations, we must bring to an end this destructive cycle.
- Q. Severe violations and ongoing denial of Indigenous peoples' human rights, including our right of self-determination, have major adverse impacts. These debilitating actions severely undermine the integrity of Indigenous nations, communities and families and impair the mental and physical health and security of individuals. Indigenous children and youth are especially affected.
- R. In regard to Indigenous peoples, the basic values and principles underlying international and domestic legal systems are not being applied fairly and in a non-discriminatory manner. This grave and recurring situation has far-reaching implications for all governments and peoples, as well as international institutions, that are concerned with such interrelated values and principles as

democracy, equality, justice, peace, security, environmental protection, development, the rule of law and respect for human rights.

- S. As applied to Indigenous peoples, these foundational principles and values of international and domestic legal systems are currently being undermined. Yet these same values and principles are the bases for solemn commitments and affirmed responsibilities by the U.N. and its Member States. These essential precepts provide additional reasons as to why the international community and States must take affirmative measures in relation to Indigenous peoples and vigorously safeguard our human rights.
- T. In light of these foundational values and principles and related commitments and responsibilities, it would be contradictory for the U.N. and its Members to terminate the UNCHR standard-setting process concerning Indigenous peoples' human rights.
- U. Failure of the United Nations to adopt a strong *Declaration on the Rights of Indigenous Peoples* results in the creation of a legal vacuum. This situation contributes to the perpetuation of grave and recurring problems and prejudices. Serious harms include the continuing impunity for human rights violations against Indigenous peoples in all regions of the world.
- V. In addition, failure of the U.N. to adopt Indigenous human rights norms in a formal instrument serves to perpetuate impunity for human rights violations against Indigenous peoples in all regions of the world. Ongoing impunity for widespread and severe human rights violations in effect denies Indigenous peoples the human right to an effective remedy. Impunity weakens respect for human rights, the rule of law and democracy and must not be tolerated.
- W. Further, the failure of the U.N. to adopt international human rights norms explicitly pertaining to Indigenous peoples serves to perpetuate an "ominous trend". Rather than take measures to ensure respect for the fundamental rights of Indigenous peoples, some States are criminalizing those Indigenous human rights defenders who protest or take other collective action to safeguard Indigenous lands, territories and resources.
- X. This ongoing human rights crisis is a stark reminder that, in relation to Indigenous peoples, the international human rights system is woefully inadequate and incomplete.

- Y. In particular, the universal human rights standard-setting process that was initiated internationally by the United Nations, with the adoption of the *Universal Declaration on Human Rights* and the two human rights Covenants, remains unfinished. However, the General Assembly has yet to adopt a U.N. instrument that explicitly, accurately and comprehensively elaborates upon our human rights.
- Z. Adoption by the General Assembly of a *U.N. Declaration on the Rights of Indigenous Peoples* would not, alone, resolve the multitude of human rights violations suffered globally by Indigenous peoples. Undoubtedly, however, it would be a crucial and significant measure.

### **Human rights obligations of U.N. and Member States**

- AA. In regard to the human rights obligations of the United Nations and Member States, the Purposes and Principles in the *U.N. Charter* are explicit and clear.
- BB. The Purposes and Principles require actions “promoting and encouraging respect” for human rights and not undermining them. According to the *U.N. Charter*, the duty to promote respect for human rights is to be based on “respect for the principle of equal rights and self-determination of peoples”.
- CC. In addition, the international obligation to respect human rights, including the right of self-determination, is of an *erga omnes* character. The same is true of the prohibition against racial discrimination. An *erga omnes* obligation signifies a duty that is binding upon all States. It is also a duty owed to the international community as a whole.
- DD. Yet, in the UNCHR Working Group, some of the participating States pay little attention to the Purposes and Principles of the *U.N. Charter*. They also show little respect for their *erga omnes* obligations relating to the right of self-determination and the prohibition against racial discrimination.
- EE. This ongoing, illegitimate conduct has been a major contributor to the lack of progress on the draft *U.N. Declaration* within the UNCHR Working Group. Clearly concrete and effective measures are required by the United Nations, in terms of upholding the *U.N. Charter* and its most basic precepts and ensuring the proper functioning of the current standard-setting process.

**“Impediments” to the adoption of a strong, uplifting *Declaration***

- FF. Major “impediments” to the adoption by the United Nations of a strong and uplifting Declaration on the rights of Indigenous peoples may be described under two broad categories. The first relates to approaches or techniques by some States that serve to lower human rights standards pertaining to Indigenous peoples. The second describes those specific issues that are of critical importance to Indigenous peoples, but continue to be opposed by some States.
- GG. In regard to illegitimate approaches or techniques, there is a tendency of some States not to approve any Article in the draft *U.N. Declaration* that differs with their own domestic policies or laws. This approach runs counter to a key purpose of the international human rights standard-setting process, namely, to elaborate the human rights of Indigenous peoples in a manner consistent with international law and its progressive development.
- HH. Some States are also (mis)interpreting international human rights treaties so as to conform to their domestic laws. This is not a valid approach and would lead to the creation of extremely low standards in regard to the human rights of Indigenous peoples. Nor is this a good faith application of the treaties concerned.
- II. Furthermore, some States participating in the UNCHR Working Group are invoking their constitutions or other domestic laws, in order to avoid including human rights norms in a U.N. Declaration consistent with their international obligations. However, under international law, States cannot invoke their internal laws or procedures as a justification for not complying with international rules.
- JJ. The United Kingdom and the United States have repeatedly proposed converting some of the basic rights in the draft *U.N. Declaration* to “freedoms”. In light of the pervasive human rights violations suffered by Indigenous peoples worldwide, we find it wholly unacceptable that some States seek to weaken our fundamental rights in the draft *Declaration*.
- KK. There are a number of issues that are considered to be essential by Indigenous peoples, but are viewed as “impediments” to making progress on the draft *U.N. Declaration*. These key matters include: i) affirmation of the collective rights of Indigenous peoples; ii) use of the term “peoples” or “Indigenous peoples”; iii) affirmation of the right of Indigenous peoples to self-determination under international law; and iv) affirmation of Indigenous rights to lands, territories and resources.

- LL. A further issue of contention is the insistence by some States to include in the draft *U.N. Declaration* the principle of territorial integrity. Indigenous representatives in the UNCHR Working Group agree that this principle already exists in international law. However, most Indigenous representatives in the Working Group are opposed to singling out “territorial integrity” in the draft *Declaration*, since this would entail a number of prejudicial effects.
- MM. However, an examination of these issues reveals that the basic State arguments have little or no validity under international law. Rather the effect of such arguments would be to create unjust and discriminatory double standards that would be detrimental to Indigenous peoples under international law. In some instances, the conclusions of U.N. treaty bodies that do not in effect support State positions are also being ignored.
- NN. The basic positions being taken by such States run directly counter to their international legal obligations, explicit commitments in numerous international instruments, and the fundamental values and principles underlying international and domestic legal systems.
- OO. One of the most outrageous State strategies to limit Indigenous peoples status and human rights under international law continues to emanate from the United States. The National Security Council, which is headed by the President of the United States, has in effect targeted the world’s 300 million Indigenous people as some kind of security risk.
- PP. Without exception, the U.S. seeks to categorically deny the world’s Indigenous peoples full and equal application of the right of self-determination under the international human rights Covenants. No other peoples in the world are singled out, as a class of people, for such wholesale discriminatory treatment. It is disturbing that not a single State participating in the UNCHR Working Group has challenged the U.S. as violating the Purposes and Principles of the *U.N. Charter*.

#### **Need to renew mandate and improve U.N. standard-setting process**

- QQ. After careful examination, this Joint Submission concludes that there are diverse and compelling reasons for the United Nations and its Member States not to terminate or otherwise abandon the human rights standard-setting process concerning Indigenous peoples (see heading V above).

- RR. Rather than penalizing over 300 million Indigenous people worldwide by terminating the human rights standard-setting process, the U.N. should be examining ways to ensure that all participating States fulfill their responsibilities and fully respect their obligations under international law.
- SS. **We strongly recommend that the U.N. and Member States renew the mandate of the inter-sessional Working Group.** Failure within the U.N. to continue this process could serve to undo the important work accomplished to date. In particular, most or all of the efforts of Indigenous peoples throughout the years in regard to the draft *U.N. Declaration* could be wiped out or severely diminished.
- TT. **We also strongly recommend that the U.N. significantly improve the operations and procedures of the UNCHR Working Group, in a manner consistent with the unique status and essential role of Indigenous peoples.**
- UU. Our recommendation to ameliorate the standard-setting process is consistent with current objectives to reform and strengthen the operations of the United Nations. Moreover, the need for an enhanced participatory role for Indigenous peoples is increasingly being emphasized by the U.N., its Member States and regional organizations.
- VV. In regard to improving the performance of the UNCHR Working Group, there are a number of specific changes or innovations that would be worthy of serious and timely consideration. These include:
- i) Introduction of specific criteria within the Working Group, so as to ensure strict adherence to the Purposes and Principles of the *U.N. Charter* when proposing new or modified human rights norms;
  - ii) in particular, proposals to undermine the human rights of Indigenous peoples or create discriminatory double standards should not be permitted or tolerated within the Working Group;
  - iii) alteration of existing rules so as to allow the appointment of two co-chairs (one of whom would be an Indigenous person);
  - iv) fair and balanced consideration of Indigenous and State positions in preparing the Chair's yearly report;
  - v) consensus within the Working Group should be explicitly confirmed as not requiring unanimity, but consensus must include both participating States and Indigenous representatives;

- vi) improved translations procedures so that representatives of Indigenous peoples and States could have timely Spanish, French, Russian, etc. versions of proposed revisions to the draft *Declaration*;
- vii) increased encouragement of *joint submissions* with a view to reaching consensus on specific Articles in the draft *Declaration*;
- viii) use of U.N. web site to make available Indigenous and State positions on the various Articles of the draft Declaration;
- ix) increased financial assistance to ensure equitable and democratic participation of Indigenous peoples from all regions of the globe;
- x) live transmission of UNCHR Working Group sessions;
- xi) use of expert panels or committees to address specific human rights issues relating to Indigenous peoples;
- xii) ensuring an effective role for the Permanent Forum and its members in advancing the goals of human rights standard-setting; and
- xiii) encouraging greater participation by the specialized agencies in the Working Group.

WW. With regard to the overall U.N. human rights standard-setting process concerning Indigenous peoples, the following additional changes or innovations should also be considered:

- i) Increased attention and priority should be accorded by the U.N. General Assembly and Commission on Human Rights to the adoption of a strong and uplifting *U.N. Declaration on the Rights of Indigenous Peoples*;
- ii) At all stages of the standard-setting process, no Declaration should be provisionally approved or adopted by the U.N. unless it has the strong support of Indigenous representatives participating in such process;
- iii) new strategies should be developed to increase State commitment to the objectives of the human rights standard-setting process relating to Indigenous peoples;
- iv) there should be greater coordination between such standard-setting processes at the United Nations and those at a regional level (such as the Organization of American States); and

- v) public education and awareness of the importance of developing international human rights standards relating to Indigenous peoples should be increased.
- XX. It is also timely and pressing that the U.N. carefully examine the question of the status and role of Indigenous peoples within this crucial international organization. In this regard, it is essential to ensure democratic and effective involvement by Indigenous representatives at all levels of the U.N. consistent with our unique legal status and rights. This vital examination should only be carried out with the full and effective participation of Indigenous peoples' representatives on an equitable global basis.
- YY. Clearly, we must all seek to strengthen the United Nations and ensure that the international human rights system is fully inclusive of and just to all peoples and States worldwide. All actors in this most essential system must strictly adhere to and consistently apply the Purposes and Principles of the *U.N. Charter*, as well as democracy, equality, human dignity, justice, non-discrimination and other foundational principles and values of international law.
- ZZ. Currently, Indigenous peoples globally are caught in legal systems, where a significant number of Member States discriminate against Indigenous peoples both within the United Nations and within their own States. In particular, States should not be permitted to block progress from being achieved in the UNCHR standard-setting process.
- AAA. Consistent with the *Charter of the United Nations* and the progressive development of international law, we strongly and respectfully urge the United Nations to make the necessary and urgent changes.

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