Developing a Modern International Law on the Rights of Indigenous Peoples

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Contents

Executive Summary

Indigenous issues began to be considered at the United Nations in the context of racial discrimination. A "Study on the Problem of Discrimination Against Indigenous Populations" was authorized in 1971. An international concern with Indigenous peoples developed in the 1960s and '70s, with the formation of non-indigenous support organizations and international organizations of Indigenous peoples. State interest developed, particularly on the part of Norway, the Netherlands and other like-minded states. In 1982 the United Nations Working Group on Indigenous Populations was established, as a pre-sessional working group of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities, an expert body. Each year the Working Group conducts a review of developments, during which Indigenous peoples from various parts of the world air their concerns. The Working Group has no power to investigate or adjudicate on allegations made by Indigenous representatives. It does not question governments or comment on specific cases.

In 1985 the Working Group began drafting a declaration on the rights of Indigenous peoples, which it completed in 1993. The United Nations Human Rights Commission began consideration of the draft declaration at its regular session in February-March 1995. The Commission, a political body, is expected to establish a new working group to consider the document. After consideration by the Human Rights Commission, the draft declaration should be approved, without further revision, by the Economic and Social Council and the General Assembly.

The Working Group on Indigenous Populations has been the most open forum in the United Nations system, allowing any individual Indigenous person or representative of an Indigenous group to speak. Indigenous participation has also been facilitated by two funds and by favourable decisions of the Economic and Social Council on the accreditation of Indigenous non-governmental organizations (NGOs). At present twelve indigenous NGOs have 'consultative status' at the United Nations.

The two senior members of the Working Group are Professor Erica-Irene Daes of Greece and Professor Miguel Alfonso Martinez of Cuba. Madam Daes has visited Canada a number of times and done investigative trips to New Zealand and Australia. She continues to work on a study on indigenous heritage, formulating standards for the protection of indigenous intellectual property. Professor Alfonso Martinez is responsible for a study on treaties between Indigenous peoples and states.

There have been discussions over the last few years about the future of the working group and also about the idea of establishing a new permanent forum for Indigenous peoples within the United Nations system. No decisions have been taken on these questions. The Working Group continues to meet annually, immediately before the regular August meetings of its parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

The most contentious parts of the draft Declaration on the Rights of Indigenous Peoples concern the international law idea of the 'self-determination of peoples'. Indigenous representatives have insisted on an unconditional application of the idea. Most observer government delegations have voiced opposition or concern about the use of the terms 'peoples' or 'self-determination'. In 1993 the Working Group decided on wording that stated:

> 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.

The Human Rights Commission and the United Nations World Conference on Human Rights, held in 1993, both rejected the term 'peoples', using instead either 'people' or 'populations'. Canada has opposed the use of 'peoples' and 'self-determination', though it proposed somewhat ambiguous wording in the Working Group in 1993 that used the terms. Brazil has expressed opposition to the terms. Denmark/Greenland has stated its support for the wording of the 1993 draft. Some indigenous representatives, while satisfied with the wording quoted above, are concerned that other provisions in the draft might be interpreted to limit its apparently unconditional language. As a result, both indigenous representatives and government delegations are divided over this aspect of the present draft.

Other provisions of the draft deal with territorial rights, self-government, treaties and intellectual property.

A Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Populations was authorized in 1989. The special rapporteur for the study, Professor Miguel Alfonso Martinez, completed a first progress report in 1992. It depicted European colonialism as racist, but suggested that the colonial powers regarded treaties with Indigenous peoples as coming under international law. The progress report outlined an extensive research agenda. A second progress report is expected in 1995 and a final report in 1996.

The International Year of the World's Indigenous People, held in 1993, was highly disappointing. An International Decade was launched in December 1994.

Concerns related to Indigenous peoples have been considered by other international bodies:

- the Centre for Transnational Corporations of the United Nations (which has now been ended),
- the International Labour Organisation,
- the Human Rights Committee (which has decided certain individual communications from Indigenous people in Canada, under the provisions of the International Covenant on Civil and Political Rights and its Optional Protocol), and
- the World Bank and other international financial institutions.

Increasingly, indigenous issues are considered in all relevant international intergovernmental organizations.

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Getting on the Agenda

Colonialism represented a massive denial of the rights of Indigenous peoples in all parts of the world. Yet within colonial practice and early international law there were elements giving limited recognition to indigenous rights. As the colonial powers and settler governments gained strength, states ceased to regard those elements of early colonial practice as legally binding. But, where they existed, they continued to be invoked by Indigenous peoples and their supporters in their campaigns for reform. In the post-war period in Canada, the United States, Australia and New Zealand, domestic legal systems moved to the recognition of a rights framework for Indigenous peoples, invoking Aboriginal and treaty rights. Modern domestic law and modern international law are based on this revision of colonialism, which has occurred in an period when human rights has become the common vocabulary of legitimacy for governmental institutions.

Concern about the treatment of Indigenous peoples is apparent in documents associated with British colonial policy. The *Royal Proclamation of 1763* refers to the tribes "with whom we are connected, and who live under our protection...". The campaigns of the Aborigines Protection Society in London in the first half of the nineteenth century led to the establishment of a Select Committee of the House of Commons on Aborigines, which reported in 1837. Centralized authority over Indigenous peoples was promoted as a policy to protect Indigenous peoples from local settler interests. 'Protection' is the historical basis for centralized jurisdiction over "Indians, and Lands Reserved for the Indians" in the Canadian constitution of 1867.[1]

The decisions of Chief Justice John Marshall of the United States Supreme Court, in a famous trilogy of cases in the early nineteenth century, described a framework of rules or

practices he attributed to the European colonial powers. The framework justified United States suzerainty, but meant that the Indian tribes retained both a political status and territorial rights.[2] Much later, Felix Cohen claimed that U.S.Indian law could be linked back to the recognition of tribal rights in the sixteenth-century writings of Franciscus de Vittoria.[3]

The last great period of European colonial expansion occurred in the latter years of the nineteenth century. In the context of the scramble for Africa, there was an effort to establish international responsibility for the tribes in the Congo basin. That effort was short-lived, and Belgium took over the Congo, now Zaire, as a colony and proceeded to establish one of the worst records of colonial administration.[4]

After the First World War, some former colonies became 'mandates' under the Covenant of the League of Nations. The Covenant said that "the well-being and development of such peoples form a sacred trust of civilization...". The "tutelage" of such peoples was "entrusted to advanced nations...".[5] The scheme was continued, using different language, in the Charter of the United Nations.

The League of Nations became involved in the international controversy over the treatment of tribal populations in the independent African country of Liberia, ruled by African-Americans who had returned from the United States. The Liberian involvement of the League was unique and is not cited as a precedent for modern international activities.[6]

The Iroquois patriot Deskaheh travelled from Canada to Geneva in the 1920s in an attempt to get a hearing before the League of Nations. While Deskaheh got support from some state representatives, his pleas were never considered by any organ of the League. The Canadian reply to Deskaheh's petition was published in the official journal of the League.[7]

The International Labour Organisation, founded at the time of the League of Nations, became involved with Indigenous populations as exploited labour pools, beginning in the 1920s. More extensive ILO involvement occurred after the Second World War.

The United Nations Charter of 1945 spoke of promoting human rights and fundamental freedoms. Previous human rights concerns at the international level had been limited to (a) humanitarian law, initiated by the Red Cross in 1864, (b) the elimination of slavery, (c) some minimum standards for the treatment of colonized peoples, and (d) the protection of certain minorities in Europe that had specific protections under individual peace

treaties ending the First World War.[8] The decision to create a new international law of human rights was a reaction to the atrocities of the Second World War. One of the first new human rights instruments was the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.

The war disrupted patterns of colonial control. The independence of India and Indonesia were early consequences, heralding the general independence of colonial territories in the following decades.

The new concern with human rights arose at both the international and the national level. The war had brought women into the industrial work force in unprecedented numbers. The United States integrated its military during the war, the first major attack on racial segregation in that country. The war experience also prompted the development of a modern homosexual political consciousness.[9]

For Aboriginal peoples in Canada, the war had a profound impact. Indian people had the highest voluntary enlistment rate of any grouping. In Canada they had second-class citizenship. Status Indians could not vote in federal elections or in most provincial elections. They had no legal access to liquor. They were geographically isolated. As soldiers in Europe, life was very different for them. Europeans had an old romantic interest in North American Indians, and in Europe Canadian Indians were equals, able to join their comrades in the pubs.

The post-war leadership of Indian peoples in both Canada and the United States was dominated by Indian veterans. In the 1970s, Vice-Chief Omar Peters of the National Indian Brotherhood (now the Assembly of First Nations) would still routinely include references in his speeches to the service record of Indians in the Second World War. Status Indian veterans and their families got the federal vote before other status Indians. The first post-war prime minister to have a personal interest in Indian issues, John Diefenbaker, had developed a friendship with an Indian serviceman during the war. The serviceman later campaigned for Diefenbaker in Saskatchewan. The vote of the Indian veterans and their families may have been decisive in Diefenbaker's first election to the House of Commons.

Diefenbaker granted the vote to all status Indians in 1960, assuring them that the vote would have no negative effects on treaty rights. Diefenbaker saw the granting of the vote as meeting real or potential international criticism. International criticism of Canada's human

rights record has virtually always been criticism of its treatment of Indigenous peoples. It is said that Hitler attacked Canada on that basis. South Africa responded to Canadian criticisms of apartheid by pointing to our Aboriginal policies. Diefenbaker, in his memoirs, recounts responding to South African criticism at the Commonwealth heads of government meeting in which South Africa was expelled from the Commonwealth. An Iroquois delegation travelled to San Francisco seeking access to the conference that founded the United Nations.[10] They were given no hearing. A delegation representing the North American Indian Brotherhood, an organization based in British Columbia, went to New York in the 1950s with a petition. They met John Humphry, the Canadian who headed the Human Rights Division. He told them to deal with Ottawa.

An examination of John Humphry's personal papers at the law library of McGill University reveals that Indian petitions were sent every year from various parts of the Americas to the United Nations.[11]

The United Nations Charter spoke of "human rights and fundamental freedoms...". The new world organization proceeded with the drafting of what came to be called the International Bill of Rights, composed of three instruments - the Universal Declaration of Human Rights of 1948 and the two basic human rights treaties of 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. These instruments generally avoided issues of minority rights. The only provision dealing directly with minorities was article 27 of the International Covenant on Civil and Political Rights, which dealt of the rights of individuals who were members of religious, linguistic or cultural minorities, not in terms of the rights of minorities as collectivities.[12] A weak declaration on the rights of minorities was approved by the United Nations General Assembly in 1992, after two decades of discussion.[13] The declaration continued the tradition of the International Covenant on Civil and Political Rights in according no rights to minorities as collectivities.[14]

The International Labour Organisation expanded its concern with Indigenous peoples in the 1950s, assuming responsibility for the Andean Indian Program on behalf of itself, the World Health Organization and the United Nations. This work led the ILO to publish a comparative study, "Indigenous Peoples", and to draft the 1957 Convention Concerning the

Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. The convention reflected the policies of assimilation that were common in the period. Canada participated in the drafting process but never signed the convention. It seems to have prompted no discussion in the country.

The second great innovation in post-war international law, along with the creation of an international law of human rights, was the development of a law on decolonization, codified in a 1960 declaration of the United Nations General Assembly.[15] Gordon Bennett records the debates at the United Nations that made it clear that 'self-determination' as decolonization did not apply to internal collectivities. The so-called 'blue water' or 'salt water' theory limited decolonization to overseas territories. It applied to India, but not to the Iroquois.[16] Decolonization applied to a list of territories, and only a very few small territories continue on the list – places like Gibraltar and Bermuda.

Indigenous issues could have been considered at the United Nations under one or more of the following headings:

- racial discrimination
- decolonization or self-determination
- cultural minorities
- individual human rights

Other themes, such as labour, economic development, the activities of transnational corporations, cultural rights, the environment, health or the status of treaties with Indigenous peoples were limited bases for international concern. The most logical themes were minority rights or decolonization/self-determination. But both areas were politically sensitive and were handled restrictively at the United Nations.

A strategic decision was taken in the mid-1960s by Augusto Willemsen Diaz, a lawyer from Guatemala and a member of the staff of the United Nations Human Rights Centre in Geneva, to route a concern with Indigenous peoples through the work under way on racial discrimination. As a result of his work, a 1970 interim report of a study on racial discrimination recommended a separate study on indigenous populations. While Willemsen Diaz saw 'discrimination' as an incomplete description of the issues involved, it was possible for Indigenous peoples to get on the agenda of the United Nations through this door.[17]

In 1971 a Study on the Problem of Discrimination Against Indigenous Populations was authorized. Jose R. Martinez Cobo, a diplomat from Ecuador and a member of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, was named the special rapporteur, the person charged with the conduct of the study. Inadequate staffing and funding at the United Nations Human Rights Centre meant that the work fell almost exclusively to Augusto Willemsen Diaz. He was constantly called on to do other work as well. Martinez Cobo took a couple of trips as part of the work but did none of the drafting. The study was completed in 1983.[18]

In this period a new international concern with Indigenous peoples was developing. The pioneer support organizations, the International Work Group for Indigenous Affairs (IWGIA), based in Copenhagen, and Survival International, based in London, were formed at the end of the 1960s around concerns about ethnocide and genocide in South America. The Program to Combat Racism of the World Council of Churches sponsored a symposium on South America in 1971. The meeting produced a ground-breaking decolonizing statement by a group of prominent South American anthropologists, the Declaration of Barbados.[19] The pioneering international indigenous organizations, the World Council of Indigenous Peoples (WCIP), based in Canada, and the International Indian Treaty Council (IITC), based in the United States, were both formed in 1975.[20] The WCIP held conferences in Sweden in 1977 and Australia in 1981, both times with financial support from the host country. The conference in Australia discussed a draft treaty on indigenous rights. The IITC began lobbying at the United Nations. It was the primary indigenous organization involved in the two conferences on Indigenous peoples that were held under NGO auspices in United Nations facilities in Geneva in 1977 and 1981.[21] The 1977 conference produced a Declaration of Principles for the Defence of the Indigenous Nations and Peoples of the Western Hemisphere. Norway included a Sami leader in its delegation to the United Nations World Conference on Racism, held in Geneva in 1978. The final conference statement devoted a section to indigenous rights. A 1981 United Nations regional seminar in Nicaragua, held as part of the Decade to Combat Racism and Racial Discrimination, focused specifically on Indigenous peoples. The Fourth Russell Tribunal, held in Rotterdam in 1980, heard a series of specific cases of the denial of rights of Indian peoples in the Americas.[22] The Federation of Saskatchewan Indians organized

the World Assembly of First Nations in Regina in 1982, drawing indigenous representatives from most parts of the Americas.

Certain states promoted the concern with Indigenous peoples at the United Nations. Through links between Helge Kleivan of the International Work Group for Indigenous Affairs and Thorvald Stoltenberg, then foreign minister of Norway, Norway began identifying Indigenous peoples in its foreign aid policies, including annual grants to both IWGIA and WCIP. Norway urged the other Nordic states to support indigenous issues internationally. The Netherlands became a strong supporter. The Dutch Parliament passed a resolution on indigenous rights after the 1980 Russell Tribunal hearings in Rotterdam.

With leadership from Theo Van Boven, the Dutch head of the United Nations Human Rights Centre, and support from certain northern European states, the decision was taken by the United Nations in 1982 to establish a Working Group on Indigenous Populations as a pre-sessional working group of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[23] As a working group of the Sub-Commission it would draw its members from the Sub-Commission. As a pre-sessional group it would meet immediately before the annual four-week August meetings of the Sub-Commission. The chart on the next page illustrates the positioning of these bodies within the structure of the United Nations.

By the Charter of the United Nations the functions of the General Assembly, the Economic and Social Council and the Human Rights Commission are very limited. These bodies are to discuss human rights issues, conduct studies, and draft the texts of declarations and treaties dealing with human rights. They have no adjudicatory or legislative functions, as those terms would be understood in domestic legal systems. International law relies upon diplomacy, negotiation, agreement/consensus and voluntary state compliance. The use of sanctions or military force is rare. While the legal authority of United Nations bodies is limited, the moral authority of the United Nations on human rights issues is great. The work of the United Nations in drafting human rights standards is important as human rights have become more of an international concern - in foreign relations, foreign aid, the policies of international funding agencies, and even, in the context of the breakup of the Soviet Union and Yugoslavia, in the recognition of states. Human rights issues have become internationalized to an extent that could not have been predicted even twenty years ago. Thus

we see the Parti québécois recognizing certain rights of the English-language minority in Quebec, explaining that it must protect minority rights in order to gain international recognition for an independent Quebec.[24]

The General Assembly
(a political body composed of representatives of the
185 states that are members of the United Nations)[25]

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ECOSOC
(the Economic and Social Council, a political body with 54 representatives
of states, charged under the Charter of the United Nations with responsibility
for human rights, among other matters)

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The Human Rights Commission
(a political body with 53 representatives of states,
concerned solely with human rights]

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The Sub-Commission on Prevention of Discrimination and Protection of Minorities
(an 'expert' body composed of 26 individuals nominated by states but who are to serve as
independent experts in their 'individual capacity' – that is,
they are not to take political direction from the governments of their states)

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The Working Group on Indigenous Populations
(composed of five members of the Sub-Commission representing
the five regions recognized by the United Nations for organizational purposes)

The Working Group on Indigenous Populations began meeting in 1982. It has met annually since that time, with the exception of 1986 when the annual session of the Sub-Commission was cancelled for financial reasons, though an unofficial session was held that

year. The Working Group began drafting a declaration on indigenous rights in 1985, a task it completed in 1993. Consideration of the draft has now passed to the Human Rights Commission. From there it will go to the Economic and Social Council and the General Assembly.

Since 1982, three United Nations seminars have been held – on relations between Indigenous peoples and states, on self-government, and on sustainable development. A fourth seminar, on land claims, has been expected.

Indigenous people were a clearly visible presence at the United Nations Conference on Environment and Development in Rio de Janeiro in 1992. Indigenous issues feature in the text of the final documents of the conference.[26] The United Nations Commission on Sustainable Development, which met for the first time in July 1993, recommended that the United Nations organize formal annual consultations with Indigenous peoples. Indigenous people were active at the United Nations World Conference on Human Rights in Vienna in 1993. Again they featured in the final document of the conference.[27]

Indigenous peoples are now clearly on the agenda of the various international intergovernmental agencies. They are seen as a special case, not as an example of a broader or more general category, such as cultural minorities or territorial minorities. Their uniqueness has facilitated support for indigenous rights issues. Benedict Kingsbury has noted this aspect of international developments:

> The progress that has been made by "indigenous peoples" in international fora has been aided by the political perception that this category of claimants is limited and in some respects unique, and that such claims can properly and safely be treated as a special case. Although the imprecision of the category and the expanding array of groups involved in the "indigenous peoples movement" could eventually threaten this perception and provoke more sustained demands for precision, such a transformation has not yet occurred.[28]

This treatment of indigenous issues as separate from consideration of the rights of other minorities is consistent with state practice in Canada and other western states. The only traditions that grouped indigenous minorities with other minorities were the nationalities policies of the Soviet Union and China. The Russian Federation has moved away from this linkage. China has not, a fact that separates Chinese policies from the international debate on Indigenous peoples.

The Working Group on Indigenous Populations

The Politics of Indigenous Issues at the United Nations

Indigenous issues were able to reach the United Nations human rights agenda because of leadership from Norway, the Netherlands and the Nordic states and support from a loose like-minded group that included Canada. In the period when the Working Group was established there was support from three of the five regions recognized by the United Nations and a lack of opposition from the other two regions. The five regions are Western Europe and Others (including Canada, the United States, Australia and New Zealand), Eastern Europe, Latin America, Africa, and Asia. Let us look at these regions.

Western Europe and Others (WEO)

Western Europe has always been the major supporter of indigenous issues at the United Nations. The 'others' – the non-European states in the WEO region – all have Indigenous peoples. They supported or did not oppose the initiatives on Indigenous peoples that led to the establishment of the Working Group. The 1970s and '80s were periods of domestic reforms on indigenous policy in those states, making them open to international consideration of indigenous issues.

The United States did not take the Working Group very seriously, spending its political energies elsewhere at the United Nations. In 1993 the U.S. representative gave a presentation indicating a higher degree of U.S. interest in the process, apparently reflecting a greater concern with human rights issues in the new administration of President Clinton.[29]

Canada has taken the Working Group very seriously and has often had the largest observer government delegation and the largest delegation of indigenous representatives. Members of the Canadian government observer delegation have been drawn from Foreign Affairs (both Ottawa and Geneva), Indian Affairs, and the Federal-Provincial Relations Office. It is common for the Canadian ambassador to the United Nations in Geneva to attend one session of the Working Group and make the major Canadian government statement. In 1994 Indian Affairs minister Ron Irwin attended some sessions but did not speak.

Canada was seen as playing a leading role in the Working Group in its early years. More recently, the Canadian government delegation has been concerned with moderating or

limiting the initiatives on Indigenous peoples at the United Nations. Canadian representatives say they are trying to develop positions that can be accepted by the various states with interests in the area. Some degree of consensus is essential for movement on indigenous issues.

Australia has also taken the Working Group very seriously and has had the highest-level delegations of any state. In recent years the minister of Aboriginal Affairs has regularly attended and spoken at the annual sessions of the Working Group. A large Aboriginal delegation attends, co-ordinated and funded by ATSIC, the Aboriginal and Torres Strait Islander Commission.[30]

Eastern Europe

Support from Eastern Europe was originally very political. Indigenous peoples were a useful human rights issue to criticize the United States and its allies in the western hemisphere. The former Soviet Union did not recognize groups like the Sami and Inuit in the Soviet north as 'indigenous'. They argued that the term 'indigenous' had no meaning when the majority national population was indigenous as well.

Even before the end of the cold war and the breakup of the Soviet Union, contact began between Soviet northern people and their counterparts in the non-Soviet Arctic. The term 'indigenous' started to appear in government statements. Since 1992 representatives of northern peoples from Russia have regularly attended the Working Group, apparently with state support. While Eastern European support for indigenous issues is stronger (and less political), the relative power of the Eastern European states within the United Nations has lessened dramatically.

Latin America

As in the WEO region, support from Latin America for the establishment of the Working Group appeared to result from a general pattern of domestic reforms on indigenous policy in the period. Bitter fights over rights issues in Guatemala and Nicaragua became regular features of the early sessions of the Working Group. Latin American support became more guarded as the work on drafting a declaration on indigenous rights proceeded. Strong

concerns about self-determination language were voiced by representatives of Brazil in 1993 and 1994.

Africa

When questionnaires were sent out by the Human Rights Centre in the early 1970s to gather information on Indigenous peoples, African states either did not reply or regarded the category as inapplicable to them. The Martinez Cobo report recommended an additional study on the applicability of the category to Africa, but that recommendation has not been acted on or even pressed.

Indigenous or tribal people from Africa now attend the annual sessions of the Working Group. In 1992 there were Tuareg from North Africa and tribals from Nigeria and Rwanda. In 1993 there were two groups from Kenya, Nubians from Sudan, Tuareg from North Africa, and a white Afrikaans group from Namibia (claiming to be indigenous on the basis of 125 years of existence). In 1994 Maasi were represented, and a Maasi is now on the board of the United Nations Voluntary Fund, which covers the expenses of certain representatives attending Working Group sessions.

African government delegations have not yet played a significant role in the Working Group.

Asia

In 1983 a representative of India at Geneva was angered when the first chair of the Working Group, Asbjorn Eide of Norway, appeared to sympathize with an accusation that a representative of the Bonded Liberation Front had been threatened by the ambassador of India. The representative worked to ensure that Eide was not re-elected to the Sub-Commission in 1984. Four of the five members of the Working Group were defeated in that election. The Working Group emerged stronger under the chairmanship of Madam Erica-Irene Daes, but anxious to avoid any repetition of the 1984 campaign. The incident now seems anomalous and largely the personal concern of an individual.

Certain Asians living in exile in Europe have regularly attended the Working Group (South Moluccans, West Irians, Timorese, tribals from the Philippines, Jumma from

Bangladesh). Representation from Asia itself has broadened gradually. In 1994 there were indigenous or tribal representatives from Bangladesh, Burma/Myanmar, India, Indonesia, Japan, Laos, the Philippines and Taiwan. The tribal delegation from India was much larger than in previous years, reflecting organizational developments in that country.[31]

Asian government representatives, with the exception of Japan and the Philippines, contest the statements of indigenous or tribal representatives but do not show great concern with the work of the Working Group. Most Asian governments appear to believe that the term 'indigenous' does not apply in their region. Representatives of India have asked for a definition of indigenous, one that would make it clear that the term has no applicability to India. In the case of Japan, both Ainu and government statements are polite and non-confrontational. Only the Philippines has accepted the term as applying to groups within the country.[32]

A certain political balance has continued since the establishment of the Working Group. Support comes from the WEO region, Latin America and Eastern Europe. Africa continues to be supportive, but not engaged. Certain states in Asia are targeted in the annual sessions of the Working Group, but since 1983 no Asian state has attempted to undermine the Working Group as such.

The Members of the Working Group

There are five members of the Working Group, representing the five regions recognized by the United Nations. The five are drawn from the membership of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Technically they are chosen by the chair of the Sub-Commission, but conventional understandings of process influence the choices. Incumbents have an unofficial right to continue as members. When India organized opposition to the first chair, Asbjorn Eide of Norway, it did so by organizing a group of states to vote against his re-election to the Sub-Commission, not by trying to influence the Sub-Commission in the selection of members of the Working Group.

The two senior members of the Working Group, who have been members since 1984, are the chair, Erica-Irene Daes of Greece, and Miguel Alfonso Martinez of Cuba.

Madam Daes is the senior member of the Sub-Commission from the WEO region. She is a professor of international law and a forceful, independent woman who has taken on the indigenous cause with some passion. Madame Daes has visited Canada at least five times. She attended one session of the first ministers' conferences on Aboriginal constitutional matters as a seated observer. She spoke to the press at the end of the conference, criticizing governments for failing to agree on a constitutional amendment on self-government. Officials in the department of External Affairs were highly annoyed by her presence and her public criticisms, but no public comments were ever made to that effect. She has been invited to Canada two or three times by the Grand Council of the Crees (Quebec). She attended a parallel conference at the time of the Commonwealth heads of government meeting held in Vancouver. The conference was organized by Treaty 6; the linkage was through Sharon Venne, a Cree lawyer who has attended most of the Working Group sessions representing Treaty 6. Madam Daes also attended the First World Indigenous Youth Conference in Quebec in July 1992.

Madam Daes made brief investigative trips to Australia and New Zealand in her 'personal capacity', meaning that she had no United Nations authorization for the visits. In each case she completed a report that was released to the press by local indigenous organizations. The reports were filed by a non-governmental organization as documents during the next session of the Working Group. In 1992 she made a second visit to New Zealand, meeting the prime minister, the members of the Waitangi Tribunal and various Maori leaders, including the Maori Queen. In June 1993, she visited Australia to speak at a conference organized jointly by the Council for Aboriginal Reconciliation and the Constitutional Centenary Foundation, a conference on the position of Indigenous peoples in national constitutions. She has also attended conferences of the Sami Council, the World Council of Indigenous Peoples and the Pacific Asia Council of Indigenous Peoples.

Madam Daes has suggested that she will remain a member of the Working Group but not continue as chair. She has a strong personal commitment to the draft declaration and will continue to be active and positioned in Geneva to work on its passage at the level of the Human Rights Commission. As well she may see herself playing a continuing role in any new body established by the United Nations.

Miguel Alfonso Martinez of Cuba is the second senior member of the Working Group, representing the Latin American region. He has been active in the United Nations system for more than three decades. Alfonso Martinez is the special rapporteur on the Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Peoples. He is a professor of international law at a political institution in Cuba. He is a much more 'political' figure than Madam Daes in the technical sense that he has been a political representative of Cuba on a number of occasions. He was made head of the Cuban government mission to the United Nations in Geneva for perhaps a year, while still serving as an independent expert on the Sub-Commission. He headed the Cuban mission to deal with an aggressive campaign by the United States in the Human Rights Commission for onsite human rights investigations in Cuba. This combination of 'political' and 'expert' roles is common on the Sub-Commission, whose current members include two or three ambassadors and other state officials.

Professor Alfonso Martinez lobbied hard to be appointed to do the treaty study. One basic reason for his strong desire to be the special rapporteur is his sense of vulnerability as a Cuban. Because of the regional system that pervades the United Nations, individuals are appointed to positions on the basis of support from regional caucuses. Since Cuba is the only socialist state in Latin America, it is unlikely to get support from the Latin American regional caucus. Indeed, Professor Alfonso Martinez became a member of the Working Group almost accidentally. He was named as an alternate to a person from Argentina. It was only the failure of the Argentinean to attend that put Professor Alfonso Martinez on the Working Group. Then the usual rules, holding that an incumbent has an unspoken right to continue in a particular position, ensured that he would remain on the Working Group. As a Cuban, however, he was still vulnerable in the elections to the Sub-Commission. Becoming a special rapporteur would ensure a continuing role, even if he was defeated in Sub-Commission elections.

It was widely believed during the 1993 Working Group that Alfonso Martinez wanted the draft declaration to remain in the Working Group for another year in the hope that he would become chair and assume some of the responsibility and credit for production of the draft. In arguing for one more year of consideration of the text, he was reflecting the stated wishes of a number of indigenous spokespeople. It was clear that Madam Daes wanted the

draft to be completed in 1993. She was very conscious of the pressure being brought to bear on the Working Group by superior bodies to complete the draft in 1993. Professor Alfonso Martinez has also argued strongly for the continuation of the Working Group, on which he would continue as a member.[33]

There has been much less continuity among Working Group members from the three other regions. Ambassador Judith Attah of Nigeria represented the African region for a number of years. She was with the foreign affairs ministry of the Nigerian government and is currently Nigeria's ambassador to Italy. She has been supportive of the drafting work of the Working Group, saying little and not seeming to regard the issues as affecting Africa. In 1994 she was replaced by Said Naceur Ramadhane of Tunisia. Two Chinese members have sat on the Working Group. The current Asian member is Ribot Hatano of Japan. He has said little. It is not clear whether he thinks that the issues have relevance to Japan or Asia. Over the last couple of years, the member from Eastern Europe has been Mr. Boutkevitch of the Ukraine or Mr. Chernichenko from the Russian Federation.

As this brief analysis of the members suggests, the initiative has been in the hands of the two senior members of the Working Group, Madam Daes and Professor Alfonso Martinez.

Indigenous Representation

At the first session of the Working Group in 1982 it was decided that any indigenous person or representative of an indigenous group could participate. In almost all other United Nations forums participation is limited to states, intergovernmental organizations, accredited non-governmental organizations and special observers, such as the Holy See or recognized liberation movements. The Working Group on Indigenous Populations is the most open body in the entire system of the United Nations and its specialized agencies.[34]

Another innovation facilitating indigenous participation was the creation of the United Nations Voluntary Fund for Indigenous Populations, which each year funds a number of indigenous representatives to attend the Working Group sessions. Canada has regularly contributed to this voluntary fund. As well three non-indigenous support organizations have a

'human rights fund' for indigenous participation. These two funding sources have been important in increasing indigenous or tribal representation from Asia.

A third innovation facilitating indigenous participation was a relaxing of the rules of the Economic and Social Council for the formal accreditation of indigenous organizations as 'non-governmental organizations' in 'consultative status' with the Economic and Social Council. Formal NGO status allows organizations to attend and speak in many of the human rights bodies of the United Nations. Most of the twelve indigenous organizations that have gained NGO status do not meet normal ECOSOC criteria for accreditation. An organization like the Grand Council of the Crees (Quebec), while it has played a constructive role in Working Group sessions, does not meet normal criteria, for it is not an international organization. In contrast groups like the Inuit Circumpolar Conference, the Sami Council and the World Council of Indigenous Peoples are organizations that obviously meet the criteria.

There is almost no secondary literature describing any of the indigenous organizations with NGO status. As of 1994, there were twelve such organizations.

1. World Council of Indigenous Peoples. This organization was founded on the initiative of George Manuel and other individuals in the National Indian Brotherhood of Canada. It was the most international of all indigenous organizations, but in recent years its activity has been confined largely to Central America and parts of South America. It has not been very active at the Working Group in recent years.

2. International Indian Treaty Council. The Treaty Council was established by the American Indian Movement and has a goal of gaining international recognition for treaties between Indian tribes and states. Representatives of IITC did the basic early lobbying at the United Nations in the 1970s, as documented in the film "Indian Summer in Geneva".[35] The organization has ceased to be very active.

3. Indian Law Resource Center. This is a public interest law firm acting for traditional indigenous governments in the United States, with involvement as well in indigenous issues in

Nicaragua. Its director, Tim Coulter, played a major role in the early years of the Working Group. The organization now plays little or no role at United Nations meetings.

4. Four Directions Council. This group originally represented four Indigenous peoples but now is a voice for the Mi'kmaq. Russel Barsh, a non-indigenous lawyer, represented the Council for many years and was the single most active person at the United Nations on indigenous issues. He was criticized for acting alone, without representatives of the people he spoke for. In the last few years Mi'kmaq have attended. In 1994 Mr. Barsh was not present.

5. National Indian Youth Council. This U.S. organization was another personal vehicle, but that person is now dead. It had been used to accredit Professor James Anaya, an Apache lawyer, now law professor, who formerly worked for the organization. In 1993 and 1994 NIYC was not represented.

6. National Aboriginal and Islander Legal Services Secretariat. This Australian organization is the personal vehicle of Paul Coe, a long-time Aboriginal activist. He had attended the Working Group regularly since it was established in 1982 but was not present in 1994. Australian Aboriginal participation in the Working Group in recent years has been co-ordinated and funded by ATSIC, the Aboriginal and Torres Strait Islander Commission, established by the government of Australia and composed of individuals elected by Aboriginal people. ATSIC is not an accredited NGO. As a government agency, it would not qualify for NGO accreditation.

7. Inuit Circumpolar Conference. ICC represents Inuit in the United States, Canada, Greenland/Denmark, and Russia. ICC is normally active in the Working Group. It was very active at the United Nations World Conference on Human Rights in Vienna in June 1993.

8. The Indian Council of South America. CISA began as a regional body within the structure of the World Council of Indigenous Peoples and may still play that role.

9. Sami Council. The council represents Sami in Norway, Sweden, Finland and the Russian Federation. It remains a regional member of the World Council of Indigenous Peoples. It applied for separate NGO status after it became frustrated by the decline in activity of the World Council.

10. Grand Council of the Crees (Quebec). This organization is represented regularly at the Working Group by Ambassador Ted Moses, former Grand Chief of the Crees, and Robert Epstein, a long-time non-indigenous adviser. The Grand Council was also active at the World Conference on Human Rights in Vienna in June 1993.

11. Indigenous World Association. This organization was originally the personal vehicle of Professor Roxanne Dunbar Ortiz, a controversial figure who had been very active in the International Indian Treaty Council. After being kicked out of the Treaty Council a few times, Ms. Ortiz formed her own organization. She was an important figure in early lobbying at the United Nations both before and after the formation of the Working Group. She has not attended recent sessions of the Working Group. In 1993 the organization was being revived by the co-chair, Ms. Chokie Cottier, a Lakota activist living in San Francisco.

12. International Organization of Indigenous Resource Development. This organization was formed jointly by CERT, the Council of Energy Resource Tribes in the United States, and the Hobbema Four Nations in Alberta, who have substantial energy revenues. In 1992 IOIRD made detailed presentations on specific wording for the declaration, based on discussions at a special tribal gathering in the United States. In 1993 it played no role other than accrediting Canadian member of Parliament Willie Littlechild, who is from one of the Hobbema Four Nations. It was not represented in 1994.

This brief overview of the accredited indigenous NGOs gives no sense of the patterns of indigenous involvement in the Working Group. Far more indigenous people speak for non-accredited groupings than on behalf of the twelve accredited indigenous NGOs. With exceptions, the twelve do not play a role of co-ordinating indigenous participation. ATSIC plays that kind of role for Australian Aboriginals. Regional organizations like CISA, the Asia

Indigenous Peoples Pact, and the Pacific/Asia Council of Indigenous Peoples play no apparent role in co-ordinating or organizing indigenous participation for their regions. National, tribal or local organizations predominate, not regional or international bodies.

The open rules of the Working Group have meant that there is no pressure on indigenous representatives to seek to participate under the auspices of the existing accredited organizations or even the non-accredited regional organizations.

In recent years when the Working Group has held private sessions it has turned over the meeting room and the simultaneous interpretation services to the indigenous representatives to discuss their concerns. In earlier years indigenous representatives held evening caucus meetings, with interpretation services provided on a volunteer basis by United Nations interpreters. Sharon Venne and Judith Sayers, both of Canada, have played prominent roles in these meetings, often serving as chair. These sessions have produced common positions on both the text of the declaration and on the process. In 1992 a common position was adopted demanding that an unqualified right of self-determination be recognized in the draft declaration. In 1993 a common position was adopted asking that the draft not be completed in 1993.

An apparently spontaneous indigenous meeting took place in the coffee lounge on the ground floor during the Working Group session on Thursday, 29 July 1993. Indigenous representatives expressed a strong sense of alienation from the process of the Working Group. But rather than restating the demand for another year for the drafting process in the Working Group, the meeting focused on the idea of drafting a parallel indigenous declaration. Chief Oren Lyon, Onondaga, from the United States, proposed that it be based on an earlier declaration. Both the Working Group draft and the indigenous declaration could be submitted to the Human Rights Commission together. A general plan was proposed by Mililani Trask of Ka Lahui Hawaii to assign responsibility for different parts of an indigenous declaration to different regions or organizations, with the hope of a meeting in six months. An Anishnabe representative from Manitoba said, "We will accomplish a lot more on our own. Immediately we gather in a circle, not like the other meeting." A Venezuelan Indian said of the declaration, "We wanted it to be an Indian document." An Andean Indian representative said, "The important thing of the last eleven years [of Working Group meetings] has been meeting

with each other." A Kuna Indian from Panama said, "The drafting of the declaration must end. It will not express our wishes, but we will not come back to waste time again and again. Here we just give information to them." A Latin American Indian said, "We can manage time much better than westerners." Another said, "The world has changed and now we have public opinion on our side." An Andean Indian said, "We think this [meeting] is the best time of the whole affair." Chief Oren Lyons confirmed his sense of the meeting: "We do our own statement. We deal with this one that is coming and we go on."

This indigenous meeting came too late to lay the foundation for any new initiatives. While it had important representatives from the Americas and Hawaii, it did not include Australasian, Asian or Sami people. A second meeting of the group held the next day – the last day of the Working Group meetings – was poorly attended. A proposed press release was not produced. No similar meetings occurred in 1994. The meeting demonstrated a frustration with the processes of the Working Group that seems fairly common among indigenous representatives. While the Working Group has been remarkably open by United Nations standards, it is run by non-indigenous individuals, and drafting is completed in closed sessions.

The draft declaration moved to the United Nations Human Rights Commission in early 1995. Only representatives of accredited NGOs can speak at the Commission under current rules. Some new arrangements will be necessary to have adequate indigenous representation in a new working group at the level of the Human Rights Commission.

The Independent Experts

Over the years the number of academics attending the sessions of the Working Group has increased. The original group of scholars attending Working Group sessions was made up of advisers to indigenous delegations. But in recent years certain of those people have ceased to be attached to indigenous delegations, and other scholars have come without a history of such attachment. In this way a grouping of so-called 'independent experts' emerged as a separate grouping participating in the annual meetings of the Working Group. Sixty-six "individual scholars, experts on human rights and human rights activists and observers" attended the Working Group in 1994.[36]

In 1992 Madam Daes appealed publicly and privately to the 'professors' to participate in the debate on the draft. It was clear that Daes was concerned about the extent of polarization between indigenous and governmental delegations and hoped that scholarly input could bridge the gap. The professors did not bridge the gap. Indigenous people wanted to speak for themselves. Government observer delegations saw the professors as generally pro-indigenous, not neutral. In any case the issues dividing the indigenous and governmental delegations were not technical issues. The debate over the use of the phrase 'self-determination of peoples' was not capable of any 'expert' resolution.

In 1993 Madam Daes and the other members of the Working Group departed from their previous strategy of working out compromise wording and accepted indigenous demands for unconditional wording on self-determination. Any expectation that the 'professors' might play the role of reconciling differing positions ended with that decision.

The Observer Government Delegations

To complete the picture of the participants in the Working Group process, there are always observer government delegations representing a number of states. The most prominent delegations are those of Australia, Brazil, Canada, Chile, Denmark, Finland, New Zealand, Norway and Sweden.

In the 1994 sessions, 42 observer government delegations registered, though perhaps only ten were in regular attendance. The Canadian delegation was headed by Denis Marantz of the department of Foreign Affairs in Ottawa and included other members representing the departments of Foreign Affairs and Justice. Denis Marantz has been the person in the department of Foreign Affairs responsible for indigenous issues since 1989. He has brought continuity to Canada's participation in the Working Group and was also part of the Canadian delegation at the World Conference on Human Rights in Vienna in June 1993.[37]

There do not appear to have been any organized mechanisms for co-ordinating governmental positions. Mr. Marantz states that Canadian representatives have sought to formulate positions that would be acceptable to other states, in order to make approval of a declaration possible. The most aggressive governmental statements against 'peoples' and 'self-determination' in 1993 and 1994 came from representatives of Brazil. This position was

stated by members of Brazilian government delegations and, as well, in 1994 by the supposedly independent 'expert' from Brazil who is a member of the Sub-Commission. The Brazilian statements were not made on behalf of any grouping of states. Only the Nordic states occasionally speak as a group.

The Working Group as a Forum

The review of developments has been the most dramatic feature of the Working Group's activities. Indigenous peoples come from all regions of the world to tell their stories and accuse the governments of the states within which they now live. Madam Daes has praised the Working Group as

> ...a unique forum in the world community where the aspirations and concerns of 300 million indigenous peoples could be voiced.[38]

She also referred to it as a "free and democratic listening post...".

While the review of developments sessions are fascinating, they have been of limited use in work on the declaration. The Working Group has no mandate to hear specific complaints about the abuse of human rights, no mandate to investigate, no mandate to question government representatives. Madam Daes states repeatedly that the Working Group is not a "chamber of complaints" and that communications on specific human rights abuses have to go to other competent bodies within the United Nations system.[39] In 1993 she brusquely cut off a young Karen woman, apparently because of the existence of a special rapporteur on Myanmar/Burma at the level of the United Nations Human Rights Commission.

Bangladesh provides an example of the inability of the meetings of the Working Group and the Sub-Commission to allow debate or commentary on any indigenous issues. Each year representatives of the Jumma or hill tribe peoples of Bangladesh give detailed accounts of land loss and attacks by Bengali settlers and military. In 1992, the representative of the government of Bangladesh did not reply to the accusations. In 1993 the Bangladesh representative dismissed the speakers as "terrorists" and denied the existence of a Jumma people (apart from the individual tribal groups). No member of the Working Group commented on either the tribal or the governmental position. The member of the Sub-

Commission from Bangladesh spoke in 1993, dismissing the tribal statements. No other member of the Sub-Commission referred to the controversy.

While Madam Daes has visited western liberal democracies like Canada, Australia and New Zealand, she has never attempted an investigative visit to a country like Bangladesh. Such a trip would be either blocked or controlled by the government. The continuous criticism of a government like Bangladesh in the Working Group forum may have consequences in other forums, but it goes nowhere in the Working Group or the Sub-Commission.[40]

Many of the indigenous statements are difficult to comprehend without specialized knowledge of the situation in the particular state. Many of the comments of government representatives are routine, uninformed denials, sometimes with the added suggestion that the allegations against their state arise out of some dark plot to discredit the good name of the country. The forum does not permit debate. At most there are statements and counter-statements, with the members of the Working Group listening, not commenting. The annual reports rarely name states against whom allegations are made, muting much of the impact of the review of developments.

Even with its deficiencies, the forum provided by the review of developments is valued highly by Indigenous peoples. The annual sessions of the Working Group have become the largest regular human rights meeting in the United Nations calender. More than 790 people attended the sessions in 1994.[41] Given that the drafting work on the declaration had been completed at the Working Group level in 1993, some observers expected fewer representatives in 1994. Instead numbers were higher than at any time in the past.

The Future of the Working Group and the Issue of a Permanent Forum for Indigenous Peoples

In 1994 the Working Group on Indigenous Populations discussed as two agenda items the question of the future of the working group and the question of a permanent forum of Indigenous people. While these were separate agenda items, the discussion of the two items took place together. This illustrated the uncertainty that exists on whether the two issues are inter-related.

The future of the Working Group

The Working Group has a double mandate: to review developments and to draft standards. It is useful to set out the exact wording of the mandate, which treats the two elements separately:

> (a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyse such materials, and to submit its conclusions to the Sub-Commission, bearing in mind the report of the Special Rapporteur of the Sub-Commission, Mr. Jose R. Martinez Cobo, entitled "Study of the problem of discrimination against indigenous populations" (E/CN.4/Sub.2/1986/7 and Add. 1-4);
>
> (b) Give special attention to the evolution of standards concerning the rights of indigenous populations, taking account of both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world.[42]

The information received by the Working Group is mainly the oral and written presentations of indigenous representatives and observer government delegations. Some information comes from intergovernmental agencies. There are no regular requests by the Secretary General producing information for the Working Group (a process referred to in the mandate).

The Working Group has no authority to adjudicate or investigate. The mandate asks the Working Group to "analyse such materials and to submit its conclusions to the Sub-Commission". The Working Group does not do this. The annual reports merely summarize statements. Anything that could be called analysis or conclusions comes in the drafting of standards or in the context of studies (which are authorized separately). This has meant that the function of the review of developments seems to be to aid the Working Group in its work in drafting standards. If the mandate is seen in this way, there would be no reason to continue the sessions of the Working Group once the drafting work was completed. But this is too simple a view of the Working Group. Members of the Working Group are involved in the

additional studies on treaties and on indigenous heritage. The forum continues to be valued, it seems, as a forum, without any investigative or adjudicatory activity.

At the United Nations World Conference on Human Rights, held in Vienna in June 1993, Madam Daes gave a strong speech, calling for the transformation of the Working Group on Indigenous Populations into a higher-level expert body with elected indigenous membership. The final statement of the Vienna conference asked the Human Rights Commission to address the mandate of the Working Group:

> 29. The World Conference on Human Rights recommends that the Commission on Human Rights consider the renewal and updating of the mandate of the Working Group on Indigenous Populations upon completion of the drafting of a declaration on the rights of indigenous people.

In July 1993, the Working Group considered the question of its future role. Miguel Alfonso Martinez supported a continuation of the Working Group with a mandate to review developments and draft standards, saying the drafting of standards was not exhausted with the completion of the draft declaration. He said that no monitoring activities should be given to the Working Group, since there were other United Nations bodies that could undertake that type of activity.[43]

Professor Alfonso Martinez prepared a working paper on the question of the future of the working group for the 1994 meeting. It described continuing work for the Working Group:

> 40. There is obviously still a long way to go in order to deal successfully with the serious and pressing plight (in the words of the preamble) of indigenous peoples. Nevertheless, everything seems to suggest that, on the basis of its current original functions, the Group has been able to make significant progress, at least in five key areas, namely, (1) setting relevant international standards through the draft declaration; (2) promoting greater understanding of the scale and seriousness of the problems which indigenous peoples currently face, both by public opinion (national, in many countries, and international) and by many national authorities involved in indigenous matters; (3) identifying such problems and their many facets (matters relating to cultural rights for example) and exploring possible tangible solutions; (4) providing a permanent forum for the free exchange of opinions between Governments and indigenous peoples on issues on which both parties are not only opposed, but also share common interests; and (5) offering a permanent annual framework in which indigenous organizations and people can meet, exchange experiences and, possibly, coordinate their positions.[44]

He suggested some new tasks, relating to the International Decade on the World's Indigenous People, monitoring the implementation of the declaration when it comes into force, and disseminating information on the declaration, largely through seminars.[45] He also suggested expanding the membership of the Working Group to include equal representation of Indigenous people.

The 1994 report of the Working Group commented:

> 153. The members of the Working Group believed that the Working Group would continue to serve important and necessary functions. Those included its present functions, in particular additional standard setting in fields in which members of the Working Group were engaged in technical studies, and ensuring continuity in the unique dialogue between indigenous peoples, Governments and the United Nations system which had evolved into a major and routine part of the Working Group's annual sessions. Both indigenous peoples and Governments had stated that they greatly valued the opportunity they had had since 1982 to meet annually at Geneva and to engage in a frank exchange of views, on a basis of equality, which had developed into a constructive dialogue.[46]

The report did not adopt the suggestion on equal indigenous membership, instead urging governments to nominate Indigenous peoples to the positions of members and alternates of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[47]

A permanent forum for Indigenous peoples

The idea of a permanent forum for Indigenous peoples in the United Nations system originated in the United Nations seminar on self-government held in Greenland in 1991. The idea is referred to in the final statement of the Vienna conference, in the General Assembly resolution establishing the International Decade of the World's Indigenous People, and in resolutions of the Human Rights Commission and the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Other documentation has also been generated on the issue, including a report of the secretariat, a note by Madam Daes, a discussion paper by Denmark/Greenland, analysis by the Aboriginal and Torres Strait Islander Commission and written comments by Canada.[48] The report of the secretariat notes some of the suggestions that have been made:

> ...the proposal to establish a Commission on Indigenous Peoples within the United Nations, an advisory body, a permanent seat for indigenous people, an office for indigenous affairs, a High Commissioner for Indigenous Peoples, and a suggestion that observer status be granted to one or more indigenous organizations at the General Assembly.[49]

The representative of Denmark, speaking in the Sub-Commission on 22 August 1994, stated:

> We agree with the conclusions of the Working Group that an important aspect of the work of the permanent forum should be the operational coordination for development in this special field. To us, this seems to indicate that the permanent forum must be a new separate entity outside the human rights machinery of the United Nations. On this basis, we are inclined to favour the idea that the forum should be a subsidiary body of ECOSOC.[50]

The August 1994, resolution of the Sub-Commission envisages more consultation on the issue and concludes with these recommendations:

> 3. *Recommends* that any future permanent forum play an important role in operational coordination for development and that it enjoy observer status at all relevant United Nations bodies, including the Economic and Social Council, the Commission on Human Rights and the Commission on Sustainable Development;
>
> 4. *Also recommends* that the Centre for Human Rights organize a workshop on a possible permanent forum for indigenous people with the participation of representatives of Governments, indigenous organizations and independent experts.[51]

Two bodies or one?

Some proposals have suggested only one body, by either turning the Working Group into the new permanent forum or ending the Working Group in favour of a new body. The 1993 report of the Working Group summed up the discussion in the following paragraphs:

> For some participants it was not clear whether a future permanent forum should be established in addition to the Working Group or whether the Working Group itself could be transformed into such a permanent forum. However, the usefulness of creating a permanent forum for indigenous issues was not questioned. That forum would deal with a range of problems and could also give advice to Governments.[52]

The 1994 working paper by Miguel Alfonso Martinez on the future of working group emphasized that the Working Group was already

> ...a permanent body (or forum) in the United Nations system devoted solely and exclusively to analysing questions affecting indigenous peoples.[53]

The paper argued that the resolutions of the World Conference, the General Assembly and the Commission on Human Rights envisaged two permanent United Nations bodies — the Working Group and a new permanent forum.

A Canadian submission in 1994 on the issue of a permanent forum clearly saw the Working Group as the appropriate body to play the roles suggested for a new permanent forum.[54]

The exact future of the Working Group or of a new forum within the United Nations remains unresolved.

The Draft Declaration on the Rights of Indigenous Peoples

There was strong pressure on the Working Group to finish the draft declaration in 1993.[55] The pressure was not a result of the length of time the drafting has taking. The slow pace was not remarkable by United Nations standards. The concern was with the substantive direction taken by the Working Group. The Working Group is a group of independent experts. When the draft moves to the Human Rights Commission, the political representatives of States will gain control of the process.

A Declaration

Declarations are approved by the General Assembly of the United Nations. Two important examples are the Universal Declaration of Human Rights of 1948 and the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960. As a matter of international law, a declaration is not legally binding on any state simply because it was approved by the General Assembly. The General Assembly is not a legislature. It cannot enact international law. The provisions of a declaration are binding only if they reflect principles of customary international law, that is, the established practice of states on the

particular matter. Declarations may be seen as some evidence that particular principles have been accepted by the community of states as normative.

In the United Nations system the texts of treaties are also approved by the General Assembly. After approval, they can be signed by states. They become binding on a state, as a matter of international law, when they have been signed by that state.

It is common for declarations to be followed by the preparation of a treaty on the same subject. For example, treaties on torture and on the rights of children were preceded by declarations. It is possible that a declaration on indigenous rights will be followed, in time, by the preparation of a treaty.

These formal rules – that declarations, unlike treaties, are not legally binding – are of limited significance. States are less concerned about whether a particular human rights provision is legally binding than about whether the words can be used to criticize state practices.

The Process

The Working Group completed its work on the draft Declaration on the Rights of Indigenous Peoples in 1993. The draft will be received by the Human Rights Commission in 1995. The Human Rights Commission is expected to establish a new working group to review the draft declaration. Initial decisions on process will be taken at the Commission meetings in February-March 1995. Any substantive rewriting of the text will take place at the Commission level. After approval of a text by the Commission, passage by the Economic and Social Council and the General Assembly should be assured.

The Indigenous Focus on Rights

Indigenous people have unified around demands for rights in their activity at the United Nations. They have focused on rights to territories and rights to autonomy, brought together in their basic demand for self-determination. They have sought rights, not co-operation, development or partnership. Robert Williams has commented on this pattern:

> In the context of the contemporary indigenous struggle for survival and international legal protection, rights discourse has functioned effectively in

> generating a shared, empowering vocabulary and syntax for indigenous peoples...Thinking in terms of rights has organized indigenous peoples on a global scale to combat their shared experiences of being excluded and oppressed by the dominant world order. The use of rights rhetoric in international human rights standard-setting bodies such as the Working Group illustrates the ways in which indigenous people can transform the dominant perception of their rights in the international context.[56]

The focus on "rights discourse" has been clear in domestic Canadian practice as well as at the United Nations. While a number of commentators criticize rights discourse as an inadequate framework for advancing the actual situation of particular groups, it is compelling and it is available. The dominant society values rights. The gaining of rights could be followed by other gains. Rights are easier to organize around than programs.

The Indigenous peoples that use rights language the least are the Sami. They have the closest relationships with governments of any of the indigenous representatives, often sitting as part of government delegations. They have accepted advisory Sami parliaments in Finland, Norway and Sweden, a kind of arrangement that North American Indigenous peoples would quickly reject. They do not dissent from the self-determination rights language that has become the common language of the indigenous delegations, but they do not emphasize it themselves.

Self-Determination in the Draft

The fight over 'self-determination of peoples'

The most central debate has been around the use of the phrase 'self-determination of peoples'. The original mandate of the Working Group spoke of indigenous populations. The Working Group now uses the phrase indigenous peoples in its work, but that phraseology has not been accepted in higher bodies. The use of indigenous populations was confirmed as established usage by the Human Rights Commission in 1995, at the insistence of Brazil.

Indigenous representatives seek an unambiguous, unconditional recognition of the rights of indigenous peoples to self-determination. The Working Group resisted such language. The 1992 draft began with the following paragraph:

> Indigenous peoples have the right of self-determination, in accordance with international law by virtue of which they may freely determine their political

> status and institutions and freely pursue their economic, social and cultural development. An integral part of this is the right to autonomy and self-government;

This wording is typical of a series of attempts to develop language that recognizes self-determination but with some qualification, linkage or context. The phrase in the 1992 wording, "in accordance with international law", could be seen as a major qualification, for most scholars would say that current international law does not recognize a right of indigenous peoples within states to self-determination. And the final sentence -- is it an explanation of what self-determination may mean, or does it limit indigenous self-determination to self-government within states?

Debate over 'peoples' occurred at the 1993 United Nations World Conference on Human Rights in Vienna. The conference was held during the International Year of the World's Indigenous People, and a theme day was devoted to Indigenous people. Madam Daes used the occasion to press for acceptance of the term 'Indigenous peoples':

> This brings me to a final observation on a matter which may seem to you purely symbolic, but it is of fundamental importance to Indigenous Peoples themselves. In the title of the Working Group, the Voluntary Funds and everywhere else in the United Nations system we must use the term "Indigenous Peoples". I share the pain and disappointment of Indigenous Peoples at the use of the term "people" in the singular, in the draft Final Document of this Conference. It is a relic of racism and racial discrimination which simply must not be legitimized by this historic Conference on human rights. Indigenous Peoples are varied and distinct societies with the same essential humanity and rights as other peoples. It should be also mentioned that the term "Indigenous Peoples" is already a term of contemporary international law. Accordingly, I implore you not to speak with the dead voice of the nineteenth century on this issue, but to adopt the term "Indigenous Peoples".[57]

Rosemarie Kuptana, head of the Inuit Tapirisat of Canada, was the most active lobbyist at Vienna on the 's' issue -- the issue of getting the conference to refer to 'indigenous peoples' in its final statement. In an indigenous briefing on 22 June, she identified Canada as denying the universality of human rights by refusing to treat indigenous peoples as peoples with the same rights as other peoples.[58] Indigenous representatives and their supporters demonstrated in the plenary hall by holding up printed sheets of paper with the word 'people' and a large letter S. Security guards started to confiscate any such sheets

from people entering the building (for there were to be no demonstrations in the conference itself). Later 'S' t-shirts were printed in time for the 1993 sessions of the Working Group.

Ms. Kuptana lobbied many government delegations in Vienna in an attempt to have the wording of the final statement changed on the floor of the final plenary session. Many states indicated to her that they would support a motion if one were made, but in the end no state was prepared to make the motion. In the normal procedures of United Nations meetings, the statement had been negotiated in closed governmental sessions and was expected by all states to be approved without discussion or vote. In the end it was moved and adopted in a matter of minutes by 'consensus'. Ms. Kuptana understood, from discussions, that 16 or 17 states would have supported an amendment.

The final document, the Vienna Declaration and Programme of Action, contains five paragraphs specifically on "Indigenous people" under section 2, "Persons belonging to national or ethnic, religious and linguistic minorities". This constituted a double defeat for indigenous representatives. They lost the fight on 'peoples' and were classified as 'minorities'. At the beginning of the 1993 session of the Working Group, Madam Daes referred to the conference as a "defeat" for Indigenous peoples. But, she said, a "defeat can come before a victory."

During the Working Group sessions in 1993, the Canadian government delegation informally circulated proposed wording to members of the Working Group, indigenous representatives and others. The proposal read:

> All peoples have the right of self-determination in accordance with established principles of international law. This right applies to indigenous and non-indigenous peoples on the same basis and without discrimination.

The article would be followed by an elaboration on internal self-determination, self-government and autonomy within States.[59] The wording was interesting. Like the 1992 wording, it is not clear that self-determination would apply to all indigenous groupings.

During the Working Group sessions in July 1993, the Working Group accepted Indigenous peoples' demands for an unconditional statement on self-determination. Article 3 of the draft reads:

> 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.

When this wording came to the floor at the Working Group, indigenous delegates applauded. It copied general wording on self-determination from the first article of the Covenant on Civil and Political Rights. What is left unsaid in the provision is the actual content of self-determination for indigenous minorities living within states. That debate on the meaning or content of self-determination would take place separately from the declaration or, at least, separately from article 3.

Article 31, appearing much later in the draft, is a possible elaboration of the meaning of article 3:

> Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions;

Some indigenous representatives expressed concerns that article 31 would be seen as a definition or limitation of the right of self-determination stated in article 3. Some said they could not support the draft unless article 31 was deleted.[60] The exact wording of article 31 denies such a linkage.

There have been differing reactions by observer government delegations to the self-determination wording.

In 1994 New Zealand questioned the meaning of self-determination in this context:

> There has been much discussion on self-determination. But are we talking about the international legal concept of self-determination, developed by the UN over the last fifty years, with its focus on decolonization? Or are we talking about a different concept?[61]

Norway expressed its view on meaning:

> On the question of self-determination it is our position that this notion in the context of a declaration on the rights of indigenous peoples, has to be understood as self-determination within the framework of existing states. The emphasis should be on political and democratic participation in the decision making process in questions affecting indigenous peoples.[62]

Brazil expressed concern in the Working Group and the Sub-Commission:

> ...some of the provisions contained in articles 3 and 31, by virtue of which indigenous populations would be attributed the right to self-determination as defined by international law, tends to incorporate new and insufficiently matured concepts which are not, in their present formulation, consistent with constitutional and international law practices... These provisions might be interpreted as recognizing indigenous communities as subjects of international law and thus exempting them from the jurisdiction of the State where they live.[63]

Denmark, in 1994, speaking for the Danish government and the Greenland Home Rule government, unequivocally supported the wording adopted by the Working Group, the only government delegation to do so:

> Denmark supports the text in its entirety. In particular, I wish to point out that we fully support the paragraphs on the right of self-determination of indigenous peoples. We agree with the Working Group that this right must be recognized without reservations and according to established international law.[64]

Canada and Australia did not address the self-determination issue directly in their 1994 statements. The 1993 and 1994 reports of the Working Group summarized the debate, noting support and opposition from different indigenous representatives and different observer government delegations.

The meaning of 'self-determination of peoples'

There are two ways of limiting the application of self-determination of peoples in this context. The first is to refuse to apply the term peoples to indigenous groupings living within states. The second is to hold that Indigenous peoples within states are entitled to limited self-determination, limited to appropriate levels of autonomy or self-government and not including a right of secession. Both these approaches are in use in the current debate. Brazil's opposition, for example, is on both grounds, seeming wary of international standards even on autonomy or self-government.

It has been suggested that Canada's opposition to the use of the word peoples is paradoxical, for section 35 of the *Constitution Act. 1982*, refers to the "aboriginal peoples of Canada". But international and domestic legal systems are separate. Terms may not mean the same thing.[65]

Professor Rosalyn Higgins, a respected international law scholar from the United Kingdom and a member of the Human Rights Committee, confines the term people to the inhabitants of a state. By this reasoning there is only one 'people' in Canada. Only Canadians as a whole have a right of self-determination. The only exception she would concede is for the few overseas colonies that still exist, where the people in the territory would have a right to independence. She is anxious to counter the ethno-nationalism that is ravaging parts of the former Soviet Union and the former Yugoslavia. While she will support self-government and autonomy as essential for many minority and indigenous groupings, she opposes using the terminology of self-determination of peoples in such contexts. She would argue that examples of successful secession – Bangladesh, the Baltic States, Eritrea – do not demonstrate that the people had a 'right' to secede. Secession is more a matter of fact than of right, and the community of states will extend recognition to territories that have succeeded in establishing themselves as separate states.

It is clear that the concern with peoples is simply a concern with self-determination. It may be more productive to turn to the meaning of self-determination in contemporary international law.

The primary use of the concept of self-determination in the post-war period has been in decolonization. In this context, self-determination means that the territory has the choice of independent statehood, free association, autonomy (perhaps as a component of a federal state) or full political integration. The choice is almost always for independent statehood, though there are examples of other choices. International law draws a sharp distinction between states and non-state political entities. This has created a situation, articulated by Canada and Brazil, of fear of small independent units within the state. Would Canada look like a piece of Swiss cheese, with hundreds of 'San Marinos' inside our borders?[66]

On the face of it this fear seems absurd. A little terminological looseness in a declaration is not going obtain full membership in the United Nations or a seat on the Security Council for the Sarcee Nation or Davis Inlet. What is really going on in this debate?

First, we are uneasy about jurisdictional issues relating to First Nations communities within the country. During debates on the self-government provisions in the Charlottetown Accord there were suggestions that Indian people might be able to deal in marijuana, build

mega-malls in residential areas and operate casinos. If we do not have stable ideas on the appropriate level of autonomy for First Nations communities within Canada, it seems risky to move further into unknown territory by accepting a right of self-determination under international law.

Second, Canada is generally unwilling in domestic or international activity to use terminology that could be cited by Quebec nationalists as a basis for separation. Canadian concerns about Quebec nationalism have often affected Canadian governmental attitudes toward First Nations. Dr. Sally Weaver's fine study of the drafting of the 1969 white paper on Indian policy shows how 'special status' was being denied both to Quebec and to Aboriginal peoples for basically the same reasons.[67]

Third, Canada faces the fact that certain traditionalist or militant indigenous groupings do claim the right to independence. The position taken by the Mohawk warriors in the Oka confrontation was a sovereignty position. National Indian leaders in Canada will not disavow 'sovereignty' language, because to do so would alienate one part of their very diverse constituency. And there can be fears of other possibilities in northern areas with indigenous majorities. In an interview during the United Nations World Conference on Human Rights in Vienna in 1993, Denis Marantz said that any endorsement of self-determination for Indigenous peoples could encourage groups like the Cree of Quebec to seek independence if Quebec were to leave the Canadian federation.[68] If the Cree could control the hydroelectric facilities in their territories, independence would be viable.

Brazil has long had concerns about sustaining jurisdiction over the vast Amazonian hinterland. That seems part of the backdrop to Brazil's concerns about the language in the draft declaration. India, as well, has real concerns with territorial integrity. Naga representatives state regularly in the Working Group that they are not part of India. They declared independence one day before the proclamation of independence by India.

In other words, opposition to the self-determination language is not driven by concerns about specific or clear legal consequences of the terminology. It is driven by uncertainty, by problems in domestic indigenous policy and by particular threats or fears relating to territorial integrity.

There is general agreement on ideas of autonomy or self-government for Indigenous peoples living within states. There appear to be three international law formulations that could support autonomy and self-government:

1. All peoples have a right of self-determination. If the people live in an overseas colony, the people have the right to choose sovereign independence or whatever other political status they wish. If the people is an Indigenous people within the boundaries of an existing state, their right to self-determination must be balanced against the right of the state to territorial integrity. This balancing means that the people have the right to choose the extent of autonomy or self-government that is appropriate to their situation within the particular state. The extent of autonomy or self-government will have to reflect the concrete situation faced by the people (considering factors such as numbers, territoriality, extent of cultural distinctiveness). A denial of equality or human rights or self-government could give the people an option for independence.
2. Indigenous peoples within states have a right to 'internal self-determination', as do all other individuals or groups within the state. In the case of cultural minorities and indigenous peoples, effective participation in the life of the state requires some recognition of their distinctiveness. In most cases this will require some decentralization, autonomy or self-government. A denial of their rights could possibly justify secession.[69]
3. Indigenous peoples are cultural minorities. Cultural minorities have a right to preserve and develop their cultural distinctiveness. To accomplish this goal, the minority must have a degree of autonomy. This is particularly necessary for Indigenous peoples, where cultural difference is often very great.

It is striking that academics such as Patrick Thornberry, Richard Falk, Rosalyn Higgins and Ian Brownlie all tend to agree on two points in this context:

1. They rule out any general right of secession of Indigenous peoples, while recognizing such a right in particular, highly exceptional circumstances.
2. They accept that regimes of autonomy or self-government are appropriate structural responses to the realities of continuing communities of Indigenous peoples.[70]

The scholars do not agree, however, on the exact terminology to be used. Madam Daes stated in the 1992 sessions that the phrase self-determination "was used in its internal character, that is short of any implications which might encourage the formation of independent States."[71]

The special case of Quebec

One particular issue arises in the case of Canada. If Quebec were to secede, would Indigenous peoples within Quebec have any right to choose their status? The debate is not over the small reserve communities in southern Quebec, but over the large territories in the North where the majority populations are Cree or Inuit. The debate also involves consideration of the different historical borders of the province of Quebec. It is certainly accurate to say that the 1912 border extension added large northern areas whose peoples were racially, linguistically, culturally and religiously separate from the Francophone populations of southern Quebec.

The Cree prepared a submission to the United Nations Human Rights Commission, dated February 1992, that argued a Cree right of self-determination if Quebec seceded.[72]

Quebec commissioned five prominent international law scholars to prepare a legal opinion on the right of Indigenous peoples in Quebec to self-determination and secession. The scholars, including Rosalyn Higgins of the United Kingdom and Thomas Franck of the United States, asserted

1. that Quebec did not have a right of self-determination (in the sense of a right of secession), and
2. neither did the Indigenous peoples within Quebec.

International law does not recognize a right of Quebec to secede, but a successful secession (as with Bangladesh, Eritrea, the constituent units of the former Soviet Union and Yugoslavia) would be recognized internationally.

What would be the proper borders for an independent Quebec? Decolonization of overseas territories has adhered to the principle of *uti possidetis*, by which a colonized area becomes independent using the state boundaries created for the colony. For example, Nigeria was not a logical construct in terms of tribal identities or in terms of pre-colonial black African political units. Yet it decolonized as Nigeria, using the territory ruled by the United

Kingdom as Nigeria. By this logic, Quebec, though an artificial construct, would become independent as Quebec, including the Indigenous peoples in the territory.

But Quebec has not been considered a colony. It is a political unit within a federal state. What significance do the internal political boundaries of a federal state have in the determination of these highly unusual issues? Until recently it appeared that they would have none, but the recognition of new states in the former Soviet Union and the former Yugoslavia has generally proceeded along the lines of recognizing the former constituent units. The problems with Bosnia-Herzegovina demonstrate dramatically the failure of this principle to be applied systematically in practice, but it can be argued that the war is in violation of international law. Another prominent example of this kind of problem is Crimea, with a Russian majority population, but part of an independent Ukraine because of the internal political divisions that had been used in the former Soviet Union.

The use of *uti possidetis* is justified virtually exclusively on the pragmatic grounds of minimizing ethnic claims or political uncertainty in favour of continuity. It therefore does apply logically both to the independence of former overseas colonies and to the independence of former members of federal states.

But the boundaries of the province of Quebec are not the only important boundaries. Kingsbury has raised a parallel question in relation to Yugoslavia.[73] If you recognize the former republics of Yugoslavia, why do you not recognize the autonomous area of Kosovo within Serbia? If you recognize Quebec, should you not recognize that the Cree and Inuit have separate legal regimes in northern areas? These are not simply local, municipal-style rights. They relate to the national government, to the national constitution and to an emerging international law on the rights of Indigenous peoples.

Other Provisions in the Draft

Individual and collective rights

There has always been concern about the balance between individual rights and collective rights in the draft, with Indigenous people arguing strongly for an almost exclusive focus on collective rights.

The first two preambular paragraphs begin the document with a positive invoking of collective differences:

> Affirming that 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,
> Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

The first two operative paragraphs affirm that general human rights apply equally to Indigenous peoples and Indigenous individuals. Articles 19 and 20 grant rights of full participation in the institutions of the state within which the Indigenous people finds itself. This is, in effect, the anti-apartheid provision. Apartheid provided for group rights but denied the residents of the homelands equal rights with other South Africans outside the homelands.

The issue of collective and individual rights has been contentious over the last decade. Perhaps now the idea of the co-existence of both categories of rights is accepted.[74]

There is a concern with what limits may be placed on indigenous self-government to protect the human rights of individual members of the self-governing units. This has been a debate in Canada for a number of years. Paragraph 33 of the draft reads as follows:

> Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards.

This provision, making indigenous autonomy and indigenous law subject to international human rights norms, is in line with the recommendation of the Special Committee on Indian Self-Government of the House of Commons and with Bill C-52, the self-government bill introduced by John Munro as minister of Indian Affairs in 1984, but never debated or enacted. First Nations leaders have been prepared to have their legal systems judged by international human rights law, but have been uneasy about the application of domestic human rights law, which might be more individualistic or assimilationist in character.

At the specific suggestion of the Canadian government delegation in 1993, another article stating a human rights norm was introduced, one taken from the 1983 amendments to the *Constitution Act*. Article 43 of the draft reads:

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals;

Articles 33 and 43 were not opposed by indigenous representatives.

Lands and territories

The provisions on lands are very strong:

> 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard;

Article 26 gives Indigenous peoples ownership and control over the lands and resources "they have traditionally owned or otherwise occupied or used". Article 27 provides for the restitution of lands taken without the free and informed consent of the Indigenous peoples (while recognizing that compensation, preferably in the form of land, is a possible alternative to restitution). Development projects on indigenous lands require "free and informed consent" by article 30.

Cultural and intellectual property

Two articles deal with indigenous cultural and intellectual property, the first focused primarily on material culture and the second on intellectual property, though the sections clearly overlap:

> Article 12 Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs.

> Article 29 Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.
>
> They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and

other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts.

Powers of self-government

As in Canadian discussions on self-government, there was debate on whether there should be a list of powers of indigenous self-government or a more general description of the purposes of self-government. In the 1992 sessions, the concern was put in terms of whether there should be a 'shopping list' of powers. The result was article 31, already quoted but relevant to examine again:

> Indigenous peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

This basic provision is supplemented by provisions on membership/citizenship in the indigenous collectivity (article 32), indigenous law (article 33), education (article 15), media (article 17), child welfare (article 6), and health and housing (article 23).

In 1992 some states were concerned that national environmental laws apply on indigenous lands.

Australian and New Zealand government representatives objected specifically to the inclusion of 'criminal jurisdiction' in a previous draft.

A representative of the National Maori Council suggested the inclusion of 'foreign relations'. The current draft provides only for traditional cross-border contacts with other Indigenous people (article 35), which in North America would be understood as Jay Treaty rights, not foreign relations in general.[75]

Treaties

Though the treaty study has not been completed, the draft declaration has two references to treaties. The thirteenth preambular paragraph reads:

> Considering that treaties, agreements and other constructive arrangements between States and indigenous peoples are properly matters of international concern and responsibility;
>
> The substantive provision is article 36:
>
> Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned;

Perhaps by giving the right only to Indigenous peoples, the article leaves open the possibility of Indigenous peoples challenging treaties as unequal or imposed.

The lack of a definition of 'indigenous'

To many observers it is peculiar that the draft declaration has no definition of the term indigenous. The International Labour Organisation has suggested annually that the draft should follow the ILO pattern of referring to both Indigenous and tribal peoples. The issue of adding 'tribal' was raised briefly in the 1993 Working Group sessions. As with past versions, the 1993 draft has no definition of indigenous and does not add the word tribal.

The two issues are related. The areas where governments have asserted that they do not have Indigenous peoples tend to be areas where formal state usage is 'tribal' or 'minority', or 'nationality' or 'minority nationality'. So, for example, India and Bangladesh deny that they have Indigenous peoples but acknowledge that they have tribes. The main reason for adding 'tribal' would be to make it clear that the declaration is intended to apply in South Asia. The main reason for not including tribal and not including a definition of indigenous is to avoid provoking opposition from certain Asian states (and possibly African states as well).

The decision against a definition can be put in a different, more positive way. There is broad agreement on a large core group of peoples who are Indigenous – those in the Americas, Australasia and the Nordic states. The declaration should be left open to any

evolution of understanding of the category or to any developments in usage. By this analysis, the scope of the category can evolve as our understandings develop.

Kingsbury has suggested that United Nations usage might assist in giving content to the term, pointing to decisions of the Voluntary Fund as to which individuals should receive funding to attend sessions of the Working Group. In that context individuals from India and Burma have been funded, although those states do not accept the term indigenous. A more visible indication of inclusiveness took place at the inauguration of the International Year of the World's Indigenous People in the General Assembly in New York on 10 December 1992. The 20 indigenous speakers included Venerable Bimal Bhikku, Chittagong Hill Tracts, Bangladesh; Mr. Giichi Nomura, President, Ainu Association of Hokkaido, Japan; Mr. Moringe L. Parkipuny, Kipoc, Tanzania; and Mr. Anderson Mutang Urud, Sarawak Indigenous Peoples' Alliance, Malaysia.[76] Each of the states involved would deny that they have Indigenous people.

The international concern began with the Indians of the Americas. The Aboriginals and Maoris of Australia and New Zealand were included without hesitation. There was a delay before the governments of Norway, Sweden and Finland acknowledged that the Sami were indigenous. Their acceptance of the term marked the first time that states with indigenous majorities recognized minority populations as indigenous. Russia denied it had Indigenous people until the final years of the U.S.S.R. The Philippines uses the term. Usage has been evolving, and one can respectably argue that it would probably be counterproductive to force the process.

The Study on Treaties

Background

There are many examples of treaties being used by colonizing powers and Indigenous peoples to formalize relations. Usually the treaties were in the diplomatic language of the day and dealt with issues that were the common subjects of international treaties: peace, allegiance, jurisdiction and territory. As colonial powers became stronger, it was common for them to dismiss the treaties as of no legal or political significance. The early lower court decision in the Canadian case, *Regina* v. *Syliboy*, was cited by the federal government for years as

establishing that treaties with Indian tribes had no legal validity.[77] The early New Zealand decision in *Wi Parata* v. *Bishop of Wellington* stated the proposition that treaties with savage tribes had no legal status.[78] The decisions of Chief Justice Marshall in the early nineteenth century in the United States gave the treaties legal status in domestic law, but described the tribes as "domestic". His rulings were compatible with later decisions allowing Congress unilaterally to override treaty provisions.[79]

The devaluing of colonial-era treaties continued in the process of the decolonization of overseas territories. The major effort to assert prior treaty relationships in this new context occurred in what is now India. The Princely States had treaties of alliance with the United Kingdom. Their territories were not considered by the United Kingdom as part of British India. At one point Viscount Mountbatten decided to give the Princely States the choice of joining an independent India or remaining separate. That approach, which would have respected the treaty relationships, was abandoned. In effect, the Princely States were turned into simple colonies unilaterally by the United Kingdom. The Princely State of Hyderabad resisted incorporation and petitioned the United Nations. Hyderabad was invaded and the government of the Nizam defeated. The petition to the United Nations was withdrawn.

But the questions remained about the proper legal status of the treaties between states and Indigenous peoples. The International Indian Treaty Council had made the issue of international law recognition of treaties a central goal of its work. It was the only active indigenous lobbying group at the United Nations in the late 1970s and the leading participant in the important NGO conferences of 1977 and 1981. The Martinez Cobo report of 1983 recommended an additional study on the legal status of treaties between Indigenous peoples and states. Indians from North America regularly asked the Working Group on Indigenous Populations to proceed with a treaty study.

The Working Group on Indigenous Populations endorsed a treaty study in 1988, over private protests by Canadian government representatives. Canada tried to block the initiative at the level of the Human Rights Commission in 1989.

Canada argued that any study should be 'universal'. Canada had made the universality argument a number of times, usually concerned that the Soviet Union (as it then was) was getting a free ride on the issue of Indigenous peoples. A treaty study would not be universal

because, of course, it would focus only on countries where there were treaties. Canada also argued that any study should be forward-looking. It should not focus on problems of the past, but look to the usefulness of agreements in resolving disputes with Indigenous peoples in the present and future. After all, Canadian claims policy was geared to negotiations and agreements.

Canada was also concerned that Miguel Alfonso Martinez, the Cuban who had lobbied successfully to be the special rapporteur on the treaty study, would be interested in attacking the United States and, in the process, would attack the Canadian record as well. The member of the Sub-Commission from the United States at one point offered to be the special rapporteur if there appeared to be problems about the suitability of Alfonso Martinez. No one took that offer seriously.

The Canadian lobbying did not succeed in blocking the study, but it changed the terms of reference. The Commission authorized a Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations.

Progress on the Treaty Study

The treaty study has proceeded very slowly. There are still the staffing and funding problems at the Centre for Human Rights that worked against the efficient completion of the Martinez Cobo report a decade earlier. Indeed the staffing and funding problems are now greater. Some funding was obtained for Dr. Isabelle Schulte-Tenckhoff, a Swiss anthropologist, to do research work for Professor Alfonso Martinez.[80]

The special rapporteur prepared questionnaires that were forwarded to governments and to indigenous organizations.[81] It is standard procedure in the United Nations for a study to seek information from states in this way. As of August 1992, seven governments had responded to the questionnaire, including Canada, but not including the United States or New Zealand. The Canadian document has not been made public. It is quoted briefly in paragraphs 156 and 157 of the First Progress Report. Six indigenous organizations had responded, including two First Nations from the Treaty 6 area of Canada.

At the invitation of the Treaty 6 chiefs, Alfonso Martinez visited Canada. He met with Indian elders in Saskatchewan. He has also visited the United States and met with leaders of the International Indian Treaty Council.

Alfonso Martinez presented his first progress report in 1992. In 1994 he indicated that he had been unable to complete a second progress report, largely, he said, because of his inability to cope with the large amount of information he had received. He expects to present a second progress report in 1995 and a final report in 1996.[82]

In the 1994 session, Alfonso Martinez faced requests to expand the content of the study:

> Suggestions were made by indigenous representatives from Africa that specific treaties which affected their legal position be looked into. A more general suggestion was made that research into the role of the Holy See in the establishment of treaties in the sixteenth and seventeenth centuries be undertaken. An indigenous representative from the Russian Federation noted a gap in the first progress report with regard to treaties from Eastern Europe and Russia and expressed the hope that the Special Rapporteur would include such data in further reports.[83]

The First Progress Report

The First Progress Report begins with an attempt to construct an intellectual context of anthropology and legal anthropology in which to understand the indigenous side of any treaties or agreements.[84]

The report makes some preliminary observations on treaties. It has always been difficult to understand the use of treaties in some situations and not in others. At one point the report suggests that treaties were not made with egalitarian indigenous societies, but only with ranked indigenous societies. This could explain some situations, but not, for example, the lack of treaties in parts of British Columbia.[85]

The report also suggests that, by and large, the treaties were manipulative and strategic on the part of the colonial power and that the relationships were unequal.[86] In this, the study is influenced by the historians Jennings and Jones who attack the idea that the treaties, even the famous treaties with the Iroquois confederacy, were anything more than manipulation.[87] The report posits a uniform history of ethnocentrism and racism on the part of the colonizers,

from Sepulveda in 1550 to Chief Justice Alan MacEachern in the 1990 decision of the British Columbia Supreme Court in the *Delgamuukw* case.[88] Alfonso Martinez does not cite figures like Vittoria and Las Casas, major historical figures who favoured Indian rights and who had some successes in changing the formal law of Spain and Portugal.[89] In this, Alfonso Martinez may be reflecting the Latin American view that the colonial period was the 'conquest' and was fundamentally racist and genocidal. In contrast, the North American view has been to seek positive elements in the colonial tradition and set those up as a counter-theme to the history of dispossession and denial of rights.

After describing the treaty history as unequal and manipulative and the colonizers as uniformly ethnocentric and racist, Alfonso Martinez then affirms what has been a central feature of North American indigenous arguments about the treaties:

> Research by the Special Rapporteur has convinced him that, in establishing formal legal relationships with indigenous North Americans, the European parties were absolutely clear – despite their notions of the "inferior" nature of the former's culture/society – about a very important fact; namely, that they were indeed negotiating and entering into contractual relations with sovereign nations, with all the legal implications that such a term had at the time in international relations.[90]

In the writer's view there is a tension between this 'legal' conclusion and the earlier conclusion that the colonial powers used treaties in racist, manipulative, strategic ways. What did colonial powers think of the status of treaty relations with peoples they regarded as inferior? International law was no neutral arbiter of relations between peoples in the period we are considering. International law was the creation of the western European colonizing powers. International law endorsed colonialism. Suzerain relations were still a commonly understood framework for unequal powers.

Alfonso Martinez concludes his legal analysis by suggesting that the international status of indigenous nations, which existed under international law, has been denied in the last century. He proposes that the next stage of his research will explore "the manner in which that dramatic change actually took place."[91]

In chapter IV of the First Progress Report, Alfonso Martinez lists the five types of situations he intends to study:

1. treaties concluded between states and indigenous peoples,

2. agreements made between states or other entities and indigenous peoples,
3. other 'constructive arrangements' of a consensual nature,
4. treaties between states containing provisions affecting Indigenous peoples as third parties, and
5. situations of Indigenous peoples who are not parties to any such arrangements.

On a preliminary basis, he has selected certain case studies for each category.

For the first category, the case studies are highly ambitious, ranging from the British treaties in North America between 1763 and 1774 to the James Bay and Northern Quebec Agreement of 1975. He will examine a number of treaties in Canada and the United States, such as the treaties with the Iroquois Confederacy, those with the 'five civilized tribes', treaties with the Mi'kmaq, Treaty 6, and the Vancouver Island treaties. The 1840 Treaty of Waitangi with the Maori of New Zealand is discussed as well. There is some discussion of the situation in Africa, Latin America and Asia, but as yet no certainty about whether there will be case studies from those regions.

The identification of the Mi'kmaq treaties reflects the work of Russel Barsh and the Four Directions Council at the United Nations on behalf of the Mi'kmaq Grand Council. The identification of Treaty 6 also reflects the work of Treaty 6 representatives, notably Sharon Venne. The identification of the Western Shoshone Treaty and the Sioux Treaty reflects suggestions by the International Indian Treaty Council.

For the second category of agreements, Alfonso Martinez has listed six specific case studies. The two involving Canada are the agreement between the federal minister of Indian Affairs and the Federation of Saskatchewan Indian Nations (June 1989) and the agreement between the government of Canada and the Inuit of the Northwest Territories (the Nunavut Agreement).[92]

The third category of 'constructive arrangements' will involve a case study of Greenland home rule.[93]

On the basis that he has a mandate to explore "the potential utility" of treaties and agreements, Alfonso Martinez proposes examining the situation in several areas where there are no treaties. The preliminary list of case studies set out in paragraph 362 is as follows:

> Aboriginal Australians; Gitksan and Wet'suwet'en (Canada); Yanomami (Brazil); Ke Lahui Hawaii (United States of America); Chittagong Hill Tracts (Bangladesh); Mapuche People (Argentina-Chile); Indigenous peoples (Guatemala); Lubicon Cree (Canada); San (Bushmen) (Southern Africa); Ainu People (Japan); California Rancherias (United States of America); and Kuna Nation (Panama).

While some of his examples will reflect very badly on the states involved (for example the Lubicon Cree case in Canada), his Latin American examples are mixed. The Kuna Nation story in Panama is an extremely positive story of indigenous autonomy. When the list was prepared it probably appeared that the Yanomami story in Brazil would be positive, for Brazil had moved to demarcate Yanomami lands after long delays. More recent events may mean it will now be a negative example.

The final category is treaties between states that affect Indigenous peoples as third parties. The special rapporteur lists ten such treaties. The ones of relevance to Canada are the Treaty of Utrecht of 1713, the Treaty of Paris of 1763, the Jay Treaty of 1794 and the Migratory Birds Convention of 1916.[94]

The research agenda set out in the First Progress Report is overwhelming.

Should All Treaties Be Recognized?

Should all treaties between Indigenous peoples and states be given respect? As Jennings makes clear in his history of the early treaty period in New England, treaties were imposed by European victors after Indian military defeats. The treaty between the British and the Kandy Kingdom in central Sri Lanka, obviously written by the British, states that the rulers of Kandy forfeited any right to rule because of human rights abuses and were agreeing to capitulate to the British. The document is called a treaty and is signed by the leaders of the indigenous state.

There has been an unstated premise in discussions of treaties with Indigenous peoples that the treaties should be respected. Some should not be.

Indigenous Heritage

There is increasing concern with issues of indigenous cultural and intellectual property. This concern is reflected in articles 12 and 29 of the draft declaration.

The United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities has addressed these issues on more than one occasion. In their 1991 session they stated that international trafficking in Indigenous peoples' cultural property

> ...undermines the ability of indigenous peoples to pursue their own political, economic, social, religious and cultural development in conditions of freedom and dignity.[95]

On 27 August 1992, the Sub-Commission noted that

> ...there is a relationship, in the laws or philosophies of indigenous peoples, between cultural property and intellectual property, and that the protection of both is essential to the indigenous peoples' cultural and economic survival and development.[96]

The 1992 Rio Declaration on Environment and Development, Principle 22, affirms that

> ...indigenous peoples and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

Agenda 21, Programme of Action for Sustainable Development, has a chapter on Indigenous peoples. It calls upon states and others to

> ...adopt or strengthen appropriate policies and/or legal instruments that will protect indigenous intellectual and cultural property and the right to preserve customary and administrative systems and practices.[97]

The United Nations Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples, held in Santiago, Chile, 18-22 May 1992, recommended that the United Nations system, with the consent of Indigenous peoples,

> ...take measures for the effective protection of property rights (including their intellectual property rights) of indigenous peoples. These include, inter alia, cultural property, genetic resources, biotechnology and biodiversity.[98]

In 1992 the Economic and Social Council authorized Madam Daes to prepare a Study on the Protection of the Cultural and Intellectual Property of Indigenous Peoples. The report

was completed in 1993.[99] Relevant as well is a note of the Secretary General prepared in 1992 on existing international standards and mechanisms for the protection of intellectual property that could be used by Indigenous peoples.[100]

Madam Daes' study begins by asserting that Indigenous people do not make a distinction between cultural property and intellectual property. This makes it preferable to refer to the collective 'heritage' of Indigenous people, as Ecuador's Cultural Heritage Act of 1979 does.[101]

> "Heritage" is everything that belongs to the distinct identity of a people and which is theirs to share, if they wish, with other peoples. It includes all of those things which international law regards as the creative production of human thought and craftsmanship, such as songs, stories, scientific knowledge and artworks. It also includes inheritances from the past and from nature, such as human remains, the natural features of the landscape, and naturally-occurring species of plants and animals with which a people has long been connected.[102]

Madam Daes gives an example of the relationship of the Indigenous peoples of the northwest coast of North America to salmon:

> ...the indigenous peoples of the Pacific north-west coast in North America are harvesters of the sea. Each clan or community is or has been associated, for centuries, with the sub-species (or "runs") of salmon which return annually to its territory and are viewed as its kinfolk. The dignity and honour of each community depends on the ability to hold feasts and share these fish with others, which in turn depends on wise management of the ecosystem. Salmon is a major part of these peoples' heritage, not just in the eating or trading of salmon, but in the sharing, which would come to an end if particular sub-species of salmon disappeared. The songs, stories, designs, artworks and ecological wisdom connected with salmon are all interrelated elements of this same heritage.[103]

Madam Daes asserts that all elements of the indigenous heritage should be managed and protected as a single, interrelated and integrated whole.[104] Existing legal provisions are inadequate, because they do not integrate cultural and intellectual property, give temporally limited protection, and are geared to commercial development.

Madam Daes noted recent legislation: the Native American Graves Protection and Repatriation Act of 1990 (United States), which applies to human remains and culturally important objects; the Aboriginal and Torres Strait Islander Heritage Act of 1984 (Australia),

which allows the protection of particular sites or objects; and legislation in 1987 in the Australian state of Victoria that allows for the protection of sites, objects and folklore.[105] She also describes the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, to which Canada is a party.

> The UNESCO Convention has several shortcomings. Requests [to other states for emergency import controls] must be made by States, both States involved in a dispute must be parties to the Convention, and the removal of the object must have occurred after the Convention came into force in both States – necessarily after 1972. Most of the largest art-importing States, such as France, Germany, Japan and the United Kingdom are not parties, and indigenous peoples lost much of their cultural property before 1972.[106]

The study contains very interesting accounts of intellectual property disputes in various states, an analysis of judicial decisions, references to existing patent and copyright laws, and references to international attention to the issues. It concludes with recommendations:

1. Recognition of indigenous peoples as the true collective owners of their works, arts and ideas.
2. Alienation of indigenous cultural and intellectual property rights can only take place in conformity with indigenous peoples' own traditional laws and customs and with the approval of their local institutions.
3. Urgent attention should be given to preparing inventories of indigenous peoples' cultural property.
4. Mediation mechanisms should be established to facilitate the return of cultural property to indigenous peoples.
5. A trust fund for indigenous peoples' heritage should be established to act as a global agent for the protection and licensing of rights to use indigenous peoples' heritage when requested by the peoples concerned or where the peoples concerned cannot be immediately identified.
6. In order to prevent further loss of cultural and intellectual property, indigenous peoples must be able to control research, tourism, trade and development in their territories.
7. New international provisions should be developed by the World Intellectual Property Organization to implement the recommendations.
8. Any agreement on intellectual property in the context of the General Agreement on Tariffs and Trade must not prevent protective laws on indigenous peoples' heritage.
9. The Special Rapporteur should continue to work by drafting basic principles and guidelines relating to the protection of indigenous heritage.[107]

In 1993 the Sub-Commission on Prevention of Discrimination and Protection of Minorities endorsed the conclusions and recommendations in Madam Daes' report and authorized her to expand the study with a view to elaborating draft principles and guidelines for the protection of the heritage of Indigenous peoples. Madam Daes presented a preliminary report in 1994, with draft principles for the protection of indigenous heritage.[108] A final report is expected in 1995.

The Assembly of First Nations and the national association representing museums in Canada established a task force, co-chaired by Dr. Michael Ames of the Museum of Anthropology, University of British Columbia and Mr. Tom Hill of the Woodlands Cultural Centre, on the Six Nations Reserve in Ontario. That task force produced a report in 1992. One of the forces behind the establishment of the task force was the 1987 U.S. law, the Native American Cultural Preservation Act, which was regarded by many museums and art dealers with some alarm. As well, a National Dialogue on Museum/Native American Relations was founded in the United States to deal with these issues.

The repatriation of skeletal remains has been the strongest area in which museums have changed their policies, by removing such remains from public exhibit and increasingly returning them to the relevant Indigenous people for proper reburial.

Museums see the return of cultural property as a much more serious issue than the issue of human remains. When the New York State Museum in Albany returned wampum belts to the Six Nations in Canada, one condition of the agreement was that the return should receive no publicity. The museum greatly feared the precedent. Museums require specific proof of illegal acquisition of the items before they will consider repatriation. They do not respond, at the moment, to claims based solely on the cultural importance of the item or items in question. Madam Daes' 1991 interim report clearly indicated her belief that a claim based solely on cultural importance should be sustained on the basis that repatriation "may be necessary to ensure their right to their own culture, to practise their own religion, and to preserve their group identity."[109] Her 1993 report did not clearly address a claim based solely on cultural importance.

In June 1993, the first International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples was held in Whakatane, Aotearoa/New Zealand. The

conference was hosted by the nine Maori tribes of Mataatua in the Bay of Plenty region of New Zealand. The 150 delegates included indigenous representatives from Ainu (Japan), Aotearoa/New Zealand, Australia, the Cook Islands, Fiji, India, Panama, Peru, the Philippines, Surinam and the United States. The Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples was circulated at the 1993 session of the Working Group on Indigenous Populations. It declared that Indigenous peoples, as part of their right of self-determination, "must be recognized as the exclusive owners of their cultural and intellectual property." The declaration deals with customary knowledge, indigenous flora and fauna, and cultural objects, including human remains. One of its most sweeping demands is an unqualified right of repatriation of cultural objects, without proof of illegal acquisition or proof of exceptional cultural significance:

> Indigenous cultural objects held in museums and other institutions must be offered back to their traditional owners.[110]

A second conference is to be organized by COICA, the co-ordinating body for the Indigenous peoples' organizations of the Amazon basin.

The International Year and the International Decade

The General Assembly proclaimed 1993 the International Year of the World's Indigenous People, with the theme "Indigenous People — a new partnership". In a formal statement to the Vienna Human Rights Conference, Denis Marantz, who is responsible for indigenous issues within the department of Foreign Affairs, stated that the expectations for the year "have not been achieved". Informally he referred to the International Year as a "bust". A planning meeting for the year in the summer of 1992 was a failure. A technical meeting in July 1993, in the middle of the year, accomplished little.

Madam Daes commented on the failure of the year in her speech to the United Nations World Conference on Human Rights in Vienna on 18 June 1993:

> We are now just about to reach the halfway point of the International Year, and no concrete steps have been taken by the United Nations to fulfil this historic promise. Indeed, the International Year of the World's Indigenous People is about to become the poorest and smallest event of its kind in the history of the United Nations, with a budget of barely one per cent of what has been paid to organize this conference.[111]

The year was a failure in all regions, it appears, not just in North America. The year was inaugurated on 10 December 1992, in the General Assembly in New York. According to a United Nations account,

> ...hundreds of indigenous leaders, traditional elders, representatives of indigenous communities, youth, NGOs, press and personalities of the academic and art world were present.[112]

What is not stated is that virtually no government representatives remained in the assembly hall for the 20 indigenous speakers. Indigenous people spoke to indigenous people.

It was the obvious failure of the International Year that led to the idea of an international decade, to give another chance at something meaningful being done. The idea of a decade was endorsed at the World Conference on Human Rights and backed by the Working Group on Indigenous Populations at their meeting in Geneva in July 1993. The decade commenced in December 1994.

The Report on Transnational Corporations

In 1989 the Sub-Commission on Prevention of Discrimination and Protection of Minorities asked the United Nations Centre on Transnational Corporations to report to the Working Group on Indigenous Populations on the activities of transnational corporations on the lands of Indigenous peoples. Four reports were prepared, the final one in 1994.

Two reports contained specific case studies. In the 1992 report the case studies are the Great Whale project in northern Quebec and the Cree; petroleum exploration and the Blackfeet Nation in the United States; industrial development and the Akwesasne Mohawk Nation; and the experience of the Kuna in Panama.[113] In the 1994 report the case studies are forest people in Cameroon; the Nenets in Siberia; the Mon in Myanmar/Burma; mining in an Itogon community in the Philippines; and mining among the Amungme in Irian Jaya, Indonesia.[114]

The 1992 report acknowledges "technical support provided by the Apamuwek Institute, a research centre owned by and serving the Mikmaq people of Nova Scotia, Canada."[115] In fact it appears that much of the report is the work of Russel Barsh, who acted for the Mi'kmaq, and representatives of the Grand Council of the Crees (Quebec). This illustrates the

research problems within the United Nations, which made such a report virtually impossible without the detailed work of non-governmental organizations. The United Nations does not have adequate monitoring and research capacity on human rights issues.

An introductory paragraph in the 1994 report indicates the tone of the case studies. They deal, it says, with

> ...such issues as conflicting forms of land tenure, and co-optation of community leaders by TNCs, the impact of national development plans and structural adjustment programmes where TNCs are the major actors and indigenous peoples the uncompensated victims and finally the transition of the former socialist countries to market economies where officials must now juggle both development and indigenous participation.

The tone and style of the case studies are those of NGOs, not of United Nations staff.

These reports were an interesting experiment in investigation and reporting, quite untypical of United Nations processes. The reporting body, the Centre on Transnational Corporations, was terminated, given the ascendancy of market economies in the contemporary world. For now, at least, this kind of reporting returns to the hands of the NGOs.

The Work of the International Labour Organisation

The work of the International Labour Organisation on Indigenous peoples has had little influence in Canada, but it should be noted briefly.

The International Labour Organisation co-ordinated the Andean Indian Program in the 1950s on behalf of itself and a group of intergovernmental organizations. The work resulted in a comparative study entitled "Indigenous Peoples" and the preparation of Convention No. 107 on Indigenous and Tribal Populations in 1957. The convention was largely responsive to the Andean situation, where Indigenous people constituted peasant labour forces. It did contain a recognition of rights to land, which gave it some relevance to situations in Canada. The convention reflected the assimilationist assumptions of the period in which it was drafted. It saw Indigenous peoples as pre-modern groupings, in need of successful integration. The convention was redrafted as the Convention No. 169 on Indigenous and Tribal Peoples in 1989. The new convention has eliminated the assimilationist language of the earlier document and uses the word 'peoples', not 'populations', while stating expressly that this choice of

language is not to be taken necessarily to have any particular meaning in relation to other areas of international law. As suggested earlier, this disclaimer was inserted largely at the insistence of Canadian government representatives, who opposed the use of the word peoples. As of July 1994, seven states had signed the new convention Bolivia, Colombia, Costa Rica, Norway, Mexico, Paraguay and Peru. Twenty-two states remain signatories to the 1957 convention. The old convention is now closed. States that are party to the 1957 convention can, if they wish, sign the 1989 convention in its place. Other states can sign the new convention, but not the old convention.[116]

Canada was never a party to the 1957 convention. There does not seem to have been any public debate in Canada over the convention, at the time of its drafting or later. Canadians were involved in the revision process that produced the 1989 convention. Judith Sayers, a Nuu-Chah-Nulth lawyer from British Columbia now working in Alberta, was involved in the process as part of the Canadian Labour Congress delegation. She was chosen by a coalition of Canadian Aboriginal organizations to play this role. She has worked with Treaty 6 First Nations and with Sharon Venne. Both Judith Sayers and Sharon Venne are highly critical of the 1989 convention. Sharon Venne wrote a paper on the revised convention, entitled "The New Language of Assimilation"[117] Russel Barsh, an non-indigenous lawyer who represented the Mi'kmaq Grand Council through the Four Directions Council, was also involved in the drafting process and has been supportive of the new convention.[118]

There appears to be no interest in Canada in signing the new ILO convention, on the part of either Aboriginal leaders or government representatives.

The ILO has a monitoring system for states that are parties to Convention No. 107 or 169. In 1994 "observations" were made about the situation in Bangladesh, Brazil, India and Paraguay. The observations dealt with continuing reports of violence against Indigenous and tribal peoples, such as the November 1993 Naniachar killings in Bangladesh and the July 1993 killings of Yanomami in Brazil. In 1994, technical assistance was provided to the Russian Federation, Guatemala, Philippines and Bolivia.[119]

The Human Rights Committee

The International Covenant on Civil and Political Rights was approved by the General Assembly in 1966 and signed by Canada in 1976. The covenant establishes the Human Rights Committee.

States that sign the covenant make periodic reports on compliance. The reports are reviewed by the Human Rights Committee. Representatives of the state in question appear before the Committee, in public sessions, and respond to questions.

An optional protocol to the covenant allows individuals to take cases to the Committee for adjudication, after exhausting reasonable domestic remedies. The Committee decides whether the state in question is in violation of the covenant. Canada signed the optional protocol in 1976, and numerous cases have gone to the Committee from Canada. The procedures are very simple. The 'communication', which begins the process, must be in writing and signed (though the author of the communication will be given confidentiality if requested). The communication is forwarded by the Human Rights Committee to the 'state party' for comments. In turn those comments are given to the author of the communication for any response. All submissions are in writing. There is no public hearing. The procedure is confidential, and the Human Rights Committee does not release any documents, except its own decisions.

The language describing this adjudicatory system is muted. The body is a 'committee', not a 'court' or a 'commission'. The individual is the 'author', not a 'complainant' or a 'plaintiff'. The author submits a 'communication', not a 'complaint' or a 'petition'. The Committee gives 'views', not a 'ruling' or a 'judgement'. There is no appeal to a 'court', as in the European and Inter-American human rights systems. Implementation of decisions would depend on domestic legal systems, whether the decision-making body was called a court or a committee, but the language used does not enhance the stature of the adjudicatory body.

In the debate on the draft declaration on the rights of Indigenous peoples in the Working Group on Indigenous Populations in 1992, Madam Daes noted that Canada had been one of the first states to give Indigenous people access to an international adjudicatory body, the Human Rights Committee, by signing the Optional Protocol to the International Covenant on Civil and Political Rights. She referred to the decision of the Human Rights Committee in

the *Lovelace* case.[120] She said that Canada had accepted that decision and amended the *Indian Act* to bring Canadian law into compliance with the covenant.[121]

The story of the *Lovelace* case is beloved at the United Nations, for it is seen as proving that the individual communications system under the covenant can work. The story is told of how the Committee decided in favour of Lovelace and Canada changed the *Indian Act*. What is not included in these accounts is the fact that Canada, in its submissions to the Committee, indicated its intention to end the sexual discrimination in the *Indian Act*. Canada did not defend the content of the legislation that was in question in the case. What is also not included in these accounts is the fact that the issue of sexual discrimination in the membership system of the *Indian Act* had become a major political issue in Canada in the 1970s, and the *Lovelace* decision played a limited role in bringing pressure on Canada to change the *Indian Act*. But the process did work. Adjudication by the Human Rights Committee did increase the pressure on Canada to reform its laws, though it was not the only source of pressure. The decision of the Human Rights Committee on the Quebec law regulating the language of signs is probably now a better example of a Committee decision prompting domestic reform.

The *Lovelace* case raised the issue of the place of laws protecting indigenous communities within the general individual rights framework of international human rights law. Sandra Lovelace was not asking for equal rights with other Canadian citizens. She was asking for the right to live on the Tobique Indian Reserve, a right restricted to very few Canadians. She argued sexual discrimination. But was she not seeking rights based on race?

The Human Rights Committee held that Sandra Lovelace was culturally part of the Tobique community. The Committee reasoned that by restricting her access to the community, the *Indian Act* was infringing on her rights as a member of a cultural minority under article 27 of the Covenant on Civil and Political Rights. As Rosalyn Higgins, a current member of the Committee, confirmed in a talk in Geneva in July 1992, the consistent practice of the Human Rights Committee has been to handle indigenous cases as cases involving cultural minorities.

In *Kitok*, the Committee followed its decision in *Lovelace*, ruling that restrictions on the access of individuals to indigenous rights can be justified only if they are necessary to protect the cultural survival or integrity of the indigenous community.[122] Kitok was a Sami living in a Sami village in northern Sweden who had been excluded from reindeer herding by a joint decision of the government and the village. Reindeer herding is a Sami monopoly in Sweden and a traditional Sami occupation. The Committee upheld the exclusion, though the views never explain the exact reason for his exclusion. The limited lands now available for reindeer herding have meant that entry into the occupation must be strictly regulated.

A second issue has been taken to the Human Rights Committee by Canadian Indigenous peoples. Article one of the Covenant on Civil and Political Rights sets out the right of all peoples to self-determination. This article was invoked in the *Mikmaq* and *Ominayak* cases. In both the Committee held that article 1, a collective right, could not be invoked in the individual communications procedure established by the optional protocol to the covenant. Whether or not Indigenous peoples had the right of self-determination, it was not within the competence of the Human Rights Committee to express views on the subject.

The *Ominayak* case dealt with the Lubicon Cree band in northern Alberta. The final ruling said that the actions of the oil exploration companies were affecting the cultural survival of the Lubicon Cree, not their rights of self-determination.[123]

In the *Mikmaq* case, the Committee again refused to rule on self-determination, but went on to consider an article of the covenant that assures individuals democratic rights of participation in their governments.[124] The Mi'kmaq had asked to be seated as a separate Aboriginal people in the first ministers' conferences on Aboriginal constitutional matters between 1983 and 1987. They had been refused a seat. The federal government said they should be represented through the Assembly of First Nations, an organization to which the Mi'kmaq did not belong. The Committee ruled that the modalities of Aboriginal participation in the conferences were up to the government of Canada.

The Committee in both the *Ominayak* and *Mikmaq* cases had great difficulty understanding the complex situations behind the communications. Canadians with a serious interest in Aboriginal issues know how protracted and complex the Lubicon issues have been.

The Human Rights Committee, relying solely on written submissions by both sides, could not, in the end, figure out the root problem in the continuing impasse. The Committee did not feel able to conduct an onsite investigation or commission some third-party study of the dispute to inform the Committee. As a result, the lengthy 'views' of the Committee recount the positions of the two sides, without concrete conclusions, except for suggesting that the cultural life of the Lubicon Cree had been endangered. The Committee described the current position of the federal government and considered it a positive response to the situation.

International Financial Institutions

The World Bank, in a statement prepared for the 1993 World Conference on Human Rights, included the following paragraphs under the heading "Indigenous Peoples, Development and Human Rights":

> 32 There are estimated to be more than 300 million indigenous peoples in the world, defined by the Bank as "social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process." The Bank was the first multilateral agency to introduce a special policy towards indigenous peoples in the context of internationally-funded development projects. The Bank's original policy dated back to its involvement in several projects in the tribal lands of the Brazilian Amazon, and stated that "the Bank will not assist development projects that knowingly involve encroachment on traditional territories being used or occupied by tribal people, unless adequate safeguards are provided." These safeguards included the recognition, demarcation and protection of indigenous lands, and the provision of culturally appropriate services, especially in the area of health.
>
> 33 In 1991, the Bank expanded the scope of its original policy toward indigenous peoples. In particular, it broadened its definition of indigenous peoples and promoted the informed participation of indigenous groups and their sharing in the social and economic benefits of the development process. Apart from trying to ensure that indigenous groups do not suffer adverse effects from development projects, especially those projects which it finances, the Bank now aims to ensure that these groups receive culturally compatible social and economic benefits. The identification of local preferences, the incorporation of indigenous knowledge into project approaches, and the appropriate use of specialists are core activities for any Bank-assisted project that affects indigenous peoples and their social and economic rights.

> 34 Several Bank projects promote the participation of indigenous peoples through the preparation and financing of special Indigenous Peoples Development Plans (IPDPs). These include a special plan for the incorporation of tribal peoples (many of them tribal women) in a rubber cultivation project in India, an agricultural and rangelands management project with Bedouin tribes in Egypt, and a natural resource management and forestry project with indigenous and Afro-American communities in Colombia. There is also innovative sector work on indigenous peoples taking place at the Bank, as well as training courses and special events to increase Bank staff awareness of policies and projects concerning indigenous peoples.[125]

The concerns of the World Bank appear to date back to the Bastar forestry project in India, a project that had failed to recognize a tribal people's dependence on existing forest patterns. The project involved replacing the forest with fast-growing pine. It provoked dramatic tribal resistance, which led the national government to withdraw support from the project.

The lessons learned from the Bastar project appear to have been applied largely in Latin America, as indicated in the paragraphs quoted above. The major current controversy facing the World Bank and Indigenous or tribal peoples has been the Narmada valley project in India. The ILO kept asking India about the project, which will displace large tribal populations. But ILO processes were ineffective in bringing pressure to bear on India.

The World Bank became increasingly concerned and commissioned an independent review by Bradford Morse, former head of the United Nations Development Program, and former judge Thomas Berger of Vancouver, well known for his work on indigenous issues in Canada and Alaska. The report, published in the spring of 1992, condemned the project on a number of grounds, including the virtual impossibility of adequately rehabilitating the thousands of families that would be displaced.

The World Bank did advance some further money, but made final advances dependent upon India's compliance with a number of specific conditions. India announced that it found this imposition of conditions an affront to its sovereignty and stated that it would finance the final stages of the project itself. At the time of writing, the waters are rising behind the first major dam.

The World Bank review came far too late to stop a project in which millions of dollars had already been invested. Opposition to megaprojects has emerged only recently in

India. Recognition of the failure of past programs to rehabilitate displaced tribals and peasants is also an issue only now being addressed in social science and activist literature in India. The lessons of the Bastar project had not really been learned at home in India, where the Bastar project had been attempted.

The hopeful tales in the World Bank document quoted at the beginning of this section could not include any references to the major mistakes involved in funding the Narmada valley project.

A Final Word

This report describes developments that have occurred in intergovernmental organizations in the last two decades. Perhaps the first major indication of change was the commissioning of the Martinez Cobo study on Discrimination Against Indigenous Populations by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1972. Today we can say with confidence that indigenous issues are on the human rights agenda of the United Nations and feature in discussions on population, sustainable development, intellectual property, health, education and labour. These advances sometimes seem illusory, for intergovernmental bodies have limited authority and inadequate resources. But we are still at an early stage in the development of an international law that respects individual and collective rights.

Over the years a segment of the leadership of Aboriginal peoples in Canada has pressed, against all common-sense advice, to take their case to international bodies. Against logical predictions, they have managed to change international human rights law in our time. Perhaps they did not realize that international human rights law was still in diapers. We now know that Indigenous peoples will be part of the international human rights system as it grows to maturity.

Notes

1. Hogg, Constitutional Law of Canada, third edition (Carswell, 1992), p. 664.

2. This led some in the United States to describe U.S. Indian law as rooted in international law. Marshall quotes no international law materials, and in the author's view, the judgements did not reflect settled principles of international law. On the Marshall decisions, see Joseph Burke, "The Cherokee Cases: A Study in Law, Politics and Morality", *Stanford Law Review* 21 (1968-69), pp. 500-531; Dale Van Every, *Disinherited* (Morrow, 1966); Douglas Sanders, *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985).

3. Felix Cohen, "The Spanish Origin of Indian Rights in the Law of the United States", *Georgia Law Review* 31 (1942), p. 1.

4. Two texts emerged early in the twentieth century on Indigenous peoples, reflecting turn-of-the-century concerns: M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law* (Longmans, 1926), reprinted Negro Universities Press, 1969; and A.H. Snow, *The Question of Aborigines in the Law and Practice of Nations* (Washington, D.C.: Government Printing Office, 1919), reprinted Metro Books, 1972. See also the references to the two European conferences on Africa in paragraph 124, First Progress Report, Study on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, E/Cn.4/Sub.2/1992/32.

5. Covenant of the League of Nations, article XXII.

6. The Liberian example is noted in Bennett, "Aboriginal Rights in International Law".

7. Veatch, *Canada and the League of Nations*, pp. 91-100. Chapter 7 is entitled "The Appeal of the Six Nations". See also Sanders, "Remembering Deskaheh: Indigenous Peoples and International Law", pp. 485-504.

8. The Slavery Convention was adopted by the League of Nations in 1926. The Forced Labour Convention was adopted by the International Labour Organisation in 1930. There is considerable literature on the minority rights provisions in the post-First World War peace treaties, which were administered by the League. In general the minority rights work of the League is remembered as one of the failures of the organization.

9. See Berube, *Coming Out Under Fire: Gay Men and Women During World War II*, 1990.

10. Their petition was reprinted in the Ontario High Court decision in *Logan* v. *Styres* (1959), 20 Dominion Law Reports (2d), pp. 422-424.

11. The United Nations could not deal with these communications or even acknowledge their receipt in the first decades after the creation of the world organization. The lists

of communications in the papers of John Humphry are confidential internal lists prepared within the Human Rights Division.

12. Article 27 provides: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language." In general see Sanders, "Collective Rights", pp. 368-386. The texts of the major international human rights instruments can be found in Brownlie, *Basic Documents on Human Rights*, second edition (Oxford, 1981). A new compilation was issued by the United Nations in 1993: *Human Rights. A Compilation of International Instruments*, volume 1 (in two parts).

13. Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, in *Human Rights, A Compilation of International Instruments*, cited in note 12, volume 1, part 1, pp. 140-143.

14. See Patrick Thornberry, "The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities: Background, Analysis and Observations", An Occasional Paper from the Minority Rights Group (London: June 1993).

15. Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly resolution 1514 (XV) of 14 December 1960, in *Human Rights, A Compilation of International Instruments*, cited in note 12, volume 1, part 1, pp. 55-57.

16. See Bennett, "Aboriginal Rights in International Law".

17. Personal discussions with Augusto Willemsen Diaz.

18. E/CN.4/Sub.2/1986/7 and Add. 1-4. The Working Group on Indigenous Populations was established before the completion of the report. As a result, the report did not play a significant role in the establishment of a forum on indigenous issues at the United Nations. The report is long and not easily available.

19. Symposium on Inter-Ethnic Conflict in South America, Barbados (January 1971), co-sponsored by the Program to Combat Racism and the Churches' Commission on International Affairs of the World Council of Churches, together with the Ethnology Department, University of Berne. See Declaration of Barbados, International Work Group for Indigenous Affairs, Document #1 (Copenhagen, 1971); W. Dostal, ed., *The Situation of the Indian in South America* (World Council of Churches, 1972).

20. See Douglas Sanders, "The Re-emergence of Indigenous Questions in International Law"; and "The Formation of the World Council of Indigenous Peoples".

21. Akwesasne Notes, ed., *Basic Call to Consciousness*, deals with the 1977 conference.

22. Robin Wright Ismaelillo, *Native Peoples in Struggle, Cases from the Fourth Russell Tribunal and Other International Forums* (New York: Erin Publications, 1982).

23. The creation of the Working Group was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981, endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982, and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982. The initiative did not come at the level of the Economic and Social Council, but that is the body that formally established the Working Group in 1982.

24. "Party drafts blueprint for free Quebec" (Reuters), *Bangkok Post*, 24 August 1993, p. 13. According to the story, the party leadership said the minority language guarantees were "necessary to ensure than an independent Quebec received international recognition".

25. Palau, a Pacific island state with a population of less than 16,000, became the 185th member in December 1994. Each member state has a single vote in the General Assembly, without regard to size, wealth or power.

26. Earth Summit, Agenda 21, The United Nations Programme of Action from Rio (United Nations, 1992), pp. 227-229. Part 26 is entitled "Recognizing and strengthening the role of indigenous people and their communities".

27. Vienna Declaration and Programme of Action, A/Conf. 157/23.

28. Kingsbury, "Self-Determination and 'Indigenous Peoples'", p. 389.

29. The presentation was, however, uninformed on the history of debates in the Working Group and made suggestions based on the 1992 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, suggestions that had been rejected by the Working Group years earlier.

30. ATSIC, whose members are elected by Aboriginal people in state-run elections, administers federal Aboriginal programs. While autonomous, it is a federal government agency.

31. Asian Indigenous Peoples Pact was represented, as it had been in 1993. It is a relatively new regional organization. An earlier attempt at a regional organization, the Pacific/Asia Council of Indigenous Peoples, held meetings during the 1992 and 1993 meetings of the Working Group but has not had other programs. PACIP originated as an attempt to reorganize the Pacific region of the World Council of Indigenous Peoples.

32. The Constitution of Singapore recognizes the Malay population in the country as indigenous, but the situation in Singapore has not been raised in the Working Group.

33. See working paper submitted by Miguel Alfonso Martinez on the Future Role of the Working Group, 19 July 1994, E/CN.4/Sub.2/AC.4/1994/10.

34. Since the innovation in the Working Group, two other bodies have adopted a similar approach: the Working Group on Contemporary Forms of Slavery and the new Commission on Sustainable Development, which grew out of the Earth Summit in Rio de Janeiro which itself, like other recent United Nations conferences, allowed otherwise unaccredited NGOs to participate in its work.

35. The film was produced by Volkmar Ziegler in 1985 and is available from Broadcast Studio, 28 Montbrillant, 1201, Geneva, Switzerland. It has footage from the first or second session of the Working Group and an interesting interview with the major IITC individual who lobbied at the United Nations in the 1970s.

36. Report of the Working Group on Indigenous Populations on its twelfth session, E/CN.4/Sub.2/1994/30, paragraph 13.

37. He will have retired before the Human Rights Commission sessions in 1995 that will receive the draft declaration, unless he takes another extension of service.

38. Report of the Working Group on Indigenous Populations on its tenth session, E/CN.4/Sub.2/1992/33, paragraph 25, referred to hereafter as Report of the Working Group on Indigenous Populations on its tenth session.

39. Madam Daes is correct in this statement, but it does seem to imply that there is an adequate range of competent bodies to which communications can go. This is simply not so. The obvious bodies are (a) the Human Rights Commission under the confidential procedure established under ECOSOC resolution 1503, which did produce special rapporteurs on Guatemala and on Myanmar/Burma (where indigenous or minority national issues would have played a part in the decision to establish a special rapporteur), (b) the Human Rights Committee, established under the International Covenant on Civil and Political Rights, provided the state in question has signed the covenant and its optional protocol (a procedure that has had some use in relation to Canada and that is discussed later in this paper), (c) the Committee on the Elimination of Racial Discrimination, provided the state in question has signed the covenant and agreed to the individual complaints procedure, (d) the new Committee on Economic, Social and Cultural Rights, which has no mandate expressed in the Covenant on Economic Social and Cultural Rights, but may prove a lively forum, (e) the Committee Against Torture, provided the state in question has signed the convention and agreed to the individual complaints procedure (the convention having a broad enough definition of torture to be of relevance to indigenous peoples in western/northern states), and (f) the enforcement bodies of the International Labour

Organisation, provided the state in question is a party to either the 1957 or the 1969 version of the Convention on Indigenous and Tribal Populations/Peoples. None of these procedures has adequate investigative, monitoring or adjudicative capacities.

40. Statements on Bangladesh in the Working Group on Indigenous Populations have been noted by the International Labour Organisation, since Bangladesh is a state party to ILO Convention No. 107 on Indigenous and Tribal Populations.

41. See paragraph 13, Report of the Working Group on Indigenous Populations on its twelfth session, cited in note 36.

42. The mandate, which was formulated in resolutions in 1981 and 1982, is reprinted in each annual report of the Working Group; see E/CN.4/Sub.2/1994/30, paragraph 1.

43. Paragraph 189. His views on this point are restated in the 1994 working paper on the future of the Working Group: E/CN.4/Sub.2/AC.4/1994/10, paragraphs 72 to 78. Cuba had been 'monitored' at the insistence of the United States in the Human Rights Commission. It seems likely that Professor Alfonso Martinez was being sensitive to the possible concerns of Latin American states when he opposed a new monitoring role on indigenous issues within the United Nations. A number of them would be targeted by such a procedure. Alfonso Martinez' concern with not offending Latin American governments is apparent, as well, in the treaty study, where very few Latin American situations are listed for examination (and two have the potential for making positive comments on the actions of the state involved). On other 'competent bodies' see note 39.

44. E/CN.4/Sub.2/AC.4/1994/10.

45. Paragraphs 66 to 71.

46. E/CN.4/Sub.2/1994/30, paragraph 153. The self-congratulatory style of this paragraph is common to United Nations documentation and should not be taken as a denial of the difficulties with Working Group processes that are addressed in other parts of this paper.

47. Paragraph 155.

48. The report by the Secretariat is E/CN.4/Sub.2/AC.4/ 1994/11. The note of Madam Daes is E/CN.4/Sub.2/Ac.4/1994/ 13. The Danish/Greenland discussion paper, dated July 1994, was circulated at the 1994 Working Group Session, copy in the author's possession. The ATSIC analysis can be found in E/CN.4/Sub.2/AC.4/1994/11/Add.2. The Canadian statement can be found in E/Cn.4/Sub.2/AC.4/1994/11/Add.1. Madam Daes prepared draft 'guidelines', which are annexed to the 1994 report of the Working Group but were not agreed upon by the Working Group members.

49. Paragraph 7.

50. Statement by the representative of Denmark, Sub-Commission – Item 15: Working Group on Indigenous Populations, 22 August 1994, copy in the author's possession.

51. Permanent forum in the United Nations for indigenous people, Resolution, Agenda item 15, 22 August 1994, E/CN.4/Sub.2/1994/L.58.

52. Paragraph 190, Report of the Working Group on Indigenous Populations on its eleventh session.

53. E/CN.4/Sub.2/AC.4/1994/10, paragraph 50.

54. E/CN.4/Sub.2/AC.4/1994/11/Add.1.

55. In resolution 47/75 proclaiming the International Year of the World's Indigenous People, the General Assembly asked the Working Group to complete its drafting in 1993 and submit its report through the Sub-Commission to the Commission on Human Rights. The final statement of the World Conference on Human Rights, held in Vienna in June 1993, also called on the Working Group to complete a draft in 1993; paragraph 28, Vienna Declaration and Programme of Action, A/Conf.157/23.

56. Williams, "Encounters on the Frontiers of International Human Rights Law", pp. 701-702.

57. Address at the World Conference on Human Rights, Vienna, Austria, Austria Centre, 18 June 1993, by Professor Erica-Irene Daes, Chairperson-Rapporteur of the United Nations Working Group on Indigenous Populations, pp. 21-22 (copy in the author's possession).

58. Rosemarie Kuptana, president, Inuit Tapirisat of Canada, "Canada's position blocking recognition of indigenous peoples' right of self-determination calls into question its commitment to the universality of human rights", press release, 22 June 1993 (copy in the author's possession).

59. The text was drafted by Fred Caron, a member of the delegation from the department of Justice, and given to the author by Denis Marantz, the head of the delegation.

60. Report of the Working Group on Indigenous Populations on its twelfth session, cited in note 36, paragraph 37.

61. Statement by New Zealand Government Observer Delegation, 26 July 1994, Item 4: Standard Setting Activities, copy in possession of the author.

62. Statement by Mr. Peter. F. Wille, Observer Delegation of Norway, Item 4 (copy in the author's possession).

63. Statement by the Delegation of the Observer Government of Brazil, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Agenda item 15 (copy in the author's possession).

64. Statement by the representative of Denmark, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Item 15: Working Group on Indigenous Populations, 22 August 1994 (copy in the author's possession).

65. Self-determination has been used to describe domestic U.S. Indian policy since a 1972 policy statement by President Nixon. Clearly no international law consequences were intended.

66. San Marino is a tiny autonomous enclave in Italy that has retained a kind of formal independence. In earlier usage it would have been called a tributary state of Italy. It uses Italian currency. There are no customs formalities for entry. It has a very small population. Perhaps it is something like an Indian reserve in scale and independence. Yet San Marino became a full member of the United Nations in 1991 because international law thinking has focused so completely on the single category of sovereign states that it had no way to treat San Marino as a tributary state or some other entity with both state and non-state characteristics.

67. Sally M. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968-1970* (Toronto: University of Toronto Press, 1981).

68. Guest, "Ottawa riles native Canadians", *Terra Viva* No. 8 (19 June 1993), p. 1. The exact wording of the relevant parts of the news story are as follows:

> Mr. Denis Marantz...said that any endorsement of self-determination could encourage groups like the Cree of Quebec to seek independence if Quebec were to leave the Canadian Federation. He warned that Canada would oppose any formulation in the draft Declaration that refers to peoples, without a specific disclaimer on self-determination...Chief Ted Moses, the Cree Ambassador to the U.N., said: "We're saying that indigenous peoples should be given the same rights as others... Governments are worried about secession, but it needn't mean that. Why should Quebec have special rights in Canada, when Indians do not?"

69. One argument justifying the secession of Bangladesh from Pakistan was the denial of equality rights and cultural rights to the Bengali-speaking population of the former East Pakistan. The phrase 'internal self-determination' is not part of the traditional literature on self-determination. It is a phrase that is in current use by the Human Rights Committee established under the provisions of the International Covenant on Civil and Political Rights. Professor Rosalyn Higgins, a member of the committee, has recounted discussions with representatives of Iraq in the Human Rights Committee in which committee members strongly suggested to Iraq that Kurdish cultural rights could

not be respected without autonomy. She refuses to call the Kurds a 'people'. But if their rights to autonomy were continuously denied, the Kurds would be entitled to secede from Iraq, in her view.

70. This analysis of the views of leading international law scholars was presented to the Working Group, in a slightly different form, by the author on 24 July 1992.

71. Report of the Working Group on Indigenous Populations on its tenth session, cited in note 38, paragraph 67.

72. The brief was prepared by William Grodinsky, a lawyer in practice in Montreal; see Grodinsky's presentation to the American Society of International Law, p. 392.

73. Kingsbury, "Claims by Non-State Groups in International Law", p. 496.

74. See Sanders, "Collective Rights", pp. 368-386. The U.S. representative in 1993 expressed a preference for an exclusive focus on individual rights. In many ways this view reflected the absence of the United States from participation in the debates of the Working Group.

75. These interventions took place on 22 July 1992; notes taken by the author.

76. The other speakers were from states that accept the term indigenous: United States, Panama, Russia, Greenland/Denmark, Canada, Chile, Australia, Venezuela, New Zealand, Costa Rica, Brazil, Finland.

77. [1929] 1 Dominion Law Reports 307 (Nova Scotia County Court). The decision was criticized specifically by Chief Justice Dickson in *Regina* v. *Simon*, [1985] 2 Supreme Court Reports 387 at 399.

78. (1877) 3 N.Z.J.R. (N.S.) 72 (New Zealand Supreme Court).

79. See Sanders, *Aboriginal Self-Government in the United States* (Kingston: Institute of Intergovernmental Relations, Queen's University, 1985), pp. 7-14.

80. It is largely Dr. Schulte-Tenckhoff's work that is found in the First Progress Report, E/CN.4/Sub.2/1992/32, though she worked under detailed instructions from Alfonso Martinez. Her activities on these issues at the United Nations go back to the NGO conferences of 1977 and 1981. She studied at the University of British Columbia, among other institutions, and has written a book on the potlatch (*Potlatch: Conquête et Invention*, Lausanne: 1986). Some of her work for Alfonso Martinez has been funded. Some, apparently, has been done on a volunteer basis.

81. The questionnaires are reproduced in Annex II to the Report of the Working Group on Indigenous Populations on its tenth session, cited in note 38.

82. Report of the Working Group on Indigenous Populations on its twelfth session, cited in note 36, paragraph 93.

83. Paragraph 96.

84. First Progress Report, paragraphs 112 and 113.

85. First Progress Report, paragraph 100. It often seems true that treaties were a response to the power of the indigenous society relative to the colonial presence in the area. The lack of large-scale social organization among the Aboriginal peoples of Australia meant they were relatively weak in resisting European settlement. The Maori, in contrast, were clearly a 'ranked' society with greater population density. The coastal societies in British Columbia are among the greatest 'ranked' societies in the world, but in general, there were no treaties in the region. Other factors were present in British Columbia that may help explain the history: the division of the indigenous population into a large number of separate peoples, the slow pace of foreign settlement, and possibly certain ideological factors then current in British thinking.

86. First Progress Report, paragraph 109 and chapter III.

87. The study cites the "seminal" work of Dorothy Jones, *License for Empire, Colonialism by Treaty in Early America* (University of Chicago Press, 1982). Jones was a student of Francis Jennings, whose books *The Invasion of America* and *The Ambiguous Iroquois Empire* represent the most sophisticated historical analysis of early treaty relations in what is now the United States, an analysis sharply at odds with the assumptions of contemporary U.S. law and with the way indigenous leaders make arguments based on treaties.

88. First Progress Report, paragraphs 120 to 130.

89. I cite my own work ("The Re-emergence of Indigenous Questions in International Law"), but there are many writers who cite the positive figures in history, such as Henke, in his famous essay, "Aristotle and the American Indian", and Thomas Berger, whose book, *A Long and Terrible Shadow*, gives credit to Las Casas.

90. First Progress Report, paragraph 138. The report cites Howard Berman, "Perspectives on American Indian Sovereignty and International Law, 1600 to 1776", in *Exiled in the Land of the Free: Democracy, Indian Nations, and the U.S. Constitution*, ed. Lyons and Mohawk (Santa Fe: 1992).

91. Paragraphs 166 to 168.

92. Paragraph 336.

93. Paragraphs 342 to 347.

94. Paragraphs 363 to 390.

95. E/CN.4/Sub.2/1993/28, paragraph 161.

96. Paragraph 9.

97. Paragraphs 150 and 151.

98. Paragraph 160. The report of the conference is E/Cn.4/Sub.2/1992/31.

99. E/CN.4/Sub.2/1993/28.

100. E/CN.4/Sub.2/1992/30.

101. E/CN.4/Sub.2/1993/28 paragraph 23.

102. Paragraph 24.

103. Paragraph 25.

104. Paragraph 31.

105. Paragraphs 33 and 34.

106. Paragraph 124.

107. Paragraphs 171-181.

108. E/CN.4/Sub.2/1994/31.

109. Erica-Irene Daes, 1991 Working Paper on the Question of the ownership and control of the cultural property of indigenous peoples, paragraph 28 (copy in the author's possession).

110. Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous Peoples (June 1993), paragraph 2.14 (copy in the author's possession). The address for the conference secretariat is First International Conference on the Cultural and Intellectual Property Rights of Indigenous Peoples, P.O. Box 76, Whakatane, Aotearoa New Zealand, telephone 64-7-307-0760, fax 64-7-307-0762, or Wellington, Aotearoa New Zealand, telephone/fax 64-4-479-7781.

111. Daes, Address to the World Conference on Human Rights, cited in note 57, pp. 9-10.

112. Indigenous People Newsletter, United Nations Centre for Human Rights, Geneva, Switzerland, No. 1 (June 1993), p. 1. It is striking that by mid-year, the first and only newsletter had just been published.

113. E/CN.4/Sub.2/1992/54.

114. E/CN.4/Sub.2/1994/40.

115. Paragraph 7.

116. On the new convention, see Swepston, "A New Step in the International Law on Indigenous and Tribal Peoples", pp. 677-614.

117. To my knowledge, the paper has not been published; a copy is in my possession.

118. Barsh, "An Advocate's Guide to the Convention on Indigenous and Tribal Peoples", pp. 209-253.

119. Note by the International Labour Office, reporting developments to the Working Group on Indigenous Populations, E/CN.4/Sub.2/AC.4/1994/CRP.2.

120. *Canadian Human Rights Yearbook, 1983* (Toronto: Carswell), pp. 305-314.

121. Intervention of 23 July 1992; notes taken by the author.

122. CCPR/C/33/D/197/1985, 10 August 1988.

123. CCPR/C/38/D/167/1984, 28 March 1990.

124. CCPR/C/43/D/205/1986, 3 December 1991.

125. World Bank, "The World Bank and the Promotion of Human Rights", World Conference on Human Rights, Vienna, 1993, A/Conf.157/PC/61/Add.19.

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Appendix 1
Draft Declaration on the Rights of Indigenous Peoples
as approved by the members of the
Working Group on Indigenous Populations in 1993
and reported to the United Nations Sub-Commission
on Prevention of Discrimination and Protection of Minorities
in August 1994

Affirming that 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,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin, racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming also that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, inter alia, in their colonization and the dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources, which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring an end to all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing also that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the need for demilitarization of the lands and territories of indigenous peoples, which will contribute to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children,

Recognizing also that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect,

Considering that treaties, agreements and other arrangements between States and indigenous peoples are properly matters of international concern and responsibility,

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, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right of self-determination,

Encouraging States to comply with and effectively implement all international instruments, in particular those related to human rights, as they apply to indigenous peoples, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples:

PART I

Article 1. Indigenous peoples have the right to the full and effective enjoyment of all of the human rights and fundamental freedoms which are recognized in the Charter of the United Nations and in international human rights law;

Article 2. Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular that based on their indigenous origin or identity;

Article 3. 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;

Article 4. Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics as well as their legal systems while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State;

Article 5. Every indigenous individual has the right to a nationality.

PART II

Article 6. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide or any other act of violence, including the removal of indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and the security of person;

Article 7. Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including the prevention of and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;

(e) Any form of propaganda directed against them;

Article 8. Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such;

Article 9. Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right;

Article 10. Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return;

Article 11. Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

(a) Recruit indigenous individuals against their will in the armed forces and, in particular, for use against other indigenous peoples;

(b) Recruit indigenous children into the armed forces under any circumstances;

(c) Force indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;

(d) Force indigenous individuals to work for military purposes under any discriminatory conditions;

PART III

Article 12. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past,

present and future manifestations of their cultures, such as archeological and historical sites, artifacts, designs, ceremonies, technologies and visual and performing arts and literature, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs,

Article 13. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the indigenous peoples concerned, to ensure that indigenous sacred places, including burial sites, be preserved, respected and protected;

Article 14. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

States shall take effective measures, especially whenever any right of indigenous peoples may be affected, to ensure this right and also to ensure that they can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means;

PART IV

Article 15. Indigenous children have the right to all levels and forms of education of the State. All indigenous peoples also have this right and the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes.

Article 16. Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all segments of society;

Article 17. Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity;

Article 18. Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, inter alia, employment and salary;

PART V

Article 19. Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies through representatives chosen by themselves in accordance with their own procedures as well as to maintain and develop their own indigenous decision-making institutions;

Article 20. Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures;

Article 21. Indigenous peoples have the right to maintain and develop their political, economic and social systems, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation;

Article 22. Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and disabled persons;

Article 23. Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions;

Article 24. Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without any discrimination, to all medical institutions, health services and medical care;

PART VI

Article 25. Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard;

Article 26. Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights;

Article 27. Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.

Article 28. Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international cooperation. Military activities shall not take place in the lands and territories of indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of indigenous peoples.

States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented;

Article 29. Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs and visual and performing arts;

Article 30. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact;

PART VII

Article 31. Indigenous peoples, as a specific form of exercising their rights to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions;

Article 32. Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 33. Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards;

Article 34. Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities;

Article 35. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right;

Article 36. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned;

PART VIII

Article 37. States shall take effective and appropriate measures, in consultation with the indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that indigenous peoples can avail themselves of such rights in practice;

Article 38. Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development, and for the enjoyment of the rights and freedoms recognized in this Declaration;

Article 39. Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the indigenous peoples concerned;

Article 40. The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical

assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established;

Article 41. The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with the direct participation of indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration;

PART IX

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

Article 43. All the rights and freedoms recognized herein are guaranteed equally to male and female Indigenous individuals;

Article 44. Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights Indigenous peoples may have or acquire;

Article 45. Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations.