

An overview of the history of indigenous peoples: self-determination and the United Nations

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United Nations Working Group on Indigenous Populations (1984–2001)

Abstract *This paper reflects on the entire consultation and drafting process that resulted in the recent proclamation of the United Nations (UN) Declaration on the Rights of Indigenous Peoples (DRIP) UN General Assembly (GA) resolution 61/295. It discusses the problems the drafters of the declaration faced, including those concerning the definition of the terms ‘indigenous’ and ‘peoples’. It also reviews the formal positions of all the parties concerned in an attempt to explain the new meaning of indigenous peoples’ right to self-determination, which was one of the main stumbling blocks of the declaration. It is the conviction of this author (hereinafter UN Chairperson-Rapporteur) that the right to self-determination, as contained in Article 3 of the above-mentioned resolution 61/295, should be duly implemented by all concerned for the benefit of the states, indigenous peoples and the global community as a whole.*

Introduction

The right of peoples and nations to self-determination is a fundamental human right (United Nations [UN] General Assembly [GA] 1950) and a prerequisite to the full enjoyment of all fundamental human rights (UN GA 1952). In the historic Declaration on the Granting of Independence to Colonial Countries and Peoples (hereinafter ‘Declaration on Colonial Independence’), inter alia, it states,

The subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and cooperation; all peoples have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (UN GA 1960, Articles 1–2)

Later, the GA in elaborating on the two covenants on human rights—the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)—decided to adopt as Article 1 to both covenants that ‘all peoples have the right to self-determination’. It is based on these abovementioned provisions that the world’s indigenous peoples,

¹ The author was the founding Chairperson and Special Rapporteur of the UN WGIP (1984–2001) as well as the principal drafter of the declaration, including the last draft as agreed upon by the members of the Working Group at its 11 session, which was submitted to the sub-commission (E/CN.4/Sub.2/1993/29).

keeping in mind their own history, traditions, values, cultures and in particular their continued suffering and oppression, made UN recognition of their right to self-determination their ultimate goal and deepest aspiration.

The inherent right to self-determination of indigenous peoples has a long, interesting and complex history. Indigenous peoples believe that history is one of their strengths. They became, in most cases, numerical 'minorities' as a result of colonialism or state expansion. During the colonial period some acts of the colonizing powers recognized certain rights of indigenous peoples. Those acts of recognition are invoked in any historical argumentation as sources of rights. Nevertheless, indigenous peoples also have rights deriving from the precolonial legal order. It could be assumed that a modern political and legal relationship between the indigenous peoples and the state is derived from those pre-existing rights. Indigenous representatives have gazed at 'self-determination', 'autonomy', 'self-government' and 'sovereignty' in both domestic and international fora for many decades. Indigenous peoples have also declared that the right to lands, territories and natural resources is the basis for their collective survival and thus inextricably linked to their right to self-determination.

The Working Group on Indigenous Populations

In my former capacity as the Chairperson of the Working Group on Indigenous Populations (WGIP) and Special Rapporteur of the UN Sub-Commission on Human Rights (hereinafter 'Chairperson-Rapporteur') it is useful to make an attempt to present some comments relating to the working definition of the term 'indigenous peoples' and to briefly analyse the concepts 'self-determination', 'peoples', 'autonomy' and 'self-government', which were included in the drafts that elaborated the provisions of the UN Declaration on the Rights of Indigenous Peoples (DRIP) (2007). The WGIP enjoyed considerable success, developed a comprehensive and widely accepted draft declaration on the rights of indigenous peoples (hereinafter 'draft declaration' or 'the declaration') and made numerous other contributions on the issue without feeling a need to elaborate a definition of the term 'indigenous peoples'.

Some characteristics of the WGIP—for which it received high praise—were the liberal and democratic spirit of openness, transparency and flexibility it incorporated. The Chairperson-Rapporteur of the WGIP insisted that no indigenous community, organization, nation or even individual person from any region was to be denied the right to take the floor in the annual sessions of the WGIP to peacefully express an opinion or viewpoint. In practice, the absence of a rigorous definition did not impede progress under the mandate of the WGIP. It should be recalled that indigenous peoples have often suffered from definitions imposed on them by others. For example, in the past the criterion for membership of an indigenous population in certain countries was based upon parentage or blood quotient, which is now deemed discriminatory, since it denies the right of indigenous peoples to determine their own membership.

For this reason the WGIP did not consider it appropriate to develop a definition of its own without a full consultation with indigenous peoples. Notwithstanding these observations, the Chairperson-Rapporteur was aware of the growing interest from all sides—indigenous peoples, governments and

organizations in the UN system responsible for operational programmes—for guidance regarding the definition of the term ‘indigenous peoples’. It was noted, for example, that during the 12th session of the WGIP some indigenous peoples’ representatives expressed the view that certain participants claiming status as indigenous peoples were not in fact so. Also, several governments, which regularly attended the WGIP as observers, stated before the former Sub-Commission on the Promotion and Protection of Human Rights (hereinafter ‘the sub-commission’) and the former Commission on Human Rights (hereinafter ‘the commission’) that there were no indigenous peoples in their countries, which did not reflect reality.

The first contemporary attempt to present a definition for indigenous peoples at the UN level was made by another special rapporteur of the sub-commission, Jose Martinez Cobo. In his valuable ‘Study of the Problem of Discrimination against Indigenous Populations’ and in particular paragraph 379, Jose Martinez Cobo included the following cautious definition for the purpose of international action:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.²

This definition was established as a working definition of the term ‘indigenous peoples’ in the UN system, although there is not an international consensus on who indigenous peoples are: the term cannot be defined precisely or applied all-inclusively (Daes 2005, 509). In this respect, it should be useful to recall the basic criteria on which the abovementioned working definition of ‘indigenous peoples’ is based and to make certain brief comments related to them.

These first basic criteria included the concept of ‘historical continuity with pre-invasion and pre-colonial societies that developed on their territories’.³ In this connection, Jose Martinez Cobo proposed the following explanation: indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country, wholly or partially, at the time when persons of different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonized status. Second, the occupation of ancestral lands is often at least a part of this process. Third, the aforesaid basic criteria should be related to cultural characteristics. According to the working definition, indigenous peoples should possess distinctive cultural characteristics that distinguish them from the prevailing society in which they live—religion, language, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle and so forth. Fourth, the criterion also referred to ‘non-dominance’, which alludes to the sense that indigenous peoples should

² E/CN.4/Sub.2/1986/7 Add.1–4, paragraph 379.

³ *Ibid.*

constitute a non-dominant part of the population of the countries in which they live. Under the agenda of the WGIP its members have over the years been able to listen to a wide range of information from representatives of indigenous peoples who have indicated their non-dominant status. Very often this argument has been corroborated by representatives of certain observer governments.

In addition to the aforesaid criteria, two other criteria must be taken into consideration, in connection with the analysis of the term 'indigenous peoples': self-identification and group consciousness. It may be noted that indigenous peoples themselves have defined and determined whether they are indigenous or not and how their membership is attributed. Furthermore, members of the WGIP were aware of the indigenous consciousness that has developed among them, in particular within the framework of the UN system over some years. In certain countries, in the past, indigenous peoples felt shame or fear to identify themselves as indigenous. Of late there has been a reversal of this trend and members of indigenous nations or communities are proud to be recognized as such. At the international level, a sense of common vision and experience appears to prevail among many hundreds of indigenous peoples from all regions of the world.

International Labour Organization Convention No 169

International Labour Organization (ILO) Convention No 169 on 'Indigenous and Tribal Peoples in Independent Countries' has replaced and revised ILO Convention No 107, which in Article 1 retained the distinction between 'indigenous' and 'tribal' peoples while modifying the way in which these two terms were defined (Barsh 1994, 44; Anaya 2004, 6; ILO 1989). 'Tribal peoples' are peoples

whose social, culture and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. (ILO 1989, Article 1(a), 92)

This formulation embraces the factor of 'distinctiveness' as it appeared in ILO Convention No 107 but deletes any implication that tribal peoples are inferior or less 'advanced'. Indigenous peoples are now defined in terms of their distinctiveness as well as their descent from the inhabitants of their territory at the time of conquest, colonization or the establishment of present state boundaries. The addition of the last five words has the effect of minimizing any logical differences between the concepts of 'indigenous' and 'tribal', since both concepts are now chiefly defined by the extent to which the group in question constitutes a distinct society.

The only concrete remaining difference between the definition of 'indigenous' and 'tribal' in ILO Convention No 169 relates to the principle of self-determination. A people may be tribal, either by its own choice (through maintaining its own laws and customs) or without its consent (as a result of special legal status imposed by the state). Yet, a people may be classified as 'indigenous' only if it chooses to do so by perpetuating its own distinctive institutions and identity. In presenting this analysis, it is important to stress that the Chairperson-Rapporteur found no satisfactory reasoning for distinguishing between 'indigenous' and 'tribal' peoples in the practice or precedents of the UN. Nor has the Chairperson-Rapporteur been

persuaded that there is any general distinction between 'indigenous peoples' and 'peoples' other than the fact that the groups typically identified as 'indigenous' have been unable to exercise the right of self-determination through participation in the construction of a contemporary nation-state.

In this respect, the Chairperson-Rapporteur is compelled to conclude that any inconsistency or imprecision in previous efforts to clarify the concept of 'indigenous' were not the result of a lack of adequate scientific or legal analysis, but rather due to the efforts of governments to limit the global effects of indigenous rights and build a high conceptual wall between 'indigenous' 'peoples' and 'non-governing territories'. No one has succeeded in devising a definition of 'indigenous' which is precise and philosophically coherent, yet satisfies demands to limit its regional application and local implications. All past attempts to achieve both clarity and restrictiveness in the same definition have in fact resulted in greater ambiguity. ILO Convention No 169 concerning 'Indigenous and Tribal Peoples in Independent Countries' was adopted on 27 June 1989 by the General Conference of the ILO at its 76th session and entered into force on 5 September 1991. As of July 2007 it has been ratified by 17 states. This important international instrument constitutes a valuable contribution to the legal protection of indigenous peoples living in the countries that have duly ratified it.

International instruments

The UN Charter does not include any general right to self-determination. The principle of equal rights and self-determination of peoples, with all its ambiguity, is referred to only twice in the Charter (Articles 1 [2] and 55). The development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, is listed as one of the purposes of the UN (Higgins quoted in Sanders 1993, 74). The principle of self-determination, in contrast to the principle of sovereignty, and all that flows from it, was not originally perceived as an operative code of the Charter. Accordingly, the principle of self-determination was more of the order of desiderata than that of a legal right. However, the adoption of the Declaration on Colonial Independence by the GA was clearly the beginning of a revolutionary process within the UN, representing an attempt to supplement the relevant provisions of the Charter (UN GA 1960). This declaration, despite essentially being a political document with questionable legal authority, has formed the cornerstone of what may be called the new UN law of self-determination.⁴

Although the Declaration on Colonial Independence provides that integration and free association are ways for peoples' right to self-determination to be exercised, a great number of states fearing secession do not accept that indigenous peoples are qualified to exercise their right to self-determination. Indigenous peoples are systematically opposing the assumption that they are not entitled to the same rights as other 'peoples', insisting that this is a racist policy and practice.

⁴ Moreover, the right to self-determination is also provided for by both the ICCPR and the ICESCR of 1966, which in their common Article 1 also state, 'all peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development' (ICCPR 1966, ICESCR 1966).

The right to self-determination was limited by the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States (1970) in accordance with the UN Charter (hereinafter 'Declaration on Friendly Relations') which provides that states enjoying full sovereignty and independence and possessed of a government effectively representing the whole of their population shall be considered as conducting themselves in conformity with the principle of equal rights and self-determination of peoples, as regards that population (UN GA 1970).

It also notes that nothing in the relevant paragraphs of the aforesaid declaration shall be construed as authorizing any action that would impair, totally or in part, the territorial integrity or political unity of such states. It provides further that only when all peaceful means of achieving self-determination have failed should other measures be adopted. Subsequently, the basic objective of this declaration was to discourage secession.

Also, the right of self-determination was reaffirmed by the Helsinki Final Act (1975) of the Conference on Security and Cooperation in Europe, which under the heading of the relevant paragraph of 'Equal rights and self-determination of peoples' provides,

The participating States will respect the equal rights of peoples and their right to self-determination, acting at all times in conformity with the purposes and principles of the UN Charter and with the relevant norms of international law, including those relating to territorial integrity of States. (Helsinki Final Act 1975, Article 8)

Further, paragraph 2 of the Vienna Declaration of the World Conference on Human Rights (1993) *expressis verbis* provides that

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. (UN GA 1993, paragraph 2)

However, the context in which the universal goal is declared demonstrates an intention to confine the right to self-determination to the peoples who are still 'dependent' and those subjected to alien subjugation, domination and exploitation. No specific reference has been made to indigenous peoples. In this respect the question arises: upon whom is the right to self-determination conferred? The answer given in identical terms in all the abovementioned international instruments is as simple in formation as it is chimerical in fact. All these instruments stipulate: *all peoples have the right to self-determination.*

The concept of 'peoples'

During the discussions on the text of the draft declaration, a number of substantive comments and proposals were made related to the concept of 'peoples', of which the following are considered to be the most important. The representative of the observer government of Canada stated that Canada's acceptance of the term 'peoples' was subject to the inclusion of a qualifying phrase, failing which they would only support the use of the term 'people'. The representative of the observer government of the United States indicated that his government could not accept the term 'peoples' as presently employed in the

draft declaration, and suggested that, if the term were eventually to be retained, the draft declaration should include a provision equivalent to that contained in the ILO Convention No 169 (1989), which made clear that the use of the term 'peoples' in that convention did not imply the right of self-determination as it was understood in international law. The representative of the observer government of Japan cautioned against having the term 'indigenous peoples' unqualified, for this could eventually open the way to subjective definitions and, as a consequence, to confusion. The representative of the observer government of New Zealand said that, whatever the scope and the meaning of the term 'indigenous peoples' in the draft declaration, New Zealand strongly wished that it should cover the special position of the Maori people in New Zealand.⁵

Some representatives of indigenous peoples contended that the draft declaration should indeed consistently refer to indigenous 'peoples'. They also argued that it was not for governments to determine who constituted a nation or a people, since peoples were entitled to decide for themselves. In the opinion of the Chairperson-Rapporteur, 'indigenous peoples' are unquestionably 'peoples' in every social, cultural and ethnological meaning of this term. They have their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have so long lived (Daes 2000). It is neither logical nor scientific to treat them as their neighbours, who obviously have different languages, histories and cultures and who have often been their oppressors. The UN should not pretend, for the sake of a convenient legal fiction, that these differences do not exist. It is a fact that living side by side as neighbours under one state may gradually blend the characteristics of different peoples, reducing their original differences. If history is any judge of such matters, however, the most important differences between peoples can be subtle and very resistant to change. The proper legal issue is not the differences that exist today, but the fact that two peoples had, for millennia, had separate histories that touched very little or not at all. Also, with few exceptions, indigenous peoples were never part of state-building. They did not have an opportunity to participate in designing the modern constitution of the states in which they live, or to share, in any meaningful way, in national decision-making (Daes 1993).

Indigenous peoples' right to self-determination

In its third session in 1985, the WGIP decided, as a first important step, to proceed with the elaboration of a draft declaration on indigenous rights for eventual adoption and proclamation by the UN GA. In pursuance of this decision, the WGIP entrusted the Chairperson-Rapporteur to elaborate a draft containing the fundamental principles on which the declaration could be based. In 1987, the WGIP adopted a set of 14 draft principles, proposed by the Chairperson-Rapporteur, based on the principles adopted by the International Conference of the World's Indigenous Peoples in Panama (1984). These principles referred, inter alia, to the recognition, promotion and protection of the rights and freedoms of the indigenous peoples, including in particular the principle-right of self-determination. The WGIP

⁵E/CN.4/Sub.2/1992/33, paragraph 19.

approved the aforesaid principles and further requested the Chairperson-Rapporteur to prepare a working paper containing a full set of preambular provisions and basic principles and rights of the indigenous peoples. The relevant draft was elaborated by the Chairperson-Rapporteur and subsequently unanimously approved by the WGIP. Its recommendation was also unanimously approved by its parent bodies, namely the sub-commission, the commission and the Economic and Social Council.

A number of drafts containing proposals and amendments were submitted by representatives of indigenous peoples and governments, as well as by representatives of specialized UN agencies, in particular the ILO, members of the academic community and non-governmental organizations during the annual sessions of the WGIP between the years 1988–1990. At the inaugural meeting of the ninth session (1991), the Chairperson-Rapporteur indicated that the standard-setting activities would be the major task of the session and invited all the participants to work together closely and constructively with the main objective of elaborating a draft declaration. For this purpose, the Chairperson-Rapporteur had prepared a revised working paper containing a proposed text of the draft declaration, the draft proposals by the three informal drafting groups established during the eighth session as well as suggested amendments by indigenous and government representatives, specialized intergovernmental agencies and non-governmental organizations and other interested parties.⁶

Introducing the paper, the Chairperson-Rapporteur stated, *inter alia*, the substantive issues and proposals related to the draft declaration that had been brought to the attention of the WGIP by the representatives of both indigenous peoples and governments during, or even after, the meetings of its annual sessions. Next, particular attention was paid to the needs and aspirations of the indigenous peoples as well as the statements delivered by the observer governments relating to both parts of the WGIP's mandate: the review of developments and the standard-setting activities. Thus, the legal historian and Native American Robert A Williams accurately remarked in 1990 that 'International legal recognition of the right of indigenous peoples to self-determination as distinct peoples has been the most strident and persistently declared demand voiced before the Working Group' (Lâm 2000, 52).

The Chairperson-Rapporteur further pointed out that in elaborating the abovementioned first draft declaration consideration should be given to a number of relevant human rights and humanitarian law instruments, the recommendations made by Jose Martinez Cobo, discussed above, and the guidelines for the setting of international standards in the field of human rights as laid down by GA Resolution 41/120 (1986). Furthermore, the Chairperson-Rapporteur had underlined that among the crucial issues included in the draft declaration were: the use of the term 'indigenous peoples' rather than 'indigenous populations'; the combination of individual and collective rights, including the right to self-determination, with a special emphasis on the latter as an inherent and essential element of indigenous rights for their physical and cultural survival; the effective protection of indigenous identities as manifested in cultures, languages, religions, traditions and customs; the introduction of indigenous autonomy with meaningful functions and powers;

⁶ E/CN.4/Sub.2/1991/36.

and the reaffirmation and protection of the rights of indigenous peoples to their land and natural resources. It was clarified that the draft declaration did not contain any definition of the concept 'indigenous' because, in the opinion of the Chairperson-Rapporteur, such a definition was unnecessary for the adoption and application of the provisions of the declaration.

Moreover, during the debate, reference was made to the concepts of 'autonomy' and 'self-government' contained in Article 4 of the declaration. In this regard, it should be noted that the linguistic origins of the English word 'autonomy' derive from a Greek word that denotes self-rule. Accordingly, the meaning and scope of Article 4 of the declaration is to recognize certain powers, freedoms and rights to indigenous peoples and to provide more immediate and effective protection to them in the exercise of these powers and rights. It was important to clarify that the concepts of 'autonomy' and 'self-governance' are mainly based on indigenous fundamental freedoms—subject to certain restrictions—in matters not specifically included in the power of the autonomous entity. Thus, for example, subjects related to sovereignty, foreign affairs and military issues are not included in these articles. In this regard, indigenous representatives feared that Article 4 would be construed as an exclusive definition of the reference to self-determination in Article 3, rather than a special case of the general principle, which in the view of the Chairperson-Rapporteur was the correct interpretation. Accordingly, for indigenous peoples, autonomy and self-government are prerequisites for continuing their struggle in order to achieve full equality, freedom from racism and racial discrimination, human dignity and effective enjoyment of all human rights and fundamental freedoms. Finally, one of the most important draft provisions of the draft declaration was presented which provides for the right to self-determination. It reads,

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationship with the States in which they live, in a spirit of coexistence with other citizens, and freely pursue their economic, social, cultural and spiritual development in conditions of freedom and dignity.⁷

After a general debate on the new revised draft declaration, the WGIP proceeded with a further consideration of its provisions and a first article-by-article reading of the draft declaration. Participants were invited by the Chairperson-Rapporteur to make constructive comments, amendments, revisions and suggestions to each draft article. This exercise was extremely difficult, taking into consideration the great number of participants (about 700) and their different legal and cultural backgrounds. Several non-governmental representatives, including indigenous representatives, stated that the draft declaration should reflect the unqualified right of indigenous peoples to self-determination. However, some governmental observers indicated that it might be necessary to qualify at least the application of the right in order to make the text acceptable to governments, which would have to implement it. Other observer governments expressed opposition to the inclusion of a reference to self-determination.

⁷E/CN.4/Sub.2/1991/40/Rev.1, 32, paragraph 1.

In light of this discussion, the Chairperson-Rapporteur reiterated that this text would be transmitted to indigenous organizations, governments, international organizations and other interested parties for more detailed consideration and commentary immediately after the next session of the commission. Taking into consideration the oral and written suggestions received, the following revised text for the right of indigenous peoples to self-determination was elaborated:

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.⁸

Many references and proposals were made by some participants based on the abovementioned text, amongst which was the following relevant written proposal from a tribal summit held by the International Organization of Indigenous Resource Development, June 1992, in Denver, Colorado:

Indigenous peoples have the right to self-determination, in accordance with international law. By virtue of this right, they freely determine their relationships with States, in a spirit of coexistence, and freely pursue their cultural, spiritual, economic and social development in conditions of freedom and dignity.⁹

This proposal was considered to be representative of mainstream indigenous demands (Alfredsson 1993, 42).

A constructive discussion of the proposals took place, during which the following points were compiled. Most representatives of observer governments put forward strong reservations with regard to the inclusion of references to 'self-determination'. In particular, the representative of the observer government of Canada affirmed that he was ready to favour the insertion of the principle of self-determination for indigenous people provided that it be understood that the right of self-determination was exercised (a) within the framework of existing nation-states and (b) in a manner that recognized an interrelationship between the jurisdiction of the existing state and that of indigenous communities, where the parameters of jurisdiction were mutually agreed upon. The representative of the observer government of Norway, speaking also on behalf of Denmark, Finland and Sweden, stressed that great caution was necessary in relation to the term 'self-determination' and urged for it to be qualified carefully, if included in the draft declaration. Like the representative of the observer government of Canada, he also specified that any qualification should first of all clarify that the principle of self-determination, as embodied in the draft declaration, referred to self-determination within the framework of existing states. The representative of the observer government of Australia, while recognizing the legitimate concern of states to preserve their territorial integrity, expressed support for the inclusion of language referring to self-determination in the draft declaration.

In this connection, he suggested that in order to overcome the concerns voiced by many governments with regard to the inclusion of self-determination in the draft declaration, a more explicit reference to the 1970 Declaration on Principles of International Law on Friendly Relations and Cooperation among States than that

⁸ E/CN.4/Sub.2/1992/33, 46, paragraph 1.

⁹ E/CN.4/Sub.2/AC.4/1992/3/Add.1, 5.

contained in the present operative paragraph 4 should be inserted. The general debate on self-determination, as developed in the international fora, had witnessed the emergence of the view that there might be ways in which the right of self-determination could be legitimately exercised short of the choice for the separate status of an independent sovereign state. In the Australian government's opinion, a system that would guarantee full and genuine participation and fundamental rights, as well as recognize the special position of indigenous peoples, could provide an adequate and tangible realization of self-determination. Specific recognition of the right of self-determination for indigenous peoples, as separate and distinct peoples, would assist them to overcome the barriers to full democratic participation in the political process by which they are governed.

A number of representatives of indigenous peoples maintained that the right to self-determination was an inherent and inalienable right of all nations and peoples which existed independently of recognition from governments and international organizations. They further clarified that the meaning they ascribed to the right to self-determination was the same as that attributed to it by international law. In this connection, they specified that, in addition to the right to determine their own destiny and political, economic, cultural and social structures, the right to self-determination should necessarily encompass the right for indigenous peoples to use and control their own lands and natural resources, to impose taxes, to engage in cross-border trade, to impose their own criminal and civil jurisdiction with respect to indigenous people as well as non-indigenous living on their territory. Stanislav Chernichenko, a member of the sub-commission, proposed to formulate operative paragraph 1 of the draft declaration with the following new wording:

Indigenous peoples have the right to self-determination. In the context of this declaration it means first of all the right to autonomy and (or) self-government, including the right to freely determine their political status and institutions and freely pursue their economic, social and cultural development. The realization of this right shall not pose a threat to the territorial integrity of the State.¹⁰

The former Chairman of the Board of Trustees of the Voluntary Fund for Indigenous Populations, Augusto Willemsen-Diaz, referred to the Charter of the UN, the 1970 Declaration on Friendly Relations (UN GA 1970) and the Declaration on Granting Independence to Colonial Countries and Peoples (UN GA 1960), where the principle of self-determination was recognized as a fundamental human right—the enjoyment of which was an essential precondition for the enjoyment of any other human right and fundamental freedom. An uncompromising denial of this right to indigenous peoples might lead to potentially dangerous and conflicting situations.¹¹

Douglas Sanders, an international scholar with extensive knowledge of indigenous issues, stressed that some leading international jurists had agreed that although indigenous peoples did not normally have the right to secession, self-determination could equally apply to them in the form of self-government or autonomy within existing states. Another scholar, James Falkowski, stated that the WGIP was in the process of creating a double standard of self-determination

¹⁰ E/CN.4/Sub.2/1992/33, paragraph 18.

¹¹ *Ibid.*

in respect to indigenous peoples and suggested that the universal language of Article 1 of the two International Covenants on Human Rights be used in the draft declaration with the addition of a specific reference to indigenous peoples. This formula would equally solve the problem of inconsistency of the draft declaration with the other international human rights instruments.¹² The Chairperson-Rapporteur explained that the principle-right of self-determination, as discussed within the WGIP and as reflected in the draft declaration, was used in its internal character, that is, short of any implications that might encourage the formation of independent states.

At its 11th session, the WGIP considered a further revised text of the draft declaration presented by the Chairperson-Rapporteur and decided, among other things, that the following text would be included in its Article 3: 'indigenous peoples have the right of self-determination. By virtue of that right they freely pursue their economic, social and cultural development.' This decision of the WGIP was greeted with a standing ovation from indigenous participants and a conciliatory response for many of the governments.¹³

Post-Working Group on Indigenous Populations

The adopted draft 'United Nations Declaration on the Rights of Indigenous Peoples' (DRIP 2006) was submitted to the sub-commission, which after a brief consideration and without any amendment or change, submitted it to its parent body, the former Commission on Human Rights. The commission established an open-ended, intersessional working group with the sole purpose of elaborating a draft declaration. It was decided to consider the draft contained in the annex to Resolution 1994/45 of 26 August 1994 of the sub-commission, entitled 'Draft United Nations Declaration on the Rights of Indigenous Peoples' and to transmit this declaration to the UN GA for adoption within the international decade of the World's Indigenous People.

The working group of the commission under the chairmanship of Luis-Enrique Savez, in spite of his efforts, did not succeed in completing the drafting of the declaration within the first international decade of the world's indigenous peoples. Unfortunately, certain delegations of member states and some representatives of indigenous peoples delayed the completion of the work for almost 11 years. The 11th session of the working group established in accordance with the abovementioned resolution of the Commission on Human Rights adopted the aforesaid draft declaration and submitted it to the Human Rights Council.¹⁴

Subsequently the draft DRIP was, amongst other items, placed on the agenda of the Human Rights Council. After an extensive discussion, the Human Rights Council adopted it by its Resolution 1/2 on 29 June 2006. The text of the declaration is contained in the annex of the abovementioned Resolution 1/2. The Council submitted its resolution with the declaration to the 61st session of the GA. At its 53rd meeting on 28 November 2006, the Third Committee of the GA had

¹² *Ibid.*

¹³ E/CN.4/Sub2/1993/29, 45–50.

¹⁴ E/CN.4/2006/79 (Chairman's summary-proposal as Annex 1).

before it a revised draft resolution submitted by a great number of member states.¹⁵ At the same meeting, the representative of Namibia introduced amendments to the draft resolution.¹⁶

The Third Committee adopted the amendments by a recorded vote of 82 to 67 with 25 abstentions.¹⁷ Also, at its 54th meeting, on 30 November 2006, the Third Committee had before it a draft decision entitled 'Report of the Human Rights Council' submitted by Namibia, on behalf of the members of the group of African states of the UN, which read,

The General Assembly, reaffirming its resolution 60/251 of 15 of March 2006, by which it established the Human Rights Council as a subsidiary body of the General Assembly, welcomes the establishment of the Council, and decides to take note of the report of the Council to the General Assembly at its sixty-first session.¹⁸

At the same meeting the representative of Namibia made a statement on behalf of the members of the group of African states of the UN, and withdrew the draft decision.

Accordingly, at its 54th meeting, on 30 November, the Third Committee, on the proposal of its Chairman, decided to recommend to the GA that it take note of the report of the Human Rights Council. In this respect, it adopted resolution 61/178 by which: (a) it takes note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the UN DRIP; (b) decides to defer consideration and action on the UN consultations thereon; and (c) also decides to conclude the consideration of the declaration, as contained in the annex to the abovementioned resolution before the end of its 61st session (UN GA 2006, 25).

Afterwards, on 10 May 2007, 67 member states submitted a comprehensive letter to the President of the GA, Sheikha Haya Rashed Al Khalifa, by which they, *inter alia*, underlined that reopening the text of the declaration might lead to another lengthy process with an uncertain outcome, since it would require renegotiating the entire declaration. They also expressed the belief that this was not the intention of the GA when it decided to postpone its consideration on the declaration. Further, in a spirit of compromise they enclosed a copy of a first draft for a new resolution that was prepared among the co-sponsors of a draft resolution and expressed their readiness to engage with concerned countries to discuss this proposal, which they hoped would pave the way towards the adoption of the declaration.¹⁹

President of the GA Al Khalifa appointed His Excellency Hilario G Davide, Jr, the Permanent Representative of the Philippines to the UN, to undertake, on her behalf, further consultations on the DRIP. Davide conducted open and inclusive consultations, in formats that he considered appropriate, with a view to reflecting the views of all concerned in this process. The President requested him to report back to her on the outcome of the consultations as soon as possible, but not later than mid-July 2007. Also, given the very limited time remaining, she encouraged

¹⁵ A/C.3/61/L18/Rev. 1.

¹⁶ A/C.3/61/L57/Rev. 1.

¹⁷ *Ibid.*

¹⁸ A/C.3/61/L58.

¹⁹ Copy of the letter with the author; see also A/C.3/61/L.18.

member states to enter these consultations in a flexible manner and to provide Davide with all necessary support.

Davide had, within his mandate, convened open-ended informal consultations of the plenary on the draft declaration on 29 June 2007. The objective of these open-ended informal consultations was to focus discussions on a more tangible and concrete approach that would provide a middle ground to the major positions on the draft declaration. In his preliminary and cross-regional consultations, he had the opportunity to listen to various perspectives and to mitigate major concerns. Bearing in mind the views expressed, and with the aim of initiating or provoking a possible middle ground to expedite the process, he initially presented two possible options for the delegations to consider and reflect upon. Further, he expressed his belief that all the parties concerned could be more systematic and productive if they could start deliberating on some concrete ideas that the delegations could keep in mind in the search for a workable and acceptable middle ground solution. The first option would be to add a *chapeau* or new preambular paragraph crafted to address the major substantive concerns mentioned in paragraph 5. The second option would be to amend Article 46 of the text of the declaration in order to create an explicit linkage between the declaration and the resolution adopting it, to ensure that the declaration and the resolution will be read together for proper application and interpretation.

Davide next received initial feedback from delegations that neither the first option nor the second option could lead to a possible compromise. On the one hand, states that wanted changes in the text were not satisfied with what they mentioned was 'a fix' outside the text of the declaration. On the other hand, the states that did not want any change to the text mentioned that they did not accept any of the options. Davide thought that certain elements from the above-mentioned options presented could still be useful in formulating a possible third option. Thus, he invited delegations to explore a possible hybrid model that could combine worthwhile elements of the other options.

Davide submitted his first report to the GA President on 13 July 2007, which, among other things, contains the abovementioned ideas. He further expressed the hope that this report would provide some guidance to the President on the necessary elements for a middle ground approach that could win the broadest support for the declaration. In summary, he stated that an effective middle ground approach should, as much as possible, meet the following requirements:

- Does it represent a genuine effort to address the various concerns?
- Does it build on, and not undermine, the efforts and achievements of the process at the Commission on Human Rights and Human Rights Council?
- Does it preserve the purpose of the declaration for indigenous peoples?
- Is it tangible and specific enough to enable the GA to determine the particular adjustments to be made to the current text within the remaining period before the end of the 61st session?
- Will it ensure that the declaration that does not fall below existing human rights standards?²⁰

²⁰ Copy of report with the author.

As a reaction to the abovementioned report, the permanent missions of seven member states addressed a letter to Davide on 18 July 2007.²¹ They argued, among other things, the following: (a) Only through amendments to the text of the declaration, which address their most significant concerns, will it be possible for them to consider supporting the declaration and they reiterated their support for a limited reopening of the text, based on a thematic approach, and with the objective of achieving an irreducible minimal number of amendments. (b) They attached to the abovementioned letter a non-paper, dated 29 June 2007, which outlined a thematic approach reflecting their concerns (Davide 2007). They considered that such an approach would provide the necessary flexibility for interested parties to achieve an irreducible minimum. (c) In an effort to narrow concerns, amendments were discussed in eight areas of 16 articles:

Self-Determination, Self-Government and Indigenous Institutions (3, 4, 5, 33); Lands, Territories and Resources (26, 29); Redress (11, 27, 28); Free prior and informed consent (19, 32(2)); Rights of Third Parties (46 only); Intellectual Property Rights (11, 31); Military Issues (10, 30); and Education (14). (Davide 2007)

They clarified that not all members of the aforesaid group had identified all of these articles and the list of them was a composite. They further mentioned that members of the group had agreed not to pursue the concern regarding the definition of indigenous peoples, although they shared the concern of the African Group of States (AGS) that indigenous situations vary from state to state and group to group, and that this text must be capable of being universal in its scope and application. They finally stated that the reason for their amendments to the declaration was to render it consistent with international law.

Subsequently, Davide addressed a letter dated 20 July 2007 to the GA President and attached to it a copy of the abovementioned letter of the seven member states with the request that this letter and its annex be circulated to all member states (see A/61/1018). Also, after a meeting that he convened with the seven member states, at their request, and after listening to their views, he submitted his 'Supplement to the report of the facilitator on the Draft Declaration on the Rights of Indigenous Peoples' to reflect a development on the matter after the submission of the report. The main points reflected in the supplement to the abovementioned report are the following: (a) the insistence of the seven member states' delegation that only through amendments to the text of the declaration, which address their most significant concerns, would it be possible for them to consider supporting the declaration; (b) that they had decided not to pursue the concern regarding the definition of indigenous peoples; (c) that the 'facilitator' recommend to the President of the GA for a possible conduct of a second phase of consultations which could provide a forum to discuss the substantive aspects of the declaration as they relate to the concerns identified; and (d) the reply by the 'facilitator' that his mandate had ended.²²

Subsequently, the President of the GA addressed a letter to permanent representatives, dated 23 July 2007, with the attached report of the facilitator,

²¹ Australia, Canada, Colombia, Guyana, New Zealand, Russian Federation and Surinam.

²² The author holds a copy of the 'Supplement to the report of the facilitator on the Draft Declaration on the Rights of Indigenous Peoples'.

dated 1 July 2007, as well as his supplementary report, dated 20 July 2007, regarding the process of consultation undertaken until the 23 July 2007. She underlined, *inter alia*, that the reports outline a proposed way forward in order to allow all parties concerned to implement the mandate of the GA and adopt the draft declaration before the end of the 61st session. She also expressed the hope that the permanent representatives and permanent observers would consider the proposed way forward in a flexible and constructive manner and encouraged them to reach a swift common understanding to allow the GA to take a decision on this very important issue during the first week of September 2007.²³

As of August 2007, the positions of the various states regarding the declaration as adopted by the Council (hereinafter 'CD') were as follows:

1. The AGS originally asked for some 30 textual changes to the CD to meet its main concerns.
2. The group composed of Australia, Canada, Colombia, Guyana, New Zealand, Russian Federation and Surinam (hereinafter 'CANZ and others') asked for nine very important 'thematic' revisions of the CD that could reduce the rights of indigenous peoples enshrined therein. CANZ and others did not seem to have wide support outside their small circle, which moreover, appeared to be losing supporters.
3. The group composed of member states of the European Union and most Latin American states, including Mexico and Peru, continued to support their official position and express a strong wish for the GA to proclaim the CD as it is and be willing as a compromise to negotiate clarifying language in an attached resolution. Most members are of the opinion that good faith contextualization of the CD could meet AGS concerns, thereby permitting GA proclamation of the declaration.
4. Asia-Pacific and certain Caribbean states remained divided. There were some informal indications that a majority of them would support the proclamation of the GA.

Proclamation of the UN Declaration on the Rights of Indigenous Peoples

The UN GA taking note of the recommendation of the Human Rights Council contained in its Resolution 1/2 of 29 June 2006, by which the Council adopted the text of the UN declaration, proclaimed by its historic resolution A/61/295, on 13 September 2007 the UN DRIP. It was adopted by an overwhelming affirmative vote of 143 in favour, four against (Australia, Canada, New Zealand and United States) and 11 abstained.

In order to reach an agreement leading to the proclamation of the declaration, the consultations continued between all parties concerned, in particular between the friends of the declaration and the AGS almost until the last day. Many compromises were made concerning some articles of the declaration. The constructive role played by Al Khalifa should be mentioned: her tireless efforts and important and timely consultations and decisions within her mandate have decisively contributed to the adoption of the declaration. Article 3 of the

²³ Copy of the letter on file with the author.

declaration, in spite of efforts made by certain governments, has not been amended. Instead, Article 46 was basically revised, as paragraph 1 now states:

Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. (DRIP 2006, Article 46, paragraph 1)

As the Chairperson-Rapporteur stated to the Third Committee of the 62nd session of the UN GA, the right to self-determination provided by Article 3 of the declaration reflects all the aspirations and vision of the world's indigenous peoples. It is a right of cardinal importance for them because it is a sacred right to which they have been entitled since time immemorial (Daes 2007).

The right of self-determination, as it is contained in Article 3, according to the opinion of the Chairperson-Rapporteur, does not carry with it a right to secession. Instead, as already mentioned, respect for the principles of territorial integrity or political unity of sovereign and independent states is *expressis verbis* provided by Article 46 of the declaration. It should also be emphasized that the declaration is a declaration of human rights and it is universally understood in the law of nations that human rights obligations are not subject to contrary domestic legislation. Human rights law prevails over national law. The rights provided by the declaration should be exercised by indigenous peoples with respect to the rights of others and are subject only to limitations contained in Article 46 and other legitimate restrictions established by international human rights law.

Effective implementation of the declaration will prove the commitment of states and the whole international community to recognizing, respecting and fulfilling indigenous peoples' collective and individual rights and such states' sincere wish to move towards a fair reconciliation with indigenous peoples. It is significant that national courts have already started to respect and implement the provisions of the declaration. In this respect, mention should be made of the very important judgement of the Supreme Court of Belize in 2007. In commenting on the UN Declaration on the Rights of Indigenous Peoples it stated:

Of course, unlike resolutions of the Security Council, General Assembly resolutions are not ordinarily binding on member states. But where these resolutions or Declarations contain principles of general international law, states are not expected to disregard them.²⁴

Finally, the right of self-determination of indigenous peoples should be ordinarily interpreted as the right of these people to negotiate freely their political status and representation in the states in which they live. This process may be described as a kind of belated state-building, through which indigenous peoples are able to join with all the other peoples that comprise the state on mutually agreed-upon and just terms after many years of isolation and exclusion. This process does not require the assimilation of individuals, as citizens like all others, but the recognition and incorporation of distinct peoples in the fabric of the state on agreed terms. In coming to this conclusion, the Chairperson-Rapporteur has taken

²⁴Supreme Court of Belize Claim No 171 of 2007, paragraph 131.

into consideration that indigenous peoples themselves have overwhelmingly expressed their preference for constitutional reform within existing states as opposed to secession. Most indigenous peoples acknowledge the benefits of a partnership within existing states in view of their particular relationship with the land, small size, limited resources and vulnerability. It should be emphasized, once again, that it is not realistic to fear indigenous peoples' exercising of the right to self-determination. It is far more realistic to fear that the denial of indigenous peoples' right to self-determination will leave the most marginalized and excluded of all the world's peoples without a legal, peaceful weapon to press for genuine democracy in the states in which they live.

Concluding remarks

First, almost 22 years have passed since the decision was unanimously taken by all parties concerned to mandate the Chairperson-Rapporteur with the task of elaborating basic principles that could constitute the basis for a draft declaration on the rights of indigenous peoples. During this long period almost all governments and indigenous peoples have had the opportunity to freely and in a democratic environment at the Working Groups of both sub-commission and commission levels present their views, comments and amendments. As the Chairperson-Rapporteur repeatedly stated, no other UN instrument has been elaborated with such an active participation of all parties concerned. Building upon the compromise between states' interest in territorial integrity and indigenous peoples' demand for representation as reflected in the 1970 Declaration on Friendly Relations, the Chairperson-Rapporteur has compared the exercise of self-determination by indigenous peoples to the historic process of nation-building in democratic societies. She has emphasized that, with few exceptions, indigenous peoples were never part of state-building. As previously stated, they did not have any opportunity to participate in designing the modern constitution of the states in which they live or to share in any meaningful way in national decision-making. Since indigenous peoples in most countries have never been, and are still not, full partners in the political process, they retain their right to self-determination. This means that the state has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to share power democratically. It also means that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing state and to exercise their right to self-determination by these means to the fullest extent possible.

Second, indigenous peoples are unquestionably 'peoples' in every social, cultural and ethnological meaning of the term. They have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have so long lived. It is neither logical nor scientific to treat them as their neighbours, who obviously have different languages, histories and cultures and who often have been their oppressors. The proper legal issue is not the differences that exist today, but the fact that two or more peoples had maintained for millennia separate histories that touched each other very little or not at all.

Third, self-determination has taken on a new meaning in the post-colonial era. Ordinarily it is the right of the citizens of an existing, independent state to share power democratically. However, a state may sometimes abuse the right of citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community discourages secession as a remedy for the abuse of fundamental rights.

Fourth, it will be inadmissible and discriminatory to argue that indigenous peoples lack the right to self-determination merely because of their indigeneity. A logical and useful approach would be to agree, in keeping with the Declaration on Friendly Relations, that indigenous peoples do have the right to self-determination and that the existing state has a duty to accommodate the aspirations of indigenous peoples through constitutional reforms designed to expand the concept of democracy. This approach also would mean that indigenous peoples have the duty to try to reach an agreement, in good faith, on sharing power within the existing state and, to the extent possible, to exercise their right to self-determination by such means.

Lastly, the Chairperson-Rapporteur hopes that the world's indigenous peoples, in defending their right to self-determination and all other human rights and fundamental freedoms, will not be compelled to rebellion as a last resort against oppression. It is also hoped that their basic right to self-determination, as it is contained in Article 3 of the UN DRIP, will be fully implemented by all concerned for the benefit of the states, indigenous peoples and the global community as a whole.

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