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**Workshop**

Standard-setting: Lessons Learned for the Future

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**THE DRAFT UNITED NATIONS DECLARATION  
ON THE RIGHTS OF INDIGENOUS PEOPLES**

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1. In April 2005, the Commission on Human Rights will decide whether or not it will renew the mandate of the ad-hoc open-ended working group on the draft United Nations declaration on the rights of indigenous peoples. A gambling man might not give it much of a chance. It held its first session in 1995 with the request by the General Assembly that it should complete the adoption of the declaration before the end on the International Decade of the World's Indigenous People in December 2004. Ten years on and with only two of the 45 articles and 19 preambular paragraphs adopted at first reading, members of the Commission might consider this, even by UN standards, slow-going. Someone with an eye for figures will calculate that at the current rate of adoption a further 310 years will be necessary – a time-frame beyond the imagination of even the most stonewalling States.
2. So why is the adoption so slow? Are the principles just too controversial and complex? Are the protagonists – indigenous peoples on the one hand and States on the other – irreconcilable? Has the process been at fault or can we expect a sudden breakthrough so that all the frustration – and there has been plenty of that – will seem little more than the inevitable setbacks on the way to reaching consensus?

**BACKGROUND TO THE INSTRUMENT**

3. There are a series of photographs of indigenous representatives at the Palais des Nations taken in 1977 at the time of the first NGO conference on discrimination against the indigenous peoples of the Americas held during the first Decade against Racism. Indigenous leaders stand in traditional costumes in front of the globe in the UN grounds or else are seen walking through the main gates. The indigenous declaration began then, nearly forty years ago. Although the drafting of the first articles would wait until 1985, the international community was already being

measured to see how it would respond to these new emissaries, not perhaps from colonised states but at least from colonised peoples.

4. The photographs provide some clues that help to give a better understanding of why the draft declaration has taken so long. The faces include those of chiefs of treaty nations, descendants of peoples who had signed agreements with the British Crown or US Presidents, and had long been used to deception and dissimulation. They show patience and determination and their presence in Geneva is testimony to the faith they have in the United Nations, its Charter, declarations and fine words. These are not diplomats come to negotiate in the best interests of their governments; they are national chiefs and community leaders telling the story of what is happening on their homelands. The rights, they know they have. The injustice, they deal with every day. And a few decades are not so much when you have been waiting 500 years.
5. Thus, there are some features of the draft declaration that make its passage through the UN system quite unique. The text is rooted in the experiences of indigenous communities expressed through countless stories and explanations of delegates over the years. It is a declaration drafted for indigenous peoples and is seen by the beneficiaries as their document – as a guideline for States, of course, but essentially to re-affirm indigenous identity and set out a framework for a just reconciliation between peoples still living the legacy of colonisation with the States in whose territories they now find themselves. There is also something else and that is the expectation among indigenous peoples that the United Nations is more than the congregation of a couple of hundred imperfect States defending their national interests. It is an institution that has goals to fulfil and words to honour and somehow or another that mission will prevail.
6. The draft declaration contains much that would be deemed difficult. It is essentially a collective rights instrument whose beneficiaries are the world's indigenous peoples. It recognises the rights of indigenous peoples to self-determination in exactly the same terms of the two human rights covenants and will affirm, if adopted, indigenous peoples' right to control, use and develop their lands, territories and natural resources. Implicit throughout the draft declaration is the principle of self-determination and States and non-State actors would be required to obtain the free, prior and informed consent of indigenous communities before the realisation of economic or other activities affecting their lands and lives. In areas such as health, education and the administration of justice, the draft declaration provides for complementary systems controlled by indigenous peoples in accordance with their traditions. In many of the articles there are recommendations for affirmative action by States and, where not, there are requests that adequate resources are made available for the realisation of the rights that are recognised. The draft declaration opens up opportunities for direct support from the international community and even proposes, as a last resort, external adjudication in cases where States and indigenous peoples cannot reach agreement. Last but not least and in keeping with several other UN instruments, the draft declaration has no definition of indigenous peoples leaving it up to the individual and the community to self-identify.
7. Anyone who has followed the work of the UN on indigenous peoples over the years will understand the background for these rights. Indigenous peoples are by far the most disadvantaged of any group in the countries in which they live, with worse health, lower incomes, higher unemployment, greater likelihood of being incarcerated, reduced life expectancy, and minimal access to education and other public services. Militarization, mega-projects and large-scale development programmes have forced them from their ancestral lands against their wishes leading to the loss of collective identity. The draft declaration describes this as ethnocide.
8. Equally, it is not hard to understand the concerns of Governments. Some, although fewer than when the process began, have difficulty with the notion of collective rights being human rights and even on how such rights might impact on the rights of citizens and their equality before the

law. The right of self-determination has stimulated discussion about territorial integrity and State sovereignty that remains unresolved. Land and resource rights of indigenous peoples for some States simply violate Constitutions that place ownership of natural resources and especially sub-surface resources in the hands of the nation. Indeed, most of the articles of the draft declaration pose some kind of difficulty for certain governments.

9. The draft declaration nonetheless addresses significant gaps in protection. It recognises that indigenous peoples will not survive as distinct entities unless they can maintain control over their lives and future development - hence the identification of rights to self-determination and land and resources. It acknowledges the historic injustice of peoples subjected to colonisation and still suffering the consequences of that legacy by including rights to recognition of historic treaties, compensation for lands lost and targeted support in areas such as education and health. The draft declaration is also the first international instrument that tries to define the rights of peoples. Finally, the draft not only responds to the legacy of the colonial past but also reacts to contemporary threats to indigenous societies and particularly processes of globalisation. The draft declaration, therefore, covers issues such as the protection of traditional knowledge, biodiversity, and genetic resources and sets limits on outside actors including transnational companies from undertaking activities on their territories without the consent of the community.
10. The draft declaration is long, wide-ranging and challenges some basic assumptions about the rights of States, setting limits on their actions in relation to indigenous peoples.

#### **DESCRIPTION OF THE PROCESS**

11. The decision to draft a declaration was taken by the Working Group on Indigenous Populations in 1985.<sup>1</sup> It completed and submitted the draft to its parent body, the Sub-Commission on the Protection and Promotion of Human Rights, in July 1993. In August 1994, the draft was adopted by the 26-member expert body and transmitted to the Commission on Human Rights. In 1995 the Commission on Human Rights established an ad-hoc open-ended working group of governments and held its first session that year. At its second session in 1996, the working group of the Commission adopted at first reading articles 4 and 43. Since then no further articles have been adopted.
12. In the period 1985 to 1993, the expert Working Group set aside two to three days of each session to hear proposals from observers including NGOs, indigenous representatives, the UN system and particularly the ILO which by 1989 had adopted a new convention on indigenous and tribal peoples, and governments. The Chairperson-Rapporteur of the Working Group, who throughout this period was Erica-Irene Daes (Greece), reviewed the proposals from observers together with those from the members of the Working Group and prepared a new draft prior to each session. The last article to be adopted by the working group recognised indigenous peoples' right to self-determination.
13. There are some general comments to make regarding this first part of the process. There was a very broad and diverse participation by indigenous representatives. This was facilitated by the open door policy of the Working Group whereby all indigenous peoples, nations and communities were able to participate and by the efforts, initially by NGOs and later by the UN

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<sup>1</sup> The Working Group on Indigenous Populations is a subsidiary body of the Sub-Commission on the Protection and Promotion of Human Rights and is composed of five human rights experts. It was established in 1982 by ECOSOC resolution 1982/34 and is mandated to review developments and elaborate standards on indigenous peoples.

Centre for Human Rights, to find funding for the travel and accommodation of delegations.<sup>2</sup> In due course, the Working Group attracted the participation of many hundreds of delegates and sometimes attendance exceeded 1,000. This meant that indigenous peoples most of whom had no experience of international standard setting dominated the space.

14. The presence of community leaders, elders, youth and women representatives as well as traditional chiefs gave an authenticity to the proceedings and proposals for the declaration were often accompanied by explanations from delegates drawn from the living experience of their communities. Although for professional negotiators and even members of the Working Group, such a distended drafting process may have seemed exasperating, it did serve an important function. It educated those present on both the worldview of indigenous peoples and their very real daily problems, including the serious human rights violations that they faced. There was certainly something almost familial about the way articles were agreed upon, not simply because they constituted a clear juridical norm but because they appeared necessary in the light of the overwhelming direct testimony of the indigenous peoples present. In this sense – and much can be written about this – the almost maternal role of the Chairperson in taking up the cause and winning the trust of indigenous peoples cannot be underestimated, demonstrating that some of what happens in the UN can be attributed to individuals as much as the indefinable and changing political pressures from capitals.
15. This led to factors that cause difficulty in the on-going discussions in the governmental working group. The first relates to the strong attachment felt by indigenous peoples to the original text, drafted over so much time and with such effort and in the belief for some any way that the expert working group was the only hurdle rather than the first and perhaps easiest step on the way to adoption by the General Assembly. Secondly, indigenous peoples probably with some reason can feel frustration that they must explain the rights that they have helped to elaborate to governments, many of which were not active in the expert working group. Thirdly, many governments now participating regularly in the Commission's working group were not involved in the expert working group and have not in that sense benefited from the sensitisation of these early meetings.

## **ACTORS**

16. In the sessions of the open-ended working group, governments are a numerical minority. For example, at its 2004 session there were 64 State delegations out of a total of nearly 500 participants. Most of the people in the conference room are non-governmental actors, mostly indigenous delegates but also including a handful of NGOs working on indigenous issues that have followed the process for years and provide financial support for participants. The presence of so many indigenous delegations sets constraints upon the negotiating and decision-making of governments. Governmental delegates not only have to take instructions from their capitals but also keep an eye on the very critical presence of indigenous peoples from their countries with constituencies at home and friendly contacts among parliamentarians and the media. These are closely observed negotiations.
17. Unlike the Commission, where regional groups often have common or similar positions, the working group is characterised by wide variations of positions within regional groups. For example, the EU counts Denmark that can accept the draft declaration as adopted by the experts

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<sup>2</sup> In 1985 the General Assembly authorized the establishment of the Voluntary Fund for Indigenous Populations for the sole purpose of assisting indigenous representatives attend the Working Group. The mandate of the Fund has since been expanded to permit it to assist with travel for indigenous representatives to attend the Commission's working group on the draft declaration and the Permanent Forum on Indigenous Issues. More than a hundred travel grants are given annually.

without a change as well as the United Kingdom that can barely find a single article of the original that it can wholeheartedly support. In the Latin American region, for the last years Mexico and Guatemala have been supporting rapid adoption with few or even no changes while Brazil and Chile have raised issue with several articles especially those dealing with land and resource matters. Africa is almost absent from the discussions as a region and Asia keeps close but largely silent watch. Neither region is convinced that the draft declaration affects them because certain of the countries consider that they have no indigenous peoples or else that the entire population is indigenous.

18. As in most standard setting processes, like-minded governments coalesce to elaborate common positions to facilitate negotiations with others and the open-ended working group is no different. In the last ten years such groups have come and gone. A group composed of Australia, Canada, New Zealand and the USA (the so-called Canzus group) found common ground for a while, meeting outside of the sessions, and actively engaging in informal discussions. The Nordics, especially in recent years with the initiative taken by Norway, have looked for compromises particularly in relation to the articles relating to self-determination that can somehow maintain the principle while laying to rest the anxieties of States about sovereignty. Other new groups have been formed around common texts and in 2004 it was the CRP 1 group that included Norway and New Zealand but not Australia, Canada and the USA which came up with a revised draft with some articles amended and others untouched and the proposal to adopt as a package.<sup>3</sup> A core group of Latin American States, including Guatemala, Mexico, Bolivia and Venezuela, has been a vigorous defender of the expert's text and can also be seen as a loosely knit but vocal group.
19. Indigenous peoples on the other hand have consistently established a common position with relatively little dissension at least in public. With preparatory meetings preceding the sessions and evening meetings throughout the course of the working group, an indigenous caucus has managed until the least year or so to maintain solidarity around a no-change stance. States were seen by the caucus as seeking to weaken the draft whenever they made proposals for change and any concession was considered as opening the floodgates for a major overhaul of the declaration. The indigenous caucus was also wary of the way the work was organised and on several occasions in the first sessions walked out in protest at any hint that the original draft would be set aside or significantly rewritten. The latest incident took place in December 2004, when a group of indigenous participants held a hunger strike objecting that there was not proper consultation and that governments were ready to agree on a revised text without indigenous support.
20. For most of the last ten years, indigenous peoples have distrusted governments and governments have grown frustrated at the uncompromising no-change position held by the indigenous caucus and confidence building has not been assisted by the working methods. In the first place, the establishing resolution of the Commission limits indigenous participation to those organisations that have ECOSOC consultative status or are accepted on a "fast-track" accreditation process determined by the NGO Committee. Participation requires those non-ECOSOC NGOs and the States where their activities extend to send information to the Committee. In practice, the Committee has not accepted any NGO that is opposed by a State meaning that of the 110 organisations authorised to participate through this procedure less than 20 per cent are from Africa and Asia.
21. A second practice that has greatly inhibited confidence building relates to the decision early on and prevailing in the early sessions until recently to hold informal meetings of governments without the participation of indigenous representatives. Understandable though the working method might have appeared given the major divergences among governments, the impact on

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<sup>3</sup> The CRP group includes New Zealand, Denmark, Norway, Iceland, Finland, Sweden, Estonia and Switzerland.

the meetings was to create a sense of division between states and indigenous peoples. This was in fact misleading since several of the States were closer to indigenous positions than those of certain other governments. Yet having States meeting privately outside of the sessions and during the meetings themselves left indigenous peoples with no alternative than to ruminate on the tidbits of information that came their way. A practice that led to disenchantment with the process.

22. Finally, there appeared to be no plan, no progress towards reasonable objectives and therefore with the single exception of the adoption of two articles in 1996, no sense of achievement for the working group. Despite some significant advances in building consensus among governments and a growing flexibility within the indigenous delegations to consider and even accept some proposals by States, there was nothing to take home after each session but the vague sense that agreement was somewhere over the horizon.

## **OTHER INFLUENCES**

23. While the drafting of the declaration by experts and its review by the governmental working group has been taking place over the past 20 years, the world has not been still. Indigenous issues have impregnated the international community.<sup>4</sup> Governments hostile to indigenous peoples in the 1980s have changed their Constitutions, introduced legislation to recognise indigenous lands and institutions, and ratified ILO Convention 169. Indigenous peoples have found their representatives increasingly active in political decision-making.<sup>5</sup> The draft declaration and the work taking place at the United Nations is cited often as an influence on these developments and it can be assumed that the pro-indigenous stance of a number of governments, especially in Latin America, may be attributed to the rising profile of indigenous issues nationally.
24. At the same time, changes of government can lead to recognisably different positions at the working group. Just as many of the Latin American States have pressed forward on indigenous rights, some of the Western and Other Group have cooled. Australia, under the Howard Government, is perhaps the best example of a country that was a pioneer on indigenous rights in the early days of drafting and is now one of the most reticent. Having said this, the left-right spectrum is no guide to positions on the draft declaration. The US representative is far more conciliatory under Bush than he was under Clinton, the centre-left government of the UK has become the demon for indigenous people opposing even the notion of collective rights, and the centre-right President of France, if his speeches are any testimony, is positively enthusiastic about indigenous peoples. In the meantime, and this is more of an observation than a verifiable fact, some States that could largely accept the expert text and whose own indigenous peoples are broadly satisfied with their governments, are getting declaration fatigue and looking elsewhere to advance the situations of indigenous peoples.
25. Finally, two regional developments may be noted: the elaboration of a draft declaration on the rights of indigenous peoples on-going in the Organization of American States and the publication last year of a report by a working group on indigenous communities of the African Commission on Human Peoples Rights. Both these developments but particularly the first may

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<sup>4</sup> The establishment of a Special Rapporteur of the Commission, the Permanent Forum on Indigenous Issues, specialist working groups within the Convention of Biological Development and the World Intellectual Property Organization, policy directives in the major international financial institutions, enhanced UN agency programmes and the growing ratification of ILO Convention 169 on indigenous and tribal peoples are just some of the developments over recent years.

<sup>5</sup> Perhaps one of the best-known examples was the inclusion of indigenous ministers in the government of Ecuador notably Nina Pacari as Foreign Minister.

set in motion a cementing of positions at the regional level that will inevitably impact on the UN's declaration.

#### **ASSESSMENT OF THE OUTCOME SO FAR**

26. The process of adopting the indigenous declaration is uncompleted and there are question marks over whether there will be a next session of the working group. The decision that is taken by the Commission in the next weeks will be based on an evaluation of what has not been conducive to consensus so far and what is possible for the short future that may be granted. Some indigenous organisations are talking about calling for a temporary suspension of negotiations and there will be governments that think that the working group has little more to give.
27. It would be a pity for indigenous peoples, who urgently need a strong framework of rights, and for the United Nations as a standard bearer for social justice, if defeatism prevailed. But no one who has been involved in the process would want to maintain the desultory and self-destructive strategy that has dominated proceedings over many of the past years. Indeed the challenge to the working group's future is at the same time an opportunity for opting for a new approach. In so doing, there is occasion to reflect on what might be done better. These are some of the elements that may be included in any reflection:
  - Indigenous peoples are not typical non-governmental negotiating partners in international standard setting and are characterised by a strong attachment to the process and value of elaborating the declaration in the UN and at the same time mostly distrustful of governments. This implies more than in other similar processes a greater investment in building confidence in the procedures and outcomes.
  - Governments for the most part find indigenous peoples difficult to work with, inflexible and unwilling to seek compromises. Governments also believe that indigenous peoples underestimate the difficulties of finding consensus among States. Indigenous obduracy, some claim, plays into the hands of the States that are the least willing to compromise. This implies that indigenous peoples across the board need to understand better the challenges on the government side.
  - Confidence building requires time for the exchange of views between indigenous and governmental delegates and a sharing of the control over outcomes by both sides. Only in the last year or so have small meetings with indigenous and governmental facilitators become the norm. Confidence building implies small groups, frank discussions and co-operation on end results and, above all, a greater emphasis on informal procedures and facilitation outside the plenary.
  - A core group of indigenous representatives have been participating in the drafting of the declaration for at least 10 years and some for as many as 20 while only a handful of governmental delegates attend on a regular basis. The lifetime of an average governmental representative is three years, a part of which is spent on a sharp learning curve. This makes respectful friendships and trust more illusive. When States bring representatives from governmental departments responsible for indigenous affairs, there is noticeable institutional memory but otherwise there is a constant recapitulation of information considerably hindering progress. This implies both that indigenous peoples need to take the time to explain their positions to governmental delegations and that these same delegations participate on the basis of an evolving institutional knowledge. Familiarity in this way may breed consensus.
  - One characteristic of the last years' proceedings is the absence of a working plan for the adoption of articles with targets and a timetable in so far as one can be elaborated. Rather than working to adopt articles identified as close to consensus, the method of the working group has been to identify all the difficulties and move onto the next article on the list. While

a difference of opinion existed as to whether it was better to focus on the “easy” articles first or try to clear away the core principles such as that dealing with self-determination, thereby opening the way to the rapid adoption of the rest, it was certainly not the best option merely to review all articles without any intention of pushing for adoption. Any future session must set clear and realisable targets, focus on finding consensus, and seize the opportunities when they arise for the adoption of articles. The working group needs to feel it has achieved something at each session.

- Curiously the potential of the OHCHR or the High Commissioner for Human Rights have not been activated. Apart from a technical review published in 1994 and requested by the Sub-Commission and not the Commission’s working group, no secretariat papers have been asked for. The OHCHR has not been called upon to organise an expert meeting and only in 2004, did one government propose holding a seminar on the declaration in co-operation with the Office. The secretariat remains an untapped resource for the working group.

## **LAST WORDS**

28. There are two observations to make in conclusion. The first is to note the time-frame required for most UN human rights instruments to move from conception to realisation. The Declaration on the rights of persons belonging to national or ethnic, religious and linguistic minorities was a twinkle in the eye of governments in 1976, the working group to negotiate the text began in 1981 and it was only in 1992 that the Declaration was adopted. And the Minorities Declaration has only 9 articles.
29. Finally, it may be that the process of discussing the rights of indigenous peoples in the United Nations is as important as any eventual results. Already the draft declaration has served as a basis for national legislation, brought indigenous peoples into active partnership throughout the UN system, and sensitised governments, international civil servants and the public of peoples whose rights have yet to be recognised. Maybe the “educational” function of the exercise will be, in the end, the greater contribution to the goal of human rights for all.