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"General Provisions" of the Draft *U.N. Declaration on the Rights of Indigenous Peoples*

Joint Submission of the Grand Council of the Crees (Eeyou Istchee), Inuit Circumpolar Conference (ICC), Na Koa Ikaika Kalāhui Hawai'i, Indigenous Peoples of Africa Co-ordinating Committee (IPACC), Centro de Asistencia Legal Popular (CEALP) Programa de Pueblos Indígenas de Panamá, Saami Council, Taungya (Bangladesh), International Organization of Indigenous Resource Development (IOIRD), Foundation for Aboriginal and Islander Research Action (FAIRA), Mainyoito Pastoralist Integrated Development Organisation (MPIDO-Kenya), Tebtebba Foundation, First Peoples Human Rights Coalition, Organisation africaine des femmes autochtones (OAFA)/TIN HINAN, Native Women's Association of Canada (NWAC), Servicios del Pueblo Mixe (SER) México, Kus Kura Sociedad Civil (Costa Rica), Assembly of First Nations, Comisión de Juristas Indígenas en la Republica Argentina (CJIRA), American Indian Law Alliance (AILA), Indigenous World Association, Communauté des Autochtones Rwandais (CAURWA), Warã Instituto Indígena Brasileiro, Maasai Civil Society Forum (MCSF), ECUARUNARI, CONAIE (Ecuador), Caribbean Antilles Indigenous Peoples Caucus & the Diaspora (CAIPCD), Nepal Indigenous Peoples Development and Information Service Centre (NIPDISC), United Confederation of Taino Peoples, YABOA Native Women's Coalition, Traditional Kirati Peoples' Alliance (Nepal), Consejo General de Taino Boricanos, South African First Indigenous and Human Rights Organization (SAFIHRO), Rights and Democracy, Canadian Friends Service Committee, Netherlands Centre for Indigenous Peoples (NCIV), KAIROS: Canadian Ecumenical Justice Initiatives.

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EXECUTIVE SUMMARY

A number of States have suggested that the "General provisions" in the draft *U.N. Declaration* can be effectively used to balance collective and individual human rights, as well as take into consideration the rights of States and other third parties. This paper analyzes various State proposals in this regard and concludes that they are most often of questionable validity.

In particular, it is illegitimate to suggest that Indigenous peoples' collective rights should not limit in any way the individual rights of Indigenous or other persons. Nor can it be concluded that, in the event of a dispute, individual rights should always prevail over collective rights.

Rather, for each specific case, disputes can only be fairly resolved after the facts, law and relevant circumstances are carefully considered by a court or other competent body. Such disputes cannot be resolved in advance in the draft *U.N. Declaration*.

In addition, some States incorrectly assume that the wording of the *Declaration* creates "absolute" rights. This false reasoning is then used as grounds for imposing additional limitations on Indigenous peoples' rights.

The limitations that are being proposed by some States are largely excessive, prejudicial and unfair. They are also inconsistent with international law and its progressive development.

Clearly, international law does not apply the same limitation clauses to collective human rights as it does to individual human rights. Yet some States are proposing limitation clauses, which solely apply to individual human rights in international instruments, to Indigenous peoples' collective rights. In many instances, these provisions currently apply under international law to a small number of individual human rights. However, States are not only seeking to apply them to Indigenous peoples' collective rights, but also to *all* of the rights in the draft *U.N. Declaration*.

If adopted, these suggested provisions and the approaches they entail would create discriminatory double standards. They would also have the effect of severely limiting Indigenous peoples' collective human rights. By increasing State government discretion to limit our basic rights, the integrity of the draft *U.N. Declaration* would be placed in severe jeopardy.

As an alternative to these invalid approaches and proposals, this paper proposes a number of amendments in relation to "General provisions". The suggested amendments would strengthen or clarify the existing text of the draft *U.N. Declaration*. Similar positive approaches and beneficial amendments would be relevant to the standard-setting process on Indigenous peoples' rights at the Organization of American States.

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Introduction

At the intersessional Working Group (WGDD) that is currently considering the draft *United Nations Declaration on the Rights of Indigenous Peoples*, a number of States are seeking to amend the existing text.[1] In this regard, a primary focus appears to be Part VIII and Part IX of the draft Declaration. The Articles in these two Parts are often referred to as "general provisions" or "cross-cutting provisions". However, this latter phrase should be used with caution, since "human rights" are in themselves "cross-cutting" provisions in international law.[2]

At the same time, it is important to be aware of the standard-setting process on the rights of Indigenous peoples of the Americas that is presently taking place at the Organization of American States (OAS) in Washington, D.C. In formulating a draft American Declaration on the Rights of Indigenous Peoples, the Chair of the Working Group has produced a *Consolidated Text*.[3] Indigenous peoples still have many concerns of a diverse nature with this *Consolidated Text*.

To a large degree, this present paper focuses on the draft *U.N. Declaration*. However, many of the concerns we raise in connection with "general provisions" are also relevant to the problems that exist in the OAS Working Group Chair's *Consolidated Text*.

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[1] We are referring here to the text that was approved in 1993 by the expert members of the Working Group of Indigenous Populations and approved in 1994 by the U.N. Sub-Commission on Human Rights (as it is now called).

[2] Permanent Forum on Indigenous Issues, *Report on the fourth session (16-27 May 2005)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2005/43, E/C.19/005/9, p. 12, para. 58: "The Forum urges the United Nations system and States … to take into account the cross-cutting nature of human rights issues."

Similarly, Indigenous peoples and organizations and the government of Guatemala have raised important "cross-cutting" aspects relating to Indigenous peoples' human rights and to non-discrimination. See, for example, U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, E/CN.4/2005/89/Add.1, 24 February 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), pp. 7-8.

[3] Organization of American States (Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples), *Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, OEA/Ser.K/XVI, GT/DADIN/doc.139/03, 17 June 2003.

The "general provisions" are to a large extent[4] placed at the end of the draft *U.N. Declaration*. In order to better assess their full meaning or effect, one should consider all related Articles at the same time. Rather than read specific Articles in isolation, it is important to read them in the context of the *Declaration* as a whole.

I. Misstated Concerns on "General Provisions"

"General provisions" are used for various different purposes. However, certain provisions that have been proposed by States are of questionable validity. This paper does not address every general provision or every proposed amendment and related concern. Some primary State positions or concerns that should at least be briefly commented upon are as follows:

i) Indigenous peoples' collective rights should not limit in any way the individual rights of Indigenous or other persons.

ii) In the event of a dispute, individual rights should prevail over collective rights.

iii) Collective rights in the draft *U.N. Declaration* should not affect the rights and powers of States.

iv) All of the above concerns should be resolved in the draft Declaration.

In our view, all of the above statements are extreme and unjustifiable. Yet some States are unfairly advancing differing variations of these positions, in order to seek additional limitations or qualifications on Indigenous peoples' collective human rights.

Reasons for concluding that the above State concerns are not justifiable include the following:

i) All human rights – whether they be collective or individual – are generally[5] of a *relative* and not absolute nature.[6] Some States incorrectly assume that the

[4] As will be described, some general provisions are also in other Parts of the draft *U.N. Declaration*.

[5] A notable exception is the right not to be subjected to torture. See, for example, U.N. General Assembly, *Torture and other cruel, inhuman or degrading treatment or punishment: Note by the Secretary-General* [Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment], A/59/324, 1 September 2004, p. 5, para. 13:

> … the Special Rapporteur would like to reiterate that the absolute nature of the prohibition of torture and other forms of ill-treatment means that *no exceptional circumstances whatsoever*, whether a state of war or a threat of war, internal political instability or any other public emergency, *may be invoked as a justification for torture*. [emphasis added]

[6] S.J. Toope, *Cultural Diversity and Human Rights (F.R. Scott Lecture)*, (1997) 42 McGill L.J. 169, at pp. 177-178: "None of this is to say, however, that rights are absolute. They are defeasible under certain circumstances by other rights and sometimes by necessity ... rights are subject to processes of balancing".

wording of the *Declaration* creates "absolute" rights. This false reasoning is then used as grounds for imposing additional limitations on Indigenous peoples' rights.

ii) It is a serious distortion to view Indigenous peoples' collective rights as a threat to the individual rights of Indigenous persons.[7] Rather, our collective and individual rights are interdependent.[8] The protection and promotion of our collective rights are often a pre-requisite for the exercise and enjoyment of individual rights.[9] Thus, lack of legal recognition of our collective rights violates the individual rights of our people.[10]

iii) In any given situation, a dispute could arise in the future between collective and individual rights, just as there could be a future dispute between the individual rights of two persons or the collective rights of two peoples.[11] It would be neither appropriate nor possible for the draft *Declaration* to determine which rights should prevail in the future.

Disputes that arise in any of the above situations can only be fairly resolved after the facts, law and relevant circumstances are carefully considered.[12] This

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

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

[8] W.F. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* (Albany, N.Y.: State Univ. of N.Y. Press, 1996), at p. 19:

> There is … an interdependent relationship between group and individual rights, in that certain individual rights cannot be exercised outside of the group context. In many instances, individual rights can only be fully realized through an understanding and protection of group rights. … Certain rights are collective in nature, even though the individual is the ultimate beneficiary …

[9] *Id.*

[10] United Nations Development Programme, *Human Development Report 2004: Cultural liberty in today's diverse world* (New York: UNDP, 2004), p. 68:

> … *the lack of legal recognition of collective rights violates individual rights.* Countries such as Bolivia, Colombia, Ecuador and Mexico have begun to find ways to recognize diversity in their constitutions. [emphasis added]

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

[11] P. Thornberry, *Indigenous peoples and human rights* (Manchester: Manchester University Press, 2002), at 421: "… it is important to recall that not all disputes in human rights are between individual and collective rights: individual rights also collide and intersect in confusing ways."

[12] R. McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. L.Q. 857, at pp. 884-885: "... the human rights approach ... does provide a framework to enable every situation to be considered and all the relevant rights and interests to be taken into account, balanced and analysed."

"contextual analysis" can only be undertaken by a court or other competent body, when a particular dispute arises.[13] Such disputes could not be resolved in advance in the draft *U.N. Declaration*.

iv) Rights or powers in an aspirational instrument – such as an international "declaration" – cannot undermine the constitutional or other legislative powers of States. Therefore, there is no justification for safeguarding State powers in the draft *Declaration*.

v) Where a natural tension arises between collective and individual rights, this could lead to a number of different conclusions depending on the facts, law and circumstances in a given situation. Since human rights are generally relative in nature, different outcomes may well arise for different circumstances.

Presently, there are a host of additional provisions being proposed that are truly excessive in nature. These proposals do not fairly reflect international law and, in many instances, are highly discriminatory. If added to the draft *Declaration*, these provisions could have far-reaching adverse impacts on Indigenous peoples and our fundamental rights. The delicate balance currently existing in the draft *Declaration* could be severely undermined to the detriment of present and future generations of Indigenous people.

In light of these threats to the integrity of the draft *U.N. Declaration*, we examine under the next heading various proposals concerning "general provisions" that are excessive and prejudicial. Hopefully, this may provide further guidance as to what to avoid as general provisions. In addition, it may help to determine what further improvements or clarifications might be useful to strengthen the text of the draft *Declaration* in a fair and balanced manner.

II. Excessive and Prejudicial Proposals

Any amendments to the draft *U.N. Declaration* that are proposed by any participant should be consistent with international law and its progressive development.[14] Yet, as

[13] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, Case No. 12.053, Report No. 96/03, 24 October 2003, at para. 87:

> … in determining the present case, the Commission will, to the extent appropriate, interpret and apply the pertinent provisions of the American Declaration in light of current developments in the field of international human rights law, as evidenced by treaties, custom and other relevant sources of international law.

[14] The criterion of "progressive development" of international law is widely accepted for a wide range of purposes. See, for example, *Charter of the United Nations*, Art. 13(1)(a); *Declaration of Panama on the Inter-American Contribution to the Development and Codification of International Law*, AG/DEC. 12 (XXVI-O/96), *adopted* at the sixth plenary session, held on June 5, 1996, preamble; and *Inter-American Democratic Charter*, adopted by acclamation by the Hemisphere's Foreign Ministers and signed by the 34 countries of the Americas at the 28th special session of the OAS General Assembly, Lima, Peru, September 11, 2001, preamble.

illustrated below, there are numerous modifications being proposed that fail to meet these important criteria.

Currently, some of the most excessive and prejudicial proposals are in relation to Art. 45[15] of the draft *U.N. Declaration*. A primary example is found in the three paragraphs (particularly the third one) that the WGDD Chair has proposed be added after the existing text:

> **The exercise of the rights set forth in this Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.**
>
> **Nothing in this Declaration shall prevent the fulfilment of international obligations of States in relation to persons and peoples. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.**
>
> **In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.**[16]

These proposals were first made by the facilitators in the informal session that examined Art. 45 at the WGDD in September 2004.[17] At that time, the Chair indicated that "further discussion [was] required" in relation to these draft texts.[18] Although there were no

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See also Grand Council of the Crees (Eeyou Istchee) *et al.*, "Urgent Need to Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Statement (signed by 53 Indigenous peoples and organizations and non-Indigenous organizations), U.N. Permanent Forum on Indigenous Issues, Fourth sess., 23 May 2005, para. 16:

> … the Chair of the Working Group has never required that proposals by States or other participants be "consistent with international law and its progressive development". Thus, a number of States regularly propose discriminatory double standards within the Working Group to the detriment of more than 300 million Indigenous people worldwide.

[15] Art. 45 provides: "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."

[16] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, E/CN.4/2005/89/Add.2, 1 April 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)), p. 49.

[17] U.N. Commission on Human Rights, *Working group established in accordance with Commission on Human Rights resolution 1995/32: Chairperson's summary of proposals (Mr. Luis-Enrique Chávez)*, 10th Sess., Geneva, E/CN.4/2004/WG.15/CRP.4, 14 October 2004, p. 30.

[18] *Id.*, pp. 29-30.

additional discussions on these suggested texts at the WGDD, the Chair later endorsed these very same texts as part of his own proposals on Art. 45.

For the most part, these proposals appear to be prejudicial to Indigenous peoples' rights. As described below, the proposals have potentially far-ranging consequences for Indigenous peoples that simply are unjustifiable.

With regard to the **first proposed paragraph**, it would appear that it was taken from the 1992 *Minorities Rights Declaration*.[19] Such an adaptation serves to distort our status as Indigenous peoples[20] and our collective rights.

Indigenous peoples are not simply minorities.[21] In some cases, we constitute numerical majorities within existing States.[22] Minority rights are generally considered to be individual rights.[23] Minorities, who are not also "peoples", do not have a right of self-determination under international law.[24] While Indigenous *individuals* may invoke the rights of minorities in diverse circumstances, Indigenous *peoples* are not treated simply

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[19] *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities*, approved by the General Assembly on December 18, 1992, G.A. res. 47/135, annex, 47 U.N. GAOR Supp. (No. 49) at 210, U.N. Doc. A/47/49 (1993), Art. 8, para. 2:

> The exercise of the rights set forth in the present Declaration shall not prejudice the enjoyment by all persons of universally recognized human rights and fundamental freedoms.

[20] E.-I. Daes, *Explanatory note concerning the draft declaration on the rights of indigenous peoples*, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1, at 2, para. 7:

> *Indigenous groups are unquestionably peoples in every political, social, cultural and ethnological meaning of this 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 lived. *It is neither logical nor scientific to treat them as the same peoples as their neighbours, who obviously have different languages, histories and cultures.* [emphasis added]

[21] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations Univ. Press, 1990) at p. 88: "[I]ndigenous peoples … are not, strictly speaking, ethnic minorities at all".

[22] For example, Indigenous peoples are numerical majorities in Bolivia and Guatemala.

[23] Human Rights Committee, *General Comment No. 23, Article 27*, 50th sess., 6 April 1994, UN Doc. CCPR/C/21/Rev.1/Add.5. (1994), para. 3.1:

> Article 27 [minority rights] relates to rights conferred on individuals as such …

[24] *Id.*

as minorities by the United Nations, its treaty monitoring bodies[25] or the broader international human rights system itself.[26]

If this first proposed paragraph were to be applied to Indigenous peoples and our collective rights, the use of the term "prejudice" could have uncertain and potentially far-reaching effects. For example, it might be interpreted that individual human rights should automatically prevail over collective human rights. Such an approach would be discriminatory. It would also run counter to the "contextual analysis" approach.[27] This latter approach is commonly used to resolve specific disputes in determining whether a given human right has been validly or excessively exercised.

With regard to the **second proposed paragraph**, it is clear that it also has been taken from the *Minority Rights Declaration*. In this latter *Declaration*, Art. 8, para. 1 provides:

> Nothing in the present Declaration shall prevent the fulfilment of international obligations of States in relation to persons belonging to minorities. In particular, States shall fulfil in good faith the obligations and commitments they have assumed under international treaties and agreements to which they are parties.

The purpose of the above paragraph is to reinforce the rights of minorities in the *Minorities Rights Declaration*. Nothing in this *Declaration* could be interpreted so as to prevent States from fulfilling the international obligations that they already have in favour of minorities.

However, in regard to the second proposed paragraph for the draft *U.N. Declaration*, the analogous intention and effect would be quite different. The intention in the first sentence is not simply to ensure that nothing in the *Declaration* could be interpreted so as to prevent States from fulfilling the international obligations that they already have in favour of Indigenous peoples. Rather, it *also* seeks to safeguard international State obligations in favour of any other "peoples" or any "persons". This is a very different dynamic.

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[25] In regard to the affirmation by U.N. treaty monitoring bodies recognizing Indigenous peoples as "peoples" with the right of self-determination under the international human rights Covenants, see, for example:

> Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, U.N. Doc. E/C.12/1/Add.94, 12 December 2003, para. 11.
>
> Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 8.

[26] In relation to Indigenous peoples, both the U.N. and the OAS have distinct standard-setting processes concerning our rights. These processes are wholly separate from any others that address minorities and their rights.

[27] See text accompanying notes 12 and 13, *supra*.

It would appear that an incorrect presumption is being made here that the draft *U.N. Declaration*, if adopted, could *per se* prevent States from fulfilling in good faith their obligations or commitments to any other peoples or any persons under legally binding international treaties and agreements. This is pure fiction. To add an unnecessary provision could open the door to its abusive application by one or more States. For example, a State could claim that it is fulfilling its obligations to "persons" (Indigenous or non-Indigenous) and use this as a reason for unfairly limiting the rights of Indigenous peoples.

With regard to the second sentence of this same paragraph, the international obligation of States to act in good faith is stated much too narrowly.[28] For example, it could possibly be interpreted as not including obligations arising from customary international law, peremptory norms (*jus cogens*)[29] or *erga omnes* rights and obligations.[30] A more appropriate alternative to consider may be along the following lines:

> **States shall fulfil in good faith their obligations and commitments under international law, including those they have assumed under international treaties and agreements to which they are parties.**

In the **third proposed paragraph**, the proponents have modeled their proposal after Art. 29(2) of the *Universal Declaration of Human Rights* (*UDHR*).[31] However, when the

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

> Every State has the duty to fulfil in good faith the obligations assumed by it in accordance with the Charter of the United Nations.
>
> Every State has the duty to fulfil in good faith its obligations under the generally recognized principles and rules of international law.
>
> Every State has the duty to fulfil in good faith its obligations under international agreements valid under the generally recognized principles and rules of international law.

[29] *Domingues v. United States,* Report No. 62/02, Inter-Am. Cm. H.R. (2002), para. 49:

> Norms of *jus cogens* … derive their status from fundamental values held by the international community, as violations of such preemptory norms are considered to shock the conscience of humankind and therefore bind the international community as a whole, irrespective of protest, recognition or acquiescence.

[30] M. Ragazzi, *The Concept of International Obligations Erga Omnes* (New York: Oxford University Press, 1997), at 17: "… obligations *erga omnes* are binding on all States without exception [and] … every State is deemed to have a legal interest in their protection."

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

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

[31] *Universal Declaration of Human Rights*, U.N.G.A. Res. 217 A (III), U.N. Doc. A/810, at 71 (1948). Adopted by the U.N. General Assembly on December 10, 1948, Art. 29(2):

UDHR was formulated, no apparent consideration was given to Indigenous peoples' collective rights. As will be illustrated, it is highly inappropriate to export limitations from one context to a distinctly different one, when the latter situation was never considered at the time when restrictions were devised.

There are numerous aspects to be discussed in the context of this third proposed paragraph. Therefore, some of the key concerns are briefly discussed in the sub-headings below.

2.1 Art. 29(2) of the *UDHR* not a precedent for Indigenous collective rights

The *Universal Declaration of Human Rights* does not apply such a general limitation clause, as in Art. 29(2), to any *collective* human rights of any kind. As will be described, neither do other international human rights instruments. Therefore, Art. 29(2) of the *UDHR* is not a valid precedent for Indigenous peoples' collective rights. It is also an out-dated standard in relation to individual human rights.

The *UDHR* was adopted in 1948.[32] Since that time, a very different approach has generally been taken by the international community.[33]

For example, the international human rights Covenants abandon the notion of a *single* general limitation clause in favour of a "tailored" approach that limits certain specific Articles. As the international jurist A. Kiss describes:

> The Universal Declaration of Human Rights is the only international instrument aimed at the global protection of human rights which concentrates limitations upon rights and freedoms in a single provision. *In the Covenant on Civil and Political Rights, as in all other human rights conventions, the limitations are scattered, but with some variations – applicable to particular freedoms or rights.* The change from a single

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> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

[32] A regional instrument that was also adopted in 1948 was the *American Declaration on the Rights and Duties of Man*, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/I.4 Rev.9 at 17, 31 January 2003. Art. XXVIII of this *Declaration* also includes a single general limitation clause in relation to *individual* human rights:

> The rights of man are limited by the rights of others, by the security of all, and by the just demands of the general welfare and the advancement of democracy.

[33] The sole exception of which we are aware is found in the *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 123 entered into force July 18, 1978, reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/I.4 Rev.9 at 27, 31 January 2003. Although it is not used as "single" general limitation clause, Art. 32, para. 2 provides:

> The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.

> general clause to several particular formulas reflected a desire to tailor limitations to the extent strictly necessary so as to assure maximum protection to the individual.[34]

In the *International Covenant on Civil and Political Rights* (*ICCPR*), there is no general limitation clause at all. Rather, a principal intention is to safeguard individuals against government abuses[35] and this is how the Covenant is to be interpreted.[36]

In regard to the tailored limitations on certain specific Articles in the *ICCPR*, most of the existing restrictions are on aspects that are not covered in the draft *U.N. Declaration* (see Annex I of this paper). Any limits, where specified, must be "prescribed by law" and "*necessary* in a democratic society in the interests of [national security, public safety, etc.]". In any event, these possible restrictions are only applied to individual human rights and not collective rights.

In the *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*), a general limitation clause is included:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law *only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society*.[37]

The above *ICESCR* clause, while still too vague and broad, has a much more narrow scope than that found in Art. 29(2) of the *Universal Declaration of Human Rights*. Any limitations on the economic, social and cultural rights in the Covenant must be "compatible with the nature of these rights". Specific restrictions in the Covenant are

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[34] A. Kiss, "Permissible Limitations on Rights" in L. Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights* (New York: Columbia University Press, 1981) 290, at p. 291. [emphasis added]

[35] L. Henkin, "Introduction" in L. Henkin, (ed.), The International Bill of Rights: The Covenant on Civil and Political Rights (New York: Columbia University Press, 1981) 1, at p. 26:

> In the case of the Covenant, it must never be forgotten that it is a human rights instrument, dedicated to the protection of the individual against governmental excesses.

[36] See, for example, *International Covenant on Civil and Political Rights*, Art. 5:

> 1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
>
> 2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

[37] *ICESCR*, Art. 4. [emphasis added]

confined to *individual* human rights relating to trade unions (see Annex II of this paper). According to the *ICESCR*, all of the other individual[38] rights in the Covenant may be limited "solely for the purpose of promoting the general welfare in a democratic society".

2.2 Collective human rights are addressed differently in international law

An examination of collective human rights under international law demonstrates that they have not been subjected to general or specific limitations in international human rights instruments. This does not suggest that these collective rights are absolute. As already indicated, human rights are generally relative in nature.[39] However, it is clear that limitations on collective human rights are addressed in international law in a manner that is different from individual human rights.

For example, in the *ICCPR*, the collective human right of all peoples to self-determination under international law is not subject to any general or specific limitation. Nonetheless this essential human right is a relative, and not absolute, right under international law.[40] As H. Hannum explains:

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[38] Our interpretation is that the general limitation clause in Art. 4 applies only to the individual human rights in the Covenant and not to the collective human right of self-determination. It would be difficult to conclude otherwise. In some respects, the limits in Art. 4 may be narrower than what currently exists in regard to self-determination under international law.

In addition, the collective right of self-determination, including the right to natural resources, is included in Part I of the Covenant. In contrast, Art. 4 is included in Part II of *ICESCR*, which appears to address solely the individual human rights in the Covenant. For example, in Part I, States have an obligation to "promote the *realization* of the right of self-determination" (Art. 1, para. 3). In Part II, States undertake only to "take steps … with a view to *achieving progressively the full realization* of the rights recognized in the present Covenant" (Art. 2, para. 1). [emphasis added]

Additional reasons include the following. Art. 1 on self-determination is identical in both human rights Covenants. To impose the limitation in Art. 4 of *ICESCR* on the right of self-determination would contradict *ICCPR*, which does not specify any general or specific limitations regarding this right. Also, Art. 1, para. 2 of the Covenants relate to the right of peoples to natural resources. Both the *ICCPR* (Art. 47) and the *ICESCR* (Art. 25) specify that: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources."

[39] See text accompanying notes 5 and 6, *supra*.

[40] R. McCorquodale, "Human Rights and Self-Determination" in M. Sellers, ed., *The New World Order: Sovereignty, Human Rights, and the Self-Determination of Peoples* (Oxford/Washington, D.C.: Berg, 1996) 9 at p. 16: "The right of self-determination is not, however, an absolute right without any limitations."

See also M. Kirby, "Self-Determination: A Consideration of the Present and a Glimpse into the Future" in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 375, at p. 382: "[Self-determination] is a 'peoples'' right. It belongs to them. … But it is not an absolute right. It does not exist in a vacuum. It appears in international instruments. It exists in international law. But that law has other competing objectives."

> Of course, neither sovereignty nor self-determination is an absolute right; each is limited by other rights and international obligations.[41]

As in the case of sovereignty,[42] self-determination already has limitations in international law. There is no need – nor would it be advisable – to try and set specific limits in the draft *U.N. Declaration*. This would create a far-reaching double standard in international law and would be discriminatory.

The collective human right of self-determination is recognized as a "prerequisite" for the effective enjoyment of all other human rights.[43] It is applicable in countless situations. Therefore, it is not surprising that international instruments simply do not specify the same limitations for self-determination that may at times be specified for a small number of *individual* human rights.

2.3 Other international human rights instruments do not specifically impose limits on collective human rights

As already demonstrated, one of the most prominent and most widely recognized collective human rights – self-determination – is not subjected to the same limitations in international instruments as found for some individual human rights. The same is true for the collective human right of peoples and other groups not to be subjected to genocide.[44]

This same approach of not imposing such limitations in international instruments is consistently taken in the *Indigenous and Tribal Peoples Convention, 1989*, which revised the out-dated and "destructive"[45] *Indigenous and Tribal Populations Convention, 1957*.[46]

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[41] H. Hannum, "A Principled Response to Ethnic Self-Determination Claims" in G. Alfredsson & M. Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes*, Essays in Honour of Erica-Irene A. Daes (The Hague: Kluwer Law International, 2002) 263, at p. 263.

[42] *Id.*

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

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

[44] *Convention on the Prevention and Punishment of the Crime of Genocide*, 78 U.N.T.S. 277; 1949 Can. T.S. 27; concluded at New York, 9 December 1948. Entered into force, 12 January 1951.

[45] See "Extracts from the Report of the Meeting of Experts on the Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)" (Geneva, 1-10 September 1986), in International Labour Office, *Partial revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI (1), Geneva, 1987, Annex, para. 46:

> … the integrationist language of Convention No. 107 is outdated, and that the application of this principle is destructive in the modern world. … [Integration] had become a destructive concept, in part at least because of the way it was understood by governments.

[46] *Indigenous and Tribal Populations Convention, 1957* (No. 107), entered into force June 2, 1959, 328 U.N.T.S. 247.

In the *Indigenous and Tribal Peoples Convention, 1989*, there are important collective human rights that are affirmed relating to such key matters as lands,[47] natural resources[48] and economic, social and cultural development.[49]

The restrictions imposed in international instruments on certain individual human rights are not included in any manner in the *Indigenous and Tribal Peoples Convention, 1989*. Therefore, it is disingenuous for some States to insist that such restrictions must be included in an aspirational instrument that addresses similar matters, such as the draft *U.N. Declaration on the Rights of Indigenous Peoples*.

This conclusion is further reinforced when examining other international instruments that include collective human rights. There are no such limitations on collective human rights in the *Declaration on the Right of Development*,[50] and the *Declaration on the Right of Peoples to Peace*.[51] Nor are there such restrictions on collective human rights in the *African Charter of Human and Peoples' Rights*.[52]

2.4 Canada's Constitution treats Indigenous peoples' collective rights differently as compared to individual human rights

International law is not bound by the practice of States in their own national constitutions. Nevertheless, it is worth noting that in Canada's Constitution the limitations that are explicitly imposed on certain individual human rights are not extended to Indigenous peoples' collective human rights.

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[47] See, for example, *Indigenous and Tribal Peoples Convention, 1989*, Art. 14, para. 1: "The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised."

[48] *Id.*, Art. 15, para. 1: "The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded."

[49] *Id.*, Art. 7: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development.

[50] *Declaration on the Right to Development*, adopted by the U.N. General Assembly, Dec. 4, 1986. U.N.G.A. Res. 41/128, 41 U.N.GAOR, Supp. (No. 53) U.N. Doc. A/41/925 (1986).

[51] *Declaration on the Right of Peoples to Peace*, approved by General Assembly resolution 39/11 of 12 November 1984.

[52] *African Charter of Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

In Canada's *Constitution Act, 1982*,[53] the collective[54] rights of Indigenous peoples in Part II are not subjected to any specified limitations.[55] This is in sharp contrast to individual human rights in the *Canadian Charter of Rights and Freedoms* in Part I, where some explicit restrictions are included.[56]

It is important to highlight that Canada's highest law does not seek to subordinate Indigenous peoples' collective rights in favour of individual human rights. Rather, s. 25 of the *Canadian Charter* provides the following safeguards for Aboriginal peoples' rights vis-à-vis individual rights in the *Charter*:

> The guarantee in this Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal peoples of Canada …

The absence of specific restrictions on the collective rights of Indigenous peoples in Canada's Constitution has not resulted in absolute rights. Canada's highest court has confirmed that Aboriginal rights are relative in nature.[57] Moreover, the Supreme Court of Canada consistently takes a contextual[58] approach and judicially balances these rights with the rights of others, according to the circumstances of each particular case.

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[53] *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11.

[54] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, 153 D.L.R. (4th) 193, (1998) 37 I.L.M. 268, at para. 115: "A further dimension of aboriginal title is the fact that it is held communally. Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions with respect to that land are also made by that community."

[55] *Constitution Act, 1982*, note 53, *supra*, section 35(1): "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."

[56] *Id.*, s. 1: "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

[57] See, for example, *Delgamuukw* v. *British Columbia*, note 54, *supra*, para. 161: "The aboriginal rights recognized and affirmed by s. 35(1) [of the *Constitution Act, 1982*], including aboriginal title, are not absolute." See also *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075, at p. 1109: "Rights [of Aboriginal peoples] that are recognized and affirmed are not absolute."

[58] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203, (1999) 173 D.L.R. (4th) 1, [1999] 3 C.N.L.R. 19 (S.C.C.), para. 54 (L'Heureux-Dubé J.):

> … the contextual approach … requires that the equality analysis of provisions relating to Aboriginal people must always proceed with consideration of and respect for Aboriginal heritage and distinctiveness, recognition of Aboriginal and treaty rights, and with emphasis on the importance for Aboriginal Canadians of their values and history.

2.5 Specific classes of limitations in Art. 29(2) of the *UDHR* would invite further abuses of Indigenous peoples' collective human rights

In relation to Indigenous peoples' collective rights, there are additional reasons why Art. 29(2) of the *UDHR* would be inappropriate and unjust. This provision includes the following specific classes of limitations:

- morality
- public order
- general welfare in a democratic society
- due recognition and respect for the rights and freedoms of others.

In the context of Indigenous peoples globally and our collective rights, all of these categories for limiting human rights have been severely and repeatedly abused by States.

In regard to **"morality"**, the term has been used by States in highly subjective and self-serving ways to justify worldwide colonialism and widespread dispossession of the lands, territories and resources of Indigenous peoples. By characterizing Indigenous peoples as "primitives" and "savages", States and their courts labeled us as immoral and not worthy of equal protection of the law.[59] Our human rights and collective security[60] that were confirmed or elaborated in treaties were repeatedly violated, by dismissing us as "savages" and "uncivilized" and denying the legal status and value of the treaties themselves.[61]

In relation to **"public order"** and the **"general welfare of a democratic society"**, these are excessively vague and broad terms. This could well serve to legitimize extensive and unforeseen limitations by States on the human rights of Indigenous peoples. State laws to restrict our collective human rights could be unjustly upheld by the courts, in view of

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[59] See, for example, F. Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (New York/London: W.W. Norton & Co., 1975) at p. 60:

> To invade and dispossess the people of an unoffending civilized country would violate morality and trangress the principles of international law, but *savages were exceptional. Being uncivilized by definition, they were outside the sanctions of both morality and law*. [emphasis added]

[60] P. Joffe & W. Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms" in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 12, p. 12-14:

> … to a large degree, Indigenous peoples' treaty rights are also human rights. … These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals.

[61] D. Sanders, *The Supreme Court of Canada and the "Legal and Political Struggle" Over Indigenous Rights*, (1990) 22 Can. Ethnic Studies 122 at pp. 123-124:

> In 1921 in *Sero* v. *Gault*, [(1921) 50 Ont. Law Rep. 27] an Ontario court quoted the Attorney-General as saying that treaties with the Mohawk made as much sense as treaties 'with the Jews in Duke street'. In *Regina* v. *Syliboy* [[1929] 1 D.L.R. 307 (N.S. Co. Ct.)] in 1929, a Nova Scotia Court ruled that a treaty between the Mic Mac and England was a nullity. Indians were 'uncivilized' and 'savages'. The treaty had been made with a 'handful of Indians'...These cases were all racist lower court decisions. *Yet for decades the Government of Canada referred to the Syliboy decision as defining the status of treaties in Canadian law.* [emphasis added]

these discretionary and potentially far-reaching powers. This could further empower States in criminalizing Indigenous human rights defenders, who protest or take other collective action to safeguard our rights in relation to such crucial matters as Indigenous lands, territories and resources.[62]

With regard to **"due recognition and respect for the rights and freedoms of others"**, this type of limitation is being proposed in the draft *U.N. Declaration* to protect the rights of "other persons and peoples". Such a measure is both unjustified and unnecessary. Both in historical and contemporary times, it has been Indigenous peoples who have immeasurably suffered when States favoured third parties at the expense of our basic rights.

States were complicit in, if not the architects of, massive and devastating dispossessions of the lands and resources of Indigenous peoples. Most often, this was accomplished by allowing third parties with no pre-existing rights in Indigenous territories to steal from, defraud or otherwise illegitimately obtain from, Indigenous peoples vast areas of our lands and resources.

For example, in the United States, both Congress and the courts intentionally facilitated the massive dispossession of Indigenous peoples' lands and resources in favor of non-Indigenous settlers. From 1887-1934, Indigenous nations unjustly lost two-thirds of their lands to third parties – roughly 90 million acres.[63] As a result, by the U.S. government's

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[62] See, for example, U.N. Commission on Human Rights, *Human Rights and Indigenous Issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen*, E/CN.4/2004/80, 26 January 2004, p. 15, para. 53:

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

[63] See, for example, Indian Land Working Group (Oregon), "Impact Of Allotment On Indian Lands", available at: http://www.ilwg.net/impact.htm:

> In total disregard of the treaties, the Dawes Act was implemented. Individual tribal members were allotted - 160, 80, and 40 acre - parcels. Remaining reservation (treaty) lands were declared surplus and sold to non-Indians through surplus land sales. This action was in direct violation of the treaty agreements and resulted in Indians losing title to 90 million acres of land.

own admission,[64] the territorial integrity of many Indigenous nations was in effect shattered by U.S. allotment policy and related laws.

As indicated earlier, the general application of Art. 29(2) to all individual human rights in the *UDHR* has not been adopted in the international human rights Covenants. Rather, limitations based on the specific elements in *UDHR* (e.g. "morality", public order", etc.) are most often used in the Covenants in a highly restrictive manner to a few individual human rights.

In regard to *individual* human rights in the *ICCPR*, the possible limitation of rights based on "public morals" or "public order" is restricted to: mobility rights; exclusion of the press and public from criminal trials; freedom to manifest one's religion or beliefs; right to hold opinions and freedom of expression; right of peaceful assembly; and right of freedom of association.[65] Similarly, possible limitations based on "protection of the rights and freedoms of others" are restricted to the same list of matters except for exclusion of the press and public from criminal trials. Furthermore, there is no explicit limitation based on the "general welfare in a democratic society" on any right whatsoever.

With regard to the *individual* rights in the *ICESCR*, there is no explicit limitation for reasons concerning "public morals" on any right whatsoever. Specific limitations based on "public order" and "protection of the rights and freedoms of others" are restricted to the right of everyone to form and join trade unions and the right of trade unions to function freely.[66]

While there is a general limitation in the *ICESCR* relating to the "general welfare of a democratic society", it cannot be concluded that this arbitrary and undefined restriction is necessary. For example, it is not used in any manner whatsoever in regard to any of the civil and political rights in the *ICCPR*. In addition, the notion of the "general welfare of a democratic society" should clearly include recognition of and respect for the collective human rights of Indigenous peoples.[67] By pitting this criterion in opposition to Indigenous

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[64] See, for example, Bureau of Indian Affairs, Office of the Special Trustee for American Indians, Working Group on Land Consolidation Program: Call for Nominations, "Action: Notice", *Federal Register*: April 22, 2003, Vol. 68, No. 77, pp. 19845-19846:

> The allotment of Indian lands--dividing tribal lands into small parcels and allocating those parcels to individual Indians--became Federal policy in 1887 with the enactment of the *General Allotment Act*. By the 1930s, however, it was widely accepted that the policy was a failure …
>
> Today, there are approximately four million owner interests in the 10 million acres of individually-owned trust lands, and these four million interests could expand to 11 million interests by 2030.

[65] See Annex I of this paper.

[66] See Annex II of this paper.

[67] B. Boutros-Ghali, *An Agenda for Peace: Report of the Secretary General*, U.N. Doc. A/47/277, 17 June 1992, at p. 22, para. 81: "Democracy within nations requires respect for human rights and fundamental freedoms, as set forth in the [U.N.] Charter".

See also U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Expanded working paper by Mr. Manuel Rodríguez Cuadros on the measures provided in the various international human*

peoples' rights, it serves to perpetuate the Eurocentric view that our rights are a threat to individuals or to other peoples.

In regard to the types of limitations in Art. 29(2), it is true that these exist in a somewhat scattered manner in human rights instruments, in relation to the individuals in a given State. However, if these individuals were oppressed by their State, they would have in many instances the political power (based on their sheer numbers) to oppose these State laws. The same is not generally the case for Indigenous peoples, who often have little or no voice when atrocities have been committed. Most Indigenous peoples globally do not have the resources or other means to redress recurring human rights violations.

2.6 "National security" or "security" should not be specified as a limitation on Indigenous peoples' human rights

Some State delegations are also proposing that "national security" be explicitly included in the draft *U.N. Declaration* as a limitation on the rights of Indigenous peoples.[68] Whether this limitation is expressed as "national security" or simply "security", such a limitation would be most inappropriate and result in injustices. In reference to security matters, there simply is no precedent for a general limitation clause on collective human rights in international human rights instruments.

In particular, there is no such explicit limitation on collective human rights in the international human rights Covenants. Even in relation to *individual* human rights, there is no general limitation based on "national security" or "security".[69] In the *ICCPR*, "national security" is an explicit limitation solely concerning the same few rights as restricted by the notions of "public morals" and "public order".[70] In the *ICESCR*, specific limitations based on "national security" exist only in relation to the right of everyone to form and join trade unions and the right of trade unions to function freely.[71]

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rights instruments for the promotion and consolidation of democracy, in accordance with the mandate contained in decision 2000/116 of the Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2002/36, 10 June 2002, para. 31:

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

[68] See, for example, U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, February 2005, note 2, *supra*, at p. 10, para. 52.

[69] In the *Universal Declaration of Human Rights*, there is no limitation of any kind whatsoever based on either "national security" or "security".

[70] See Annex I of this paper.

[71] See Annex II of this paper.

Pitting security against the collective human rights of Indigenous peoples would contradict existing international human rights law and be "dangerous". It could seriously jeopardize the notion of "human security".[72] As generally concluded in the 2005 *Report of the second expert seminar "Democracy and the rule of law"*:

> **The rationale for and practice of pitting security and rights against each other is both dangerous and counterproductive.**[73]

In the *African Charter on Human and Peoples' Rights*, there is no "security" limitation on collective human rights. Rather, it is affirmed as a collective human right that "All peoples shall have the right to national and international peace and security."[74] Solely individual human rights in the *African Charter* must be "exercised with due regard to … collective security".[75] Clearly, this "collective security" includes the security of all "peoples".

Some States appear to take the view that, in an age of increasing terrorism, human rights must be limited or suppressed in order to achieve security. Yet this is not a perspective embraced by the international community.[76] The protection of human rights, particularly the collective human right to peace and security, is an integral part of any acceptable security strategy.[77]

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

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

[73] U.N. Commission on Human Rights, *Report of the second expert seminar "Democracy and the rule of law" (Geneva, 28 February-2 March 2005): Note by the secretariat*, E/CN.4/2005/58, 18 March 2005, p. 15, para. 45. [bold in original]

[74] Art. 23, para. 1.

[75] Art. 27, para. 2.

[76] *ICJ Declaration on Upholding Human Rights and the Rule of Law in Combating Terrorism* (Berlin Declaration), adopted at the International Commission of Jurists (ICJ) Biennial Conference, Berlin, Germany, 28 August 2004, para. 8:

> In the implementation of counter-terrorism measures, states must respect and safeguard fundamental rights and freedoms … and the peaceful pursuit of the right to self-determination …

[77] K. Annan, "Ability to Reason Vital in Fighting Terrorism, Secretary-General Tells Conference", *Press Release*, SG/SM/8885, September 22, 2003:

> … there is no trade-off to be made between human rights and terrorism. Upholding human rights is not at odds with battling terrorism …
>
> To compromise on the protection of human rights would hand terrorists a victory they cannot achieve on their own. The promotion and protection of human rights, as well as the strict observance of international humanitarian law, should, therefore, be at the centre of anti-terrorism strategies.

In different parts of the world, human rights have been abused by States in the name of security.[78] These abuses are especially evident in the Indigenous context. For example, the National Security Council,[79] which is headed by the President of the United States,[80] has in effect targeted the world's 300 million Indigenous people as some kind of security risk. While there is one national security strategy[81] for all of the United States, there is another very specific one[82] to limit the human rights of all Indigenous peoples globally – in the absence of any factual, legal or political context. This blatant discrimination has been highlighted by Indigenous peoples as follows:

> Without exception, the U.S. seeks to categorically deny the world's Indigenous peoples full and equal application of the right of self-determination under the international human rights Covenants. This global strategy is being directed by means of a U.S. National Security Council document entitled, "Position on Indigenous Peoples", dated January 18, 2001. **No other peoples in the world are singled out, as a class of people, for such wholesale discriminatory treatment.**[83]

Those States that insist on pitting "security" against the human rights of Indigenous peoples are adopting a most anachronistic view of this important notion. Contemporary and forward-looking perspectives of "security" in international law are not only inclusive of, but also founded upon, the principle of respect for human rights.[84] Yet States, such as

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[78] U.N. General Assembly, *Statement by Ms. Louise Arbour UN High Commissioner for Human Rights to theThird Committee of the General Assembly*, New York, 26 October 2004, http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet:

> My Office also places high priority on ensuring respect for human rights while we, as a global community, take firm steps to eradicate terrorism. … Deeply entrenched rights have been rolled back in the name of the war on terrorism. This is neither principled nor effective.

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

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

[80] *Id.*

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

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

[83] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Towards a *U.N. Declaration on the Rights of Indigenous Peoples*: Injustices and Contradictions in the Positions of the United Kingdom", Joint Submission to Prime Minister Tony Blair, United Kingdom of Great Britain and Northern Ireland, September 10, 2004, para. 124. [bold in original]

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

> Our new concept of security in the Hemisphere is multidimensional in scope, … contributes to the consolidation of peace, integral development, and social justice, and is *based on democratic*

the United Kingdom, United States, France, and the Netherlands, continue to deny that our collective rights are human rights. Rather than promote our security, these and certain other States perpetuate and exacerbate our poverty and insecurity.[85]

States have internationally recognized the "importance of maintaining and strengthening international peace founded upon freedom, equality, justice and respect for fundamental human rights".[86] They have also affirmed that the "fulfillment in good faith of the obligations assumed by States, in accordance with the Charter, is of the greatest importance for the maintenance of international peace and security".[87] Therefore, it is unconscionable for certain States to ignore their solemn human rights obligations and seek discriminatory double standards based on "security", which would likely serve to perpetuate human rights abuses against Indigenous peoples globally.

2.7 Indigenous peoples' collective human rights under international law not limited by the constitutions or other internal laws of States

At the OAS Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples, the following general limitation clause is proposed in the Chair's *Consolidated Text*:

> **Any interpretation and application of the present Declaration shall respect the fundamental human rights, the democracy, and the constitutional principles of each State.**[88]

> *values, respect for and promotion and defense of human rights*, solidarity, cooperation, and respect for national sovereignty. [emphasis added]

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

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

[85] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Urgent Need to Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Statement, U.N. Permanent Forum on Indigenous Issues, May 2005, note 14, *supra*, para. 27:

> Recognition and respect for the right of self-determination and other collective human rights establish an essential context for the enjoyment and exercise of Indigenous peoples' rights to lands, territories and resources. Without an adequate land and resource base, our impoverishment by States and others will continue. This threatens our collective and individual security.

[86] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, note 28, *supra*, preamble.

[87] *Id.*

[88] Organization of American States (Working Group to Prepare the Proposed American Declaration on the Rights of Indigenous Peoples), *Consolidated Text of the Draft Declaration Prepared by the Chair of the Working Group*, note 3, *supra*, Article XXXIII.

This provision, if adopted, would mean that Indigenous peoples in each State of the Americas could have different collective human rights. For the Indigenous peoples within any given State, no interpretation or application of any collective human right would be valid unless it respected the human rights, democracy and constitutional principles of that particular State. For numerous reasons, this is a "flawed"[89] and prejudicial approach.

In regard to Indigenous peoples, this proposed limitation clause would lead to uneven[90] results – a kind of "checkerboard" of human rights throughout the Americas. For example, if the constitution of a particular State indicated that all natural resources belong to that State, the Indigenous peoples concerned would apparently have no right to the ownership of natural resources in their traditional territories under the Chair's *Consolidated Text* relating to a draft American Declaration on the Rights of Indigenous Peoples.[91] If such a constitutional limitation did not exist in another State, then Indigenous peoples in that State may have the right to own natural resources in their traditional territories.

It would appear that a similar "checkerboard" situation impairing Indigenous collective rights could also arise, if the nature and scope of "human rights" and "democracy" were different among the domestic or internal laws of the various American States. Overall, the proposed clause could seriously undermine the integrity of Indigenous peoples' collective human rights under international law. The Inter-American Commission on Human Rights and the Inter-American Court of Human Rights could conceivably be required to apply different rules for different Indigenous peoples, depending upon the domestic law of the State in which they live.

In relation to collective human rights, there exists no such general limitation clause in any international human rights instruments. By imposing such potentially widespread and far-reaching limitations solely on Indigenous peoples, the proposed clause is highly discriminatory. It would violate the peremptory norm that prohibits racial

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[89] A. Quentin-Baxter, "The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts", (1999) 29 Victoria Univ. of Wellington L.R. 85, at pp. 99-100:

> … in formulating a Declaration, care must be taken to avoid any suggestion that the international law rights of indigenous peoples are to be subordinated to the existing constitutions and legal systems of the states of which they happen to be citizens. Such a qualification would be flawed in principle. In practice it would yield uneven results, depending on the nature of the constitution and other law of the state concerned. At worst it could suggest that nothing is required to change.

[90] *Id*.

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

> While noting the principle set forth in article 41 of the Constitution [of Suriname] that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that *this principle must be exercised consistently with the rights of indigenous and tribal peoples*.
>
> It recommends legal acknowledgement by the State party of the rights of indigenous and tribal peoples to possess, develop, control and use their communal lands and to participate in the exploitation, management and conservation of the associated natural resources. [emphasis added]

discrimination.[92] Moreover, such a clause could discourage States from adopting higher standards to conform to international law, since the domestic law in their own State would largely prevail at the international level.

It is also crucial to note that, at the WGDD, the following amendment has been proposed by one or more States in regard to the right of self-determination in the draft *U.N. Declaration*:

> Indigenous peoples have the right of self-determination. By virtue of that right they freely determine, **within constitutional provision of States concerned or other positive arrangements,** their political status and freely pursue their economic, social and cultural development.[93]

Again, the proposed amendment is an attempt to ensure that the domestic law of each State would to a large degree prevail in relation to Indigenous peoples' collective human rights under international law. Any "constitutional provision" or "other positive arrangement" within a given State could apparently limit the right of Indigenous peoples to self-determination under international law.

However, in regard to the right of self-determination, no such limitations exist in the international human rights Covenants. This would mean that Indigenous peoples would have limitations under international law on the right of self-determination that other peoples do not. This would be highly discriminatory and would violate the peremptory norm that prohibits racial discrimination.

In view of the central relationship of the right to self-determination to other human rights, the proposed clause could seriously undermine the integrity of our collective and individual human rights under international law. Treaty-monitoring bodies, such as the U.N. Human Rights Committee and the Committee on Economic, Social and Cultural Rights could conceivably be required to apply different rules for different Indigenous peoples on the right of self-determination, depending upon the domestic law of the State in which they live.

Both of the above proposed texts raise additional concerns of a serious nature. To subject our human rights to the domestic law of States would serve to defeat a key purpose of the draft Declarations being discussed at the U.N. and the OAS. In each case, the international standard-setting process concerning the rights of Indigenous peoples is an important step towards the adoption of uplifting human rights norms. It is intended that

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[92] I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998), at p. 515:

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

[93] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, April 2005, note 16, *supra*, p. 8, Art. 3.

these standards would be implemented at the domestic level by States, in conjunction with the Indigenous peoples concerned.

As indicated by the International Court of Justice, at the international level, "the fundamental principle of international law [is] that it prevails over domestic law".[94] It is increasingly recognized that Indigenous peoples' rights already exist in international law. Moreover, the collective human right of self-determination in Art. 1 of the Covenants applies equally to Indigenous and non-Indigenous peoples. States should not be seeking to invoke their own constitution or other internal laws[95] in order to evade their existing international obligations.[96]

Clearly, States should be reflecting international human rights standards in their own constitution and internal laws.[97] They should not be using domestic laws as a barrier or shield against positive and urgent fundamental change.[98] With respect to Indigenous peoples' inherent and inalienable rights, strong and effective international norms are most often acutely needed to reinforce and complement the domestic law within States.[99]

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[94] *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] I.C.J. 12 (Advisory Opinion of April 26), at 34, para. 57.

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

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

[96] *Vienna Convention on the Law of Treaties*, U.N. Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969), Art. 27: "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

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

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

[97] This progressive approach is what is explicitly intended within the Inter-American human rights system. See, for example, the *American Convention on Human Rights*, Art. 41 b:

> In the exercise of its mandate, [the Inter-American Commission on Human Rights] shall have the following functions and powers: … b. to make recommendations to the governments of the member states, when it considers such action advisable, for the *adoption of progressive measures in favor of human rights within the framework of their domestic law and constitutional provisions* as well as appropriate measures to further the observance of those rights … [emphasis added]

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

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

[99] See, for example, *American Convention on Human Rights*, 2nd preambular para.:

> … the essential rights of man are not derived from one's being a national of a certain state, but are based upon attributes of the human personality, and that they therefore justify international protection in the form of a convention reinforcing or complementing the protection provided by

III. Possible Amendments to Consider

In most instances, there is no need to amend the current text of the draft *Declaration*. However, situations do arise where the current text is in need of improvements. These may include both substantive and grammatical changes.

In the context of "general provisions", there are a number of possible amendments that are worthy of further consideration, including those outlined below (indicated in bold). Our brief comments are provided in parentheses. All such amendments should be evaluated together in the context of the whole *Declaration*.

Preamble

> ***Encouraging*** **harmonious and cooperative relations between States and indigenous peoples based on principles of justice, democracy, respect for human rights, non-discrimination and good faith;**
>
> > [This para. has already been proposed by an overwhelming majority of Indigenous peoples and organizations at the WGDD in September 2004.]
>
> ***Emphasizing*** **that, in the event of any disputes, these principles are essential elements in the interpretation of the rights of indigenous peoples and individuals, States and other parties concerned.**
>
> > [This new provision, proposed by the Grand Council of the Crees at the informal consultations of the WGDD in December 2004,[100] builds upon the approach taken by the overwhelming majority of Indigenous peoples and organizations. The para. reflects how disputes are resolved, based on universal principles, in a fair and balanced manner in contemporary legal systems. It necessarily avoids pre-determining the nature and scope of the rights of the parties in the absence of any specific factual and legal context.]

Art. 1:

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

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the domestic law of the American states …

[100] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session*, E/CN.4/2005/89, 28 February 2005 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)) , p. 10, para. 53.

[It is beneficial to retain emphasis on collective rights in the first Article, consistent with the overall objectives of the draft Declaration.

In order to possibly improve the text, one might consider adding at the end of Art. 1: "… international human rights law**, including the rights contained in this Declaration**.

A similar phrase is found in the *Indigenous and Tribal Peoples Convention, 1989*.[101]]

Art. 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.

[No change is proposed. Some States have argued that the Article as drafted is ambiguous. In order to further clarify the existing wording, the following might be considered:

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

Art. 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.

[It is proposed that this Article be amended as follows:

Indigenous peoples **and individuals have the right to effective remedies for all infringements of their collective and individual rights**. **In particular, indigenous peoples** have the right to have

[101] *Indigenous and Tribal Peoples Convention, 1989*, Art. 3, para. 2:

No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States. Such a decision shall **give due recognition to** the customs, traditions, rules and legal systems of the indigenous peoples concerned.

As proposed in the above amendment, it is important to highlight first the human right of Indigenous peoples and individuals to an effective remedy. Under international law, this human right has been applied to groups[102] as well as individuals. In this context, Art. 39 already refers to "individual and collective rights". This would appear to be appropriate, since Indigenous collective and individual rights are interdependent. Both aspects are often relevant in resolving specific conflicts or disputes.

The proposed amendment is also much broader in its application than Art. 39. The existing text of Art. 39 appears to only provide for the right of Indigenous peoples to effective remedies in relation to disputes or conflicts with "States" and only through "mutually acceptable … procedures". This is far too restrictive.

The text we propose also strengthens the existing text of Art. 39 as follows: "Such a decision shall **give due recognition to** the customs, traditions, rules and legal systems of the indigenous peoples concerned."]

Art. 44:

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire.

[No change is proposed. This is an important Article consistent with international law.[103]]

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[102] Committee on Economic, Social and Cultural Rights, General Comment No. 15, *The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, 29th sess., U.N. Doc. E/C.12/2002/11, 20 January 2002, para. 55: "Any persons or groups who have been denied their right to water should have access to effective judicial or other appropriate remedies at both national and international levels …"

I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, note 13, *supra*, at para. 6: "Based upon these findings, the Commission recommended that the State provide the Maya people with an effective remedy, which includes recognizing their communal property right to the lands that they have traditionally occupied and used …"

[103] See, for example, *Indigenous and Tribal Peoples Convention, 1989*, Art. 35:

> The application of the provisions of this Convention shall not adversely affect rights and benefits of the peoples concerned pursuant to other Conventions and Recommendations, international instruments, treaties, or national laws, awards, custom or agreements.

Art. 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.

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 aimed at the destruction of any of the rights or freedoms recognized in international human rights law, including the rights contained in this Declaration.

[The amended text that we propose maintains the existing text of Art. 45. At the same time, we add two new elements. The first addresses the concerns of some States that the rights in the draft *U.N. Declaration* would not imply any right to destroy any rights or freedoms recognized in international human rights law. A similar proposal is found in a 2005 Report of the WGDD Chair[104] and a similar text is included in the *International Covenant on Civil and Political Rights*, Art. 5, para. 1.[105]

The second element we add is to make clear that international human rights law includes the rights in the draft *U.N. Declaration*. This would be consistent with the approach and phrase found in the *Indigenous and Tribal Peoples Convention, 1989*.[106]

However, some States have proposed deleting the phrase "contrary to the Charter" and replacing it with "**aimed at the destruction of any of the rights or freedoms recognized in the Charter of the United Nations and in international human rights law**". As Indigenous representatives have emphasized in the WGDD, it would be unacceptable to delete the phrase "contrary to the Charter". This phrase covers a great deal more than "destruction of the rights … recognized in the Charter". It also means, for example, that any State, group etc. could not act in a manner contrary to

[104] U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session: Addendum*, April 2005, note 16, „*supra*, p. 49:

> 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 aimed at the destruction of any of the rights or freedoms recognized in applicable international human rights law, or at their limitations to a greater extent than is provided for therein.

[105] Art. 5, para. 1: "Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.

[106] See *Indigenous and Tribal Peoples Convention, 1989*, Art. 3, para. 2:

> No form of force or coercion shall be used in violation of the human rights and fundamental freedoms of the peoples concerned, including the rights contained in this Convention.

the Purposes and Principles of the Charter. All member States have a legal obligation to respect the *U.N. Charter* and this most fundamental duty must be affirmed in the draft *Declaration*.

These same States have also proposed that an additional phrase be added at the end of the para.: "… international human rights law**, or at their limitations to a greater extent than is provided for therein**." This phrase would be highly problematic in the current context. At the time of the adoption of most international human rights instruments, the limitations that were established generally related to States and the extent to which they could limit *individual* human rights. The collective rights of Indigenous peoples were never considered. Since our collective and individual rights are interdependent, any limitations of rights must take into account this crucial dynamic.

In considering proposed amendments to Art. 45, one might consider some variation of the following additional para.:

Nothing in this Declaration shall be construed as prejudicing in any manner the provisions of the Charter or the rights and duties of Member States under the Charter or the rights of peoples under the Charter, taking into account the elaboration of these rights in this Declaration.[107]

While the above para. has some overlap with the existing text and possibly other proposed amendments, the portion on the "rights of peoples" and "taking into account the elaboration of these rights in this Declaration" may be of particular interest.]

Conclusions

"General provisions", if appropriate, balanced and fair, can have diverse beneficial purposes in the draft *U.N. Declaration on the Rights of Indigenous Peoples*. However, certain clauses examined in this paper that have been proposed by some States and the WGDD Chair do not stand up to scrutiny. These provisions are largely excessive, prejudicial and unfair. They would be inconsistent with international law and its progressive development.

These questionable provisions import limitation clauses from international instruments that solely apply them to individual human rights. They do not apply these clauses to collective human rights at all. In many instances, the provisions proposed apply under international law to a small number of individual human rights in a somewhat scattered

[107] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, note 28, *supra*, General Part, para. 2.

and inconsistent manner. Regardless of these basic concerns and flaws, some States still seek to include such extreme and unwarranted clauses in the draft *U.N. Declaration*.

These suggested provisions and the approaches they entail would have the effect of severely limiting and undermining Indigenous peoples' collective human rights. Some of States are insisting on these restrictions while, at the same time, denying the human rights quality of our collective rights.

For example, a number of States at the U.N. and OAS standard-setting processes are proposing a general limitation clause that is an adaptation of Art. 29(2) of the *Universal Declaration of Human Rights* (*UDHR*). Yet the *UDHR* does not apply such a general limitation clause to any *collective* human rights of any kind. Nor do other international human rights instruments, including the *ICCPR* and the *ICESCR*. Therefore, it is clear that Art. 29(2) of the *UDHR* is not a valid precedent for Indigenous peoples' collective rights. It is also an out-dated standard in relation to individual human rights.

Both the *ICCPR* and the *ICESCR* abandon the notion of a *single* general limitation clause in favour of a "tailored" approach that limits certain specific individual human rights. An examination of collective human rights under international law demonstrates that these rights have not been subjected to general or specific limitations in international human rights instruments. This does not suggest that these collective rights are absolute, since human rights are generally relative in nature. However, it is clear that notion of limitations on collective human rights is addressed in international instruments in a manner that is very different from individual human rights.

In relation to Indigenous peoples' collective rights, there are additional reasons why Art. 29(2) of the *UDHR* would be inappropriate and unjust. This provision includes specific classes of limitations that have been or continue to be highly problematic for Indigenous peoples, namely, "morality"; "public order"; "general welfare in a democratic society"; and "due recognition and respect for the rights and freedoms of others".

Even for individual human rights, there is no widespread and consistent use of these categories in the two human rights Covenants. There is certainly no precedent for States to insist that these categories apply to *all* of the collective and individual rights in the draft *U.N. Declaration*.

In the global context of Indigenous peoples and our collective rights, all of these vague and subjective categories for limiting human rights are reflective of rationales used by States to severely and repeatedly abuse our basic rights. Therefore, it would be wholly unjust and unreasonable to legitimize in the draft *U.N. Declaration* even more far-reaching and discretionary State powers to restrict the exercise and enjoyment of our fundamental rights. These measures would only perpetuate and exacerbate the impunity that already exists in relation to rampant violations of our human rights.

In addition, Art. 29(2) was used in the *UDHR* as a *single* general limitation clause. In other words, there were no additional limitation clauses included in this instrument. However, in relation to the draft *U.N. Declaration*, States are proposing numerous

general limitation clauses to apply to our rights. Some of these additional clauses apply to "minorities" and their individual human rights.

Aside from Art. 29(2), some State delegations are also proposing that "national security" be explicitly included in the draft *U.N. Declaration* as a limitation on the rights of Indigenous peoples. Whether this limitation is expressed as "national security" or simply "security", this type of restriction would be most inappropriate and unjust. In reference to security matters, there simply is no precedent for a general limitation clause on collective human rights in international human rights instruments. This is especially evident in respect to the right of self-determination in the human rights Covenants.

For all of the above reasons, it must be concluded that the State proposals described in this paper are generally unjustifiable, disproportionate and unprecedented in terms of their nature and scope. If adopted, these clauses could well serve to undermine the integrity of the draft *U.N. Declaration* and all of the collective rights that it comprises. These double standards on Indigenous peoples' human rights would be highly discriminatory.

A number of States have indicated that, if Indigenous peoples would agree to their proposals for "general provisions", then these States could agree to many of the Articles in the draft *U.N. Declaration*. However, such agreements would contravene the objectives of a strong and uplifting *Declaration* on the rights of Indigenous peoples worldwide. The human rights of Indigenous individuals would also be seriously compromised.

As an alternative to these invalid approaches and proposals, this paper proposes a number of amendments in relation to "general provisions". The suggested amendments would strengthen or clarify the existing text of the draft *U.N. Declaration*. These improvements would reinforce the integrity of the *Declaration*. Moreover, the alternative amendments are wholly consistent with international law and its progressive development.

Similar positive approaches and beneficial amendments would be relevant to the standard-setting process on Indigenous peoples' rights at the Organization of American States.

Annex I

Limitation clauses in *International Covenant on Civil and Political Rights* (*ICCPR*)

Note:

* There are no general limitation clauses in this Covenant

* There are no limitation clauses in regard to the *collective* human right of self-determination, including natural resource rights. Rather, in regard to resource rights, it is explicitly provided that nothing in the Covenant shall be interpreted as impairing these rights (Art. 47)

* There are only limits on certain specific Articles concerning *individual* human rights. Any limits must be "prescribed by law" and "necessary in a democratic society in the interests of [national security, etc.]"

* Relatively few subject matters in this Covenant are subjected to specific restrictions. Many of the aspects that have restrictions are not covered in the draft *U.N. Declaration on the Rights of Indigenous Peoples*

* There are limits to protect the rights of third parties only in relation to the following *individual* rights and freedoms: mobility; religion or beliefs; opinion and expression; peaceful assembly; and association.

Specific limitation clauses in *ICCPR*:

"National security" –Art. 12(3) – mobility rights, including freedom to leave any country
But "restrictions … [must be] consistent with the other rights recognized in the present Covenant"
14(1) – exclusion of press and public from criminal trials
19(3) – right to hold opinions and freedom of expression
21 – right of peaceful assembly
22(2) – right of freedom of association

"Public safety" – Art. 18(3) – freedom to manifest one's religion or beliefs
21 – right of peaceful assembly
22(2) – right of freedom of association

"Public order" – Art. 12(3) – mobility rights, including freedom to leave any country

But "restrictions … [must be] consistent with the other rights recognized in the present Covenant"
14(1) – exclusion of press and public from criminal trials
18(3) – freedom to manifest one's religion or beliefs
19(3) – right to hold opinions and freedom of expression
21 – right of peaceful assembly
22(2) – right of freedom of association

"Public health" – Art. 12(3) – mobility rights, including freedom to leave any country
But "restrictions … [must be] consistent with the other rights recognized in the present Covenant"
18(3) – freedom to manifest one's religion or beliefs
19(3) – right to hold opinions and freedom of expression
21 – right of peaceful assembly
22(2) – right of freedom of association

"Public morals" – Art. 12(3) – mobility rights, including freedom to leave any country
But "restrictions … [must be] consistent with the other rights recognized in the present Covenant"
14(1) – exclusion of press and public from criminal trials
18(3) – freedom to manifest one's religion or beliefs
19(3) – right to hold opinions and freedom of expression
21 – right of peaceful assembly
22(2) – right of freedom of association

"Protection of the rights and freedoms of others"
– Art. 12(3) – mobility rights, including freedom to leave any country
But "restrictions … [must be] consistent with the other rights recognized in the present Covenant"
18(3) – freedom to manifest one's religion or beliefs
19(3) – right to hold opinions and freedom of expression
21 – right of peaceful assembly
22(2) – right of freedom of association

Annex II

Limitation clauses in *International Covenant on Economic, Social and Cultural Rights* (*ICESCR*)

Note:

* There is a general limitation clause in Part II of this Covenant. The clause is of relatively narrow scope, as compared to Art. 29(2) of the *Universal Declaration of Human Rights*. Any limitations "determined by law" must be "compatible with the nature of these rights [in the Covenant]" and "solely for the purpose of promoting the general welfare in a democratic society" (Art. 4)

* It would appear that the general limitation clause in Part II is intended to apply solely to the *individual* human rights in the Covenant and not to the *collective* human right of self-determination in Part I of the Covenant

* There are no specific limitation clauses in regard to the *collective* human right of self-determination, including natural resource rights. Rather, in regard to resource rights, it is explicitly provided that nothing in this Covenant shall be interpreted as impairing such rights (Art. 25)

* There is only one Article (*i.e.* trade unions) in the Covenant that is subjected to specific restrictions. These limits, which must be "prescribed by law", only concern *individual* human rights

* There are limits to protect the rights of third parties only in relation to the following *individual* rights and freedoms: trade unions.

Specific limitation clauses in *ICESCR*:

"National security" – Art. 8(1)(a) – right of everyone to form and join trade unions
8(1)(c) – right of trade unions to function freely

"Public order" – Art. 8(1)(a) – right of everyone to form and join trade unions
8(1)(c) – right of trade unions to function freely

"Protection of the rights and freedoms of others"
– Art. 8(1)(a) – right of everyone to form and join trade unions
8(1)(c) – right of trade unions to function freely