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INDIGENOUS PEOPLES AND INTERNATIONAL HUMAN RIGHTS: ELIMINATING STATE DISCRIMINATION

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By Romeo Saganash[1] and Paul Joffe[2]

Introduction

International human rights law is intended to safeguard both individuals and peoples,[3] including those who are the most vulnerable. Unquestionably, Indigenous peoples fall into this latter category as one of the most vulnerable and dispossessed peoples in the world. Yet the international community has been painfully slow and too often insensitive or neglectful in addressing the rights of Indigenous peoples.

As described by R. Falk:

> Undoubtedly, the most vulnerable of all categories of vulnerable peoples is that of "indigenous peoples." Ravaged by colonial and settler oppression often verging on tactics of eradication, these peoples have also been denied the benefits of "decolonisation." Furthermore, their distinctive outlook has been overlooked or distorted by most understandings of human rights, and their ways disvalued and cast aside by the modernization consensus embraced by every sovereign state.[4]

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[3] I. Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, (eds.), *International Human Rights Law : Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 63, at p. 63: "… [human rights] may be said to refer to a whole series of political, democratic, legal, egalitarian, economic, social and cultural rights having individual, minority and collective perspectives – and which, taken together, form what I would call the corpus of human rights in our time.

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

There are over 300 million Indigenous people in the different regions of the world.[5] The historical and contemporary experiences of Indigenous peoples in every region are most often described in such terms as dispossession,[6] colonization and colonialism,[7] racism and discrimination,[8] exclusion, marginalization,[9] cultural genocide or ethnocide[10] and

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[5] H. Whall, "Indigenous Self-Determination in the Commonwealth of Nations", Commonwealth Policy Studies Unit, United Kingdom, http://www.cpsu.org.uk/downloads/indigenous_self_determination.pdf, at p. 8:

> Current estimates put the number of indigenous peoples worldwide at more than 300 million people (approximately 7,000 indigenous societies or cultures) – five per cent of the global population. A third of the worlds' indigenous peoples, approximately 150 million, live in the Commonwealth …

[6] Land dispossessions affecting Indigenous peoples were and continue to be a worldwide phenomenon. See United Nations Development Programme, *Human Development Report 2004: Cultural liberty in today's diverse world* (New York: UNDP, 2004), at pp. 29-30:

> From occupying most of the earth's ecosystems two centuries ago indigenous people today have the legal right to use about 6% of the earth's territory. And in many cases the rights are partial or qualified. In most South-East Asian countries, for example, there are no laws granting indigenous people the right to their land. And not only their land is being coveted and taken—so is their knowledge. Multinational corporations have discovered its commercial potential, and the race is on to patent, privatize and appropriate.

[7] See, for example, R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations Univ. Press, 1990), at p. 118:

> The subordination of indigenous peoples to the nation-state, their discrimination and marginalization, has historically, in most cases, been the result of colonization and colonialism. Within the framework of politically independent countries, the situation of indigenous and tribal peoples may be described in terms of internal colonialism.

In M. Pomerance, *Self-Determination in Law and Practice* (The Hague/Boston: Martinus Nijhoff Publishers, 1982) at p. 106, n. 260, it is said that colonialism was first declared to be a "crime" by the General Assembly in Resolution 2621 (XXV), October 12, 1970 (adopted by a vote of 86-5-15).

[8] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, adopted in Durban, South Africa, 8 September 2001, para. 14:

> We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that Africans and people of African descent, and people of Asian descent and indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented.

[9] See, for example, Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, U.N. Doc. E/C.12/1/Add.31, 10 December 1998, para. 18:

> The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands, as recognized by the [Royal Commission on Aboriginal Peoples], and endorses the recommendations of the RCAP that policies which violate Aboriginal treaty obligations and extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party.

[10] World Commission on Environment and Development, *Our Common Future* (New York: Oxford University Press, 1987), at p. 114:

genocide.[11] These tragic and often brutal encounters with States, settlers,[12] corporations,[13] religious orders[14] and other outsiders have resulted in far-reaching adverse impacts that still profoundly affect most Indigenous peoples and individuals.

> Growing interaction with the larger world is increasing the vulnerability of these groups, since they are often left out of the processes of economic development. Social discrimination, cultural barriers, and the exclusion of these people from national political processes make these groups vulnerable and subject to exploitation. Many groups become dispossessed and marginalized, and their traditional practices disappear. They become victims of what could be described as cultural extinction.

See also R. Stavenhagen, note 7, *supra*, at p. 89:

> The first and principal attack on the way of life of indigenous and tribals is the attack upon their land and their ecological resource base. The loss of land and territory has contributed to wipe out many peoples around the world. It is probably the principal factor in the ongoing process of ethnocide of which they are the continuing victims. For indigenous and tribal peoples, land is not only a productive resource, an economic factor. Land is habitat, territory, the basis for social organization, cultural identification, and political viability … Land is the essential element in the cultural reproduction of the group.

[11] See, for example, J. Tully, *Strange Multiplicity: Constitutionalism in an age of diversity* (Cambridge: Cambridge University Press, 1995), at p. 197:

> [In regard to Aboriginal peoples in the Americas,] every imaginable means of destruction of their cultures and assimilation into uniform European ways has been tried. Yet, after five hundred years of repression and attempted genocide, they are still here and as multiform as ever. … The suppression of cultural difference in the name of uniformity and unity is one of the leading causes of civil strife, disunity and dissolution today.

See also World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, note 8, *supra*, para. 15:

> We recognize that apartheid and genocide in terms of international law constitute crimes against humanity and are major sources and manifestations of racism, racial discrimination, xenophobia and related intolerance, and acknowledge the untold evil and suffering caused by these acts and affirm that wherever and whenever they occurred, they must be condemned and their recurrence prevented …

[12] See, for example, E. Kolodner, *Population Transfer: The Effects of Settler Infusion Policies on a Host Population's Right to Self-Determination*, (1994) 27 N.Y.U.J. Int'l L. & Politics 159, at p. 159:

> While governments tend to use forced relocation policies to conquer those being transferred, settler infusion policies are used to conquer and subjugate residents of the territory receiving the new settlers. Historical examples of settler infusion include the United States' policy of transferring citizens into territories occupied by the Native Americans …

[13] Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted at the Committee's 1235th meeting on 18 August 1997), para. 3:

> The Committee is conscious of the fact that in many regions of the world indigenous peoples have … lost their land and resources to colonists, commercial companies and State enterprises.

[14] In regard to the impact of residential schools run by religious institutions, see U.N. General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people) A/59/258, 12 August 2004, p. 13, para. 42:

> From a historical perspective, however, State policies have not always recognized or protected the languages spoken by indigenous peoples or linguistic minorities. On the contrary, the intention of

Human rights atrocities, both past and present, have compelled Indigenous peoples to seek effective remedies outside the States or territories in which they live.[15] At different times in the twentieth century, the quest for justice has led Indigenous leaders, representatives and organizations to the United Nations or to its predecessor, the League of Nations.[16]

Finally, in 1982, the U.N. took a significant step in responding to the burgeoning global concerns of Indigenous peoples. The Working Group on Indigenous Populations (WGIP)[17] was mandated[18] to devote special attention to the evolution of standards

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> official linguistic, educational and cultural policies has often been the assimilation of such groups into the national mainstream, thus leading to language and culture loss. In Canada, the bitter memory of "residential schools" did much to destroy the cultural identity of the First Nations for at least an entire generation. Similar situations exist in the Latin American countries. More recently, there has been an awareness that such processes violate the human rights of members of the affected language communities.

In addition, State governments used religious doctrines to dispossess Indigenous peoples of their lands and territories. In the U.S. context, see for example, S.T. Newcomb, "The Evidence of Christian Nationalism in Federal Indian Law: The Doctrine of Discovery, *Johnson v. McIntosh*, and Plenary Power" 20 N.Y. U. Rev. Law & Social Change 303 (1993) at p. 309:

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

[15] African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, s*ubmitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa" adopted by the African Commission on Human and Peoples' Rights at its 28th Ordinary Session*, 14 May 2003, p. 7:

> Indigenous peoples suffer from particular human rights violations – to the extent that some groups are on the verge of extinction. While the degree of experience may differ from country to country, the situation is a cause for serious concern and it calls for intervention.

[16] See, for example, D. Sanders, "The Legacy of Deskaheh: Indigenous Peoples as International Actors" in C. Price Cohen, *Human Rights of Indigenous Peoples*, ed. (N.Y.: Transnational Publishers, 1998) 73.

[17] The creation of the Working Group on Indigenous Populations was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981. The establishment of WGIP was endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982.

[18] In its resolution 1982/34 of 7 May 1982, the Economic and Social Council authorized the Sub-Commission to establish annually a Working Group to meet in order to:

> (a) Review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations, including information requested by the Secretary-General annually from Governments, specialized agencies, regional intergovernmental organizations and non-governmental organizations in consultative status, particularly those of indigenous peoples, to analyse such materials, and to submit its conclusions and recommendations to the Sub-Commission, bearing in mind inter alia the conclusions and recommendations contained in the report of the Special Rapporteur of the Sub-Commission, Mr. José R. Martínez Cobo, entitled "Study of the problem of discrimination against indigenous populations" (U.N. Doc. E/CN.4/Sub.2/1986/7 and Add.1-5);

relating to the rights of Indigenous peoples. In 1985, the WGIP decided to begin work on a "draft declaration on indigenous rights" for eventual submission to and adoption by the General Assembly.[19]

During a period of about nine years, a draft *U.N. Declaration on the Rights of Indigenous Peoples*[20] was carefully formulated and ultimately approved by the expert members of the WGIP.[21] Within this highly democratic and dynamic process, Indigenous peoples, States, specialized agencies and academics actively participated and exchanged views. In 1994, the Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved the draft *Declaration* elaborated by the WGIP and submitted it for consideration to the Commission on Human Rights (UNCHR).[22]

While these achievements within the U.N. system generated much-needed optimism in regard to Indigenous peoples' human rights, a new reality was soon to appear. In the next stage of the standard-setting process, States and not independent international human rights experts would play a central and controlling role.

In March 1995, the Commission on Human Rights established an open-ended inter-sessional working group (WGDD) of the Commission on Human Rights with the sole purpose of elaborating a draft declaration.[23] During the past 10 years, the WGDD has considered the text of the draft *Declaration* that was approved by the Sub-Commission and has made little progress in reaching consensus.

Only 2 of the 45 Articles in the draft *U.N. Declaration* have been provisionally approved by the participating States.[24] As a result, no text has been recommended for adoption by

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> (b) Give special attention to the evolution of standards concerning the rights of indigenous populations, taking into account both the similarities and the differences in the situations and aspirations of indigenous populations throughout the world.

[19] See U.N. Doc. E/CN.4/Sub.2/1985/2, Ann. II.

[20] *United Nations Declaration on the Rights of Indigenous Peoples* (Draft), in U.N. Doc. E/CN.4/1995/2; E/CN.4/Sub.2/1994/56, 28 October 1994, at 105-115, *reprinted in* (1995) 34 I.L.M. 541.

[21] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Report of the Working Group on Indigenous Populations on its eleventh session*, U.N. Doc. E/CN.4/Sub.2/1993/29, 23 August 1993 (Chairperson-Rapporteur: Ms. Erica-Irene Daes), p. 44, para. 209.

[22] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1994/45 of 26 August 1994.

[23] U.N. Commission on Human Rights, *Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, Res. 1995/32, 3 March 1995.

[24] The two Articles of the draft *U.N. Declaration* that have been provisionally approved in 1997 only affirm individual rights. They are:

> Every indigenous individual has the right to a nationality. (Art. 5)

the General Assembly. Thus, at the end of the *International Decade of the World's Indigenous People* in December 2004, its "major objective"[25] to adopt such a Declaration was not achieved.

It is important to note that, in March 2004, Indigenous nations and organizations and non-Indigenous human rights organizations from various regions of the world sent a detailed Joint Submission on the U.N. standard-setting process to the Office of the High Commissioner for Human Rights.[26] For the most part, the Submission attributed the difficulty to arrive at a consensus to the "lack of political will[27] among a number of States to redress past and ongoing violations of our human rights and prevent such intolerable acts in the future".[28] The Submission also underlined the discriminatory aspects of a number of State positions.[29]

Grave concern was expressed that issues considered to be essential by Indigenous peoples are viewed by some States as "impediments" to making progress on the draft *U.N. Declaration*. These key matters include: i) affirmation of the collective rights of Indigenous peoples; ii) use of the term "peoples" or "Indigenous peoples"; iii) affirmation of the right of Indigenous peoples to self-determination under international law; and iv) affirmation of Indigenous rights to lands, territories and resources.[30]

> All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals. (Art. 43).

[25] U.N. General Assembly, *International Decade of the World's Indigenous People*, Res. 52/108, 18 February 1998, para. 6. The Decade ended on December 10, 2004. A Second International Decade of the World's Indigenous People was proclaimed by the General Assembly to begin on January 1, 2005.

[26] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", Joint Submission to the Office of the High Commissioner for Human Rights, Geneva, March 2004.

[27] The lack of political will among States in matters relating to racial discrimination is a recurring problem globally. See generally U.N. Commission on Human Rights, *Report of the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action on its third session: Chairperson-Rapporteur: Mr. Juan Martabit (Chile)*, 61st Sess., E/CN.4/2005/20, 14 December 2004, (Advance edited version), p. 20, para. 73, Recommendation 25:

> **… the obstacles to overcoming racism, racial discrimination, xenophobia and related intolerance and achieving racial equality lie mainly in the lack of political will, weak legislation, and lack of implementation strategies and concrete action by States.** [bold in original]

[28] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", note 26, at para. 6.

[29] *Id*., para. R (Conclusions and Recommendations): "In regard to Indigenous peoples, the basic values and principles underlying international and domestic legal systems are not being applied fairly and in a non-discriminatory manner." See also para. 90: "Regardless of intention, the denial of Indigenous peoples' collective rights constitutes a serious and pervasive form of racial discrimination."

[30] *Id.*, at para. 86.

It is beyond the scope of this law article to address in detail all of these major issues. However, all of these matters are interrelated in various ways.

Some States object to use of the term "peoples" in seeking to deny Indigenous peoples the right of self-determination *under international law*. Some States resist use of this term in the draft *U.N. Declaration*, since they are not in favour of recognizing Indigenous peoples' collective rights, or they seek assurance that collective rights will not be characterized as human rights. Some States oppose Indigenous peoples' land and resource rights if they constitute collective rights, or rights linked to self-determination under Art. 1 of the international human rights Covenants.

Generally, these prejudicial positions serve to severely impede progress within the WGDD and have little or no legitimacy. In seeking to create different and lesser standards for Indigenous peoples than exist for other peoples, the States concerned are engaging in forms of racial discrimination.

In examining adverse strategies and arguments by certain States, this article will focus on Indigenous peoples' rights to lands, territories and resources. Full enjoyment and exercise of these rights are critical to the survival and well-being of Indigenous peoples. However, in order to appreciate the various dimensions of this central issue, it is necessary to first examine the broader context of Indigenous peoples' international human rights. The issue of lands, territories and resources clearly encompasses other key matters referred to above, namely, use of the term "peoples", the collective rights of Indigenous peoples and the right of self-determination.

In considering the land and resource rights of Indigenous peoples and the opposition of certain States, this article will devote due attention to the positions of the United Kingdom.[31] First, as will be demonstrated, the UK positions are highly inflexible and discriminatory. They serve to severely impair the integrity of Indigenous peoples' basic rights. If adopted, these positions could have widespread impacts on the status, rights, legal systems and worldviews of Indigenous peoples.

Second, current UK positions give rise to a number of basic concerns that need to be addressed if the participants of the WGDD are to make substantial progress. We are assuming here that the mandate of the WGDD will be extended at the next session of the UNCHR in April 2005 for at least another year. Third, the present UK positions are impeding the possibility of more enlightened human rights positions being taken within

[31] This article largely relies upon the Indigenous positions elaborated in two major Joint Submissions, in which the Grand Council of the Crees (Eeyou Istchee) had a lead role. These Submissions are: 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; and Grand Council of the Crees (Eeyou Istchee) *et al.*, "Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", note 26, *supra*.

the European Union. Indigenous peoples in many countries may be significantly affected by the policies adopted by EU States.[32]

Fourth, a democratic State, such as the UK, cannot credibly urge others to respect and promote human rights, if it refuses or fails to uphold its own legal obligations in this context. In our respectful view, such actions serve to undermine the international human rights system as a whole.

In summary, this article will examine the following key aspects:

i) International duties to respect and promote human rights;
ii) Significance of Indigenous peoples' collective rights;
iii) Indigenous peoples' collective rights as human rights;
iv) Indigenous peoples as self-determining peoples;
v) Indigenous peoples' rights to lands, territories and resources;
vi) "Free, prior and informed consent" – a crucial international standard;
vii) Impacts of "individualizing" collective rights in Indigenous territories;
viii) Principle of territorial integrity – State and Indigenous aspects; and
ix) Need to eliminate State discrimination.

I. International duties to respect and promote human rights

In the context of the U.N. standard-setting process, Indigenous peoples globally have repeatedly emphasized that the human rights norms in the draft *U.N. Declaration* must be consistent with international law and its progressive development.[33] In striving to ensure that their fundamental rights are clearly embraced by the international human rights system, Indigenous representatives have underlined the duties of the U.N. and Member States to uphold the Purposes and Principles of the *U.N. Charter*:

[32] In relation to human rights, see for example, *Cotonou Agreement* (Partnership agreement between the members of the African, Caribbean and Pacific Group of States of the one part, and the European Community and its Member States, of the other part), signed in Cotonou on 23 June 2000, 2000/483/EC, Official Journal L 317, 15/12/2000 P. 0003 – 0353. Many of the 78 States that are currently in the ACP Group include Indigenous peoples.

[33] In regard to the "progressive development of international law", see for example, *Charter of the United Nations*, Can. T.S. 1945 No. 76; [1976] Yrbk. U.N. 1043; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945; entered into force on October 24, 1945, Art. 13, para. 1a:

> The General Assembly shall … make recommendations for the purpose of:
> a. promoting international cooperation in the political field and encouraging the progressive development of international law and its codification …

> The Purposes and Principles of the *U.N. Charter* require actions "promoting and encouraging respect"[34] for human rights and not undermining them. The duty to promote respect for human rights is to be based on "respect for the principle of equal rights and self-determination of peoples"[35].[36]

Clearly, the U.N. and its Member States[37] have no authority to weaken the human rights of Indigenous peoples under international law and thereby create a double standard.[38] The international obligation to respect human rights is of an *erga omnes* character. An *erga omnes* obligation is a duty that is binding upon all States.[39] In addition, it is an obligation

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[34] *Charter of the United Nations*, Art. 1, para. 3: "The Purposes of the United Nations are: … 3. To achieve international cooperation … in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion …"

[35] *Id.*, Art. 55, para. c:

> With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:
> …
> c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

[36] 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.

[37] *Charter of the United Nations*, Art. 2, para. 2:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
> …
> 2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.

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

[38] See also *Charter of Paris for a New Europe, A New Era of Democracy, Peace and Unity*, November 21, 1990, *reprinted in* (1991) 30 I.L.M. 190: " … non-compliance with obligations under the Charter of the United Nations constitutes a violation of international law."

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

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

owed to the international community as a whole.[40] The duty to respect human rights is also said to be a peremptory norm or *jus cogens*.[41]

In relation to both Indigenous peoples and individuals,[42] the creation of discriminatory double standards based on race would be a violation of international law, including the Purposes and Principles of the *U.N. Charter*.[43] It would also be a violation of the peremptory norm that prohibits racial discrimination.[44] According to the Inter-American Commission on Human Rights, "the principle of non-discrimination is a particularly

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[40] 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.

[41] A. Cassese, *International Law* (Oxford/N.Y.: Oxford University Press, 2001), at 110-111: "The principle on *respect for fundamental human rights* also belongs to the category of *jus cogens*."

See also 424, n. 52: "Various delegates stated that the rules of international law protecting fundamental rights belong to *jus cogens*. See … United Nations Conference on the Law of Treaties, First Session (Vienna, 26 March – 24 May 1968), *Official Records*, at 323, para. 22 (statement by representative of Canada)."

South West Africa Case (Second Phase), [1966] I.C.J. Rep. 6, at p. 298: "...surely the law concerning the protection of human rights may be considered to belong to the *jus cogens* …"

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

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

[43] R. Wolfrum, "Article 56" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 793, at p. 795:

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

[44] 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.

significant protection that permeates the guarantee of all other rights and freedoms under domestic and international law".[45]

Thus, States could not validly agree to create discriminatory norms in a new Declaration on the rights of Indigenous peoples or other U.N. instrument. Clearly, in such a situation, the obligations of Member States under the *U.N. Charter* would prevail over those in any other international agreement.[46] In regard to the *Charter*[47] or other international instruments, legal obligations must be fulfilled in good faith.[48]

Despite the essential international legal obligations of States enshrined in the *U.N. Charter* and in peremptory norms, a number of States participating in the WGDD show little regard for these binding commitments. Indigenous peoples have expressed their concern regarding this unacceptable conduct and its consequences in the following terms:

> … in the UNCHR Working Group, the UK and a number of other participating States pay little attention to the Purposes and Principles of the *U.N. Charter*. They also show little respect for their *erga omnes* obligations relating to the right of self-determination and the prohibition against racial discrimination.

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[45] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize*,* Case No. 12.053, Report No. 96/03, 24 October 2003, para. 162.

See also Committee on the Elimination of Racial Discrimination, *General Recommendation XIV (42) on article 1, paragraph 1*, (Forty-second session, 1993) (contained in document A/48/18), para. 1: "Non-discrimination, together with equality before the law and equal protection of the law without any discrimination, constitutes a basic principle in the protection of human rights."

[46] *Charter of the United Nations*, Art. 103: "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

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

[47] *U.N. Charter*, Art. 2, para. 2. See also *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. … Where obligations arising under international agreements are in conflict with the obligations of Members of the United Nations under the Charter of the United Nations, the obligations under the Charter shall prevail."

[48] *Nuclear Tests (Australia v. France)*, [1974] I.C.J. Rep. 253 (Merits), at p. 267: "One of the basic principles governing the creation and the performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming essential.

See also *Vienna Convention on the Law of Treaties*, note 46, *supra*, Art. 26 : "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

> This ongoing, illegitimate conduct has been a major contributor to the lack of progress on the draft *U.N. Declaration* within the UNCHR Working Group. Clearly concrete and effective measures are required by the United Nations, in terms of ensuring the proper functioning of the current standard-setting process and upholding the *U.N. Charter* and its most basic precepts.[49]

Examples of this recurring problem are included later in this article. Prior to highlighting the rights of Indigenous peoples to lands, territories and resources, it is necessary to highlight the significance of the collective rights of Indigenous peoples.

II. Significance of Indigenous peoples' collective rights

It is widely recognized that Indigenous rights are predominantly collective in nature. This is profoundly reflected in the cultures, identities, worldviews, and legal systems of Indigenous peoples and nations. Indigenous individuals often exercise rights that flow from these collective rights.[50] Therefore, protection of and respect for collective rights is also a vital factor for the enjoyment of basic rights by Indigenous individuals.

As highlighted in the draft *U.N. Declaration*,[51] Indigenous peoples and individuals are free and equal to all other peoples and individuals in dignity and rights. This is consistent with equality, non-discrimination and other human rights principles.

It is important to emphasize here that principle of respect for human dignity is intimately related to respect for human rights.[52] This universal principle is said to be the *raison*

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[49] 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", note 31, *supra*, paras. 29 and 30.

[50] *Conceptual Framework Paper (2nd draft) by the Working Group on the Rights of Indigenous Peoples/Communities in Africa of the African Commission on Human and Peoples' Rights*, 20 December 2002, at p. 9: "The indigenous rights are clearly collective rights, even though they also recognize the foundation of individual human rights."

[51] Art. 2.

[52] U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General*, A/56/326, 6 September 2001, p. 36, para. 195: "All human rights — civil, political, economic, social and cultural — are comprehensive, universal and interdependent. They are the foundations that support human dignity, and any violations of human rights represent an attack on human dignity's very core."

See also S. Leckie, *Another Step Towards Indivisibility: Identifying the Key Features of Violations of Economic, Social and Cultural Rights*, (1998) 20 Hum. Rts. Q. 81, at p. 124: "All human rights violations, notwithstanding the perpetrator victim, or extent of the violation, must be seriously considered as acts in disregard of human dignity and the rule of law."

d'être of international human rights law.[53] It is applicable to both individuals and groups,[54] and has been explicitly linked to respect for Indigenous peoples and their collective human rights.[55]

In view of the ongoing rampant violations of the rights of Indigenous peoples and the fact that existing international human rights instruments largely have an individual-rights orientation, it is urgent that a strong and uplifting Declaration be adopted to explicitly elaborate the collective rights of these peoples worldwide.[56] In this way, respect for the dignity of Indigenous peoples may also be significantly strengthened.

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[53] *Prosecutor* v. *Furundžija*, International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, judgment of 10 December 1998, para. 183: "The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law."

[54] *Declaration on Race and Racial Prejudice*, note 42, *supra*, Art. 9, para. 1.

See also *Law* v. *Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 (Supreme Court of Canada) at p. 530, para. 53: "Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. … Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."

[55] I. Cotler, "Human Rights Advocacy and the NGO Agenda", note 3, *supra*, at p. 81: "A fourth issue – which really goes to the question of human dignity in a very existential sense – is that of *aboriginal rights*. … And aboriginal rights involve both collective rights and individual rights. I am speaking of those rights which in fact give expression to the human dignity of aboriginal peoples, to their dignity as an indigenous people, and to the panoply of aboriginal rights."

See also *UNESCO Universal Declaration on Cultural Diversity***,** Resolution 25 adopted by the General Conference at its 31st session, (2001), Art. 4: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples."

[56] 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, at pp. 12-8 and 12-9:

> Like the rights in the various international human rights instruments, Indigenous rights are of a political, economic, social, cultural and spiritual nature. However, Indigenous rights are predominantly "collective". Therefore, it is necessary to elaborate Indigenous rights from an Indigenous perspective in new instruments, such as is being done in the *U.N. Declaration on the Rights of Indigenous Peoples*. This is wholly consistent with Indigenous peoples' right to be different and tolerance for difference is a fundamental international value.

See also African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, p. 75: "The overall conclusion is that indigenous peoples and communities in Africa suffer from a number of particular human rights violations that are often of a collective nature …"

Yet within the context of the U.N. standard-setting process, some States are still challenging the collective nature of Indigenous peoples' rights and their human rights quality. Certain States, such as the Netherlands, United Kingdom, France[57] and Belgium, are of the view that Indigenous collective rights are not human rights.

While some States choose not to vocalize their disagreement, the United Kingdom has indicated its strong refusal to recognize Indigenous peoples' collective rights:

> With the exception of the right to self-determination (which forms article one of the two international covenants on human rights), we do not accept the concept of collective rights. … Of course certain rights belonging to individuals can often be exercised collectively through, for example, freedom of association, freedom of religion or through a collective title to property.[58]

It would appear that the UK opposes the very notion of collective rights under international law – regardless of whether these rights are considered as human rights.[59] This position rests on highly questionable and erroneous premises. First, the statement that the UK government has a "long-held" position that does not accept the concept of collective rights in international law is contradicted by its own actions and history. As F. MacKay observes:

> The UK/Great Britain has long recognized collective rights in its dealings with indigenous peoples and in its colonies. This is evident in Royal Proclamations, Acts of Parliament, numerous treaties with indigenous peoples, decisions, including recent ones, of the Law Lords and Judicial

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[57] In terms of Indigenous peoples' dignity and human rights, it does not appear that French government representatives have taken positions within the WGDD that are consistent with those expressed by the President of France. See, for example, J. Chirac, "Speech by M. Jacques Chirac, President of the Republic, at the Reception in Honour of the Amerindian Peoples", Paris, 23 June 2004, available at www.france.diplomatie.fr:

> From generation to generation, despite foreign domination, despite ostracism and stigmatization, your peoples have sustained the memory of those ancient times and preserved your languages, traditions, way of life and memory. You are the children of those nations, determined to remain faithful to their heritage and to regain a dignity denied you by past centuries.
>
> *France is moved by your fate. … it is time for the particularity and dignity of your nations to be affirmed and protected under international law*. [emphasis added]

[58] United Kingdom (Foreign and Commonwealth Office), *Human Rights: Annual Report 2004* (London: 2004), at p. 212.

[59] See also H. Whall, "Indigenous Self-Determination in the Commonwealth of Nations", note 5, *supra*, at p. 15: "The UK position is that human rights are individual rights and that there cannot be scope for collective rights in international law. According to the UK, recognising the concept in international law could lead to a weakening of the responsibility of states to protect the individual rights of their citizens."

> Committee of the Privy Council, colonial ordinances and general colonial policy.[60]

In regard to the treaties that it signed prior to 1948, the UK has recently dismissed their human rights significance:

> As for the treaties in the 18th and 19th centuries, the Foreign Office insists that they have no relevance to international human rights law, which began with the 1948 universal declaration of human rights.[61]

To suggest that treaties signed prior to 1948 have "no relevance to international human rights law" is a serious misstatement[62] that has far-reaching implications. International human rights law is relevant to a wide range of situations involving human rights considerations. In the case of *Mary and Carrie Dann v. United States*, the Inter-American Commission on Human Rights concluded that, in regard to human rights issues pertaining to Indigenous peoples, it was necessary to review their particular historical context as well as relevant treaties, legislation and jurisprudence that developed over more than 80 years.[63]

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[60] F. MacKay, "The UN Draft Declaration on the Rights of Indigenous Peoples and the Position of the United Kingdom", Submission to the Government of the United Kingdom, London, 26 May 2003, at pp. 14-15.

[61] See Owen Bowcott, "A Tribal Quest", *The Guardian* (15 December 2004), Section G2, p. 13.

[62] B. Ramcharan, "Opening statement by Bertrand Ramcharan, Acting High Commissioner for Human Rights", Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, organized by OHCHR, Geneva, 15-17 December 2003:

> … despite their historic character – in many cases signed or otherwise agreed upon over a century ago – treaties remain for some indigenous peoples the core of their sense of identity and determine the relationship they have with the State. *These historic treaties are thus of contemporary human rights significance.* [emphasis added]

C. Charters, "Report on the Treaty of Waitangi 1840 Between Maori and the British Crown", Background paper, Expert Seminar on Treaties, Agreements and Other Constructive Arrangements Between States and Indigenous Peoples, organized by OHCHR, Geneva, 15-17 December 2003, HR/GENEVA/TSIP/SEM/2003/BP.15, p. 11:

> The New Zealand Human Rights Commission has the statutory function to promote by research, education, and discussion a better understanding of the human rights dimensions of the TOW [Treaty of Waitangi] and their relationship with domestic and international human rights law. It has produced a *Draft Discussion Document on Human Rights and the Treaty of Waitangi: Te Mana I Waitangi*, which forms the basis of nation-wide consultation on, as the title suggests, the relationship between the TOW and human rights.

[63] I/A Comm. H.R., *Mary and Carrie Dann v. United States*, Case Nº 11.140, Report No. 113/01, para. 125:

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

For example, as highlighted in the February 2002 Report of the U.N. Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Rodolfo Stavenhagen), "land, territory and resources together constitute an essential human rights issue for the survival of indigenous peoples".[64] These human rights considerations are not nullified simply because they are based, at least in part, on historical treaties that were entered into prior to 1948.[65] Rather, in relation to Indigenous peoples and their fundamental rights, a contextual approach is always required that includes consideration and respect for their heritage, distinctiveness, values, history and treaty rights.[66]

In addition, it is inaccurate and confusing for the UK government to state that "certain rights [such as collective title to property] belonging to individuals can often be exercised collectively, in community with others". Both domestic courts[67] and international bodies[68] have already determined that Indigenous land rights and titles are held by the Indigenous peoples, nations or other groups concerned.

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[64] 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, submitted pursuant to Commission resolution 2001/57*, E/CN.4/2002/97, 4 February 2002, p. 18, para. 57.

[65] P. Joffe & W. Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms", note 56, *supra*, at p. 12 –14:

> While each treaty should be examined on its own merits, it may at least be generally concluded that, to a large degree, Indigenous peoples' treaty rights are also human rights. Their treaties often entail a wide range of human rights considerations. Whether in general or specific terms, Indigenous peoples' treaties constitute an elaboration of arrangements relating to the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned. These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals.

[66] *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 (Supreme Court of Canada), para. 54 (L'Heureux-Dubé J.:

> … the contextual approach to s. 15 [of the *Canadian Charter of Rights and Freedoms*] 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.

[67] See, for example, *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010 (Supreme Court of Canada), 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."

See also *R.* v. *Sparrow*, [1990] 1 S.C.R. 1075, at p. 1078: "Fishing rights are not traditional property rights. They are held by a collective and are in keeping with the culture and existence of the group."

[68] See, for example, I/A Court H.R., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001, Ser. C No. 76 (2001), at para. 149:

> *Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups*, by the fact of their very

Yet this does not mean that Indigenous persons are "left vulnerable and without protection". Indigenous individuals have rights that flow from Indigenous peoples' collective rights.[69] Further, should certain citizens or members of an Indigenous nation or people be arbitrarily deprived of exercising Indigenous rights, such as hunting, fishing or gathering, principles of equality and non-discrimination would generally apply.

The UK government perceives the collective rights of Indigenous peoples as a threat to the individual human rights of Indigenous persons globally.[70] This view is highly discriminatory. It presumes, *in the absence of any particular context*, that the collective rights of Indigenous peoples will undermine or conflict with the rights of Indigenous individuals.[71] However, the promotion of human rights and values generally enriches societies. Equal recognition of the collective human rights of "peoples" cannot in itself constitute a violation of the rights of "individuals".[72]

> existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. [emphasis added]

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

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

[70] H. Whall, "Indigenous Self-Determination in the Commonwealth of Nations", note 5, *supra*, at p. 15: "While the UK remained silent on the issue of Article 3 at the first session of the WGDD [in 1995], it did express its reluctance to recognise the concept of indigenous collective rights on the grounds that this could challenge or override internationally recognised individual rights."

It is difficult to take seriously the UK's alleged concern for the human rights of Indigenous persons. In the early 1900s, the British entered into so-called "fake treaties" with the Maasai in order to dispossess them of their ancestral territories. See African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, *supra*, at p. 16:

> The famous fake treaties signed between the British and Maasai in 1904 and 1911 to evict the Maasai from their best land to make room for colonial settlers have never been settled.

[71] *Cf.* A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, (1993) 3 Transnat'l L. & Contemp. Probs. 89, at p. 108: "… the indigenous peoples' movement's emphasis on collective rights, including collective land rights, enriches, rather than undermines, international human rights law."

[72] In Canada see also *Reference re Same-Sex Marriage*, [2004] S.C.J. No. 75, 2004 SCC 79 (Supreme Court of Canada), online:QL, para. 46: "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another. The promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster."

The government's view also assumes that individual rights must always prevail over the collective rights of Indigenous peoples. This would not allow for possible balancing to occur between collective and individual rights that should be based on the particular facts in any given case.

In any human rights dispute, should it arise, a "contextual analysis" would take place based on the particular facts and law in a specific situation. This is the fair and just approach that is generally accepted under both international[73] and domestic[74] law. It would be highly unjust and discriminatory to try and resolve any and all conflicts in the future, by determining in the draft *U.N. Declaration* that the rights of individuals must always prevail.[75]

It is worth noting that, in regard to the draft *U.N. Declaration*, the UK and other States are insisting on broad and vague general powers to limit the rights of Indigenous peoples and individuals. Therefore, it is curious that the UK would seek in effect to deprive Indigenous nations or governments – or even the courts – from balancing if necessary in a given situation the exercise of collective and individual human rights.

The UK government view also seriously devalues, if not wholly denies, the critical role and significance of collective rights[76] in Indigenous communities and nations. This has

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[73] 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. This balance means that the geopolitical context of the right being claimed – the particular historical circumstances – and the present constitutional order of the State and of international society, is acknowledged and addressed.

[74] *Corbière* v. *Canada (Minister of Indian and Northern Affairs)*, note 66, *supra*, para. 54:

> … the contextual approach to s. 15 [of the *Canadian Charter of Rights and Freedoms*] 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.

See also *Reference re Same-Sex Marriage*, note 72, *supra*, at para. 50: "*The collision between rights must be approached on the contextual facts of actual conflicts.* The first question is whether the rights alleged to conflict can be reconciled: ... Where the rights cannot be reconciled, a true conflict of rights is made out. In such cases, the Court will … go on to balance the interests at stake …" [emphasis added]

[75] *MacKay v. Manitoba*, [1989] 2 S.C.R. 357 (Supreme Court of Canada), at p. 361:

> *Charter* decisions [concerning human rights] should not and must not be made in a factual vacuum. To attempt to do so would trivialize the *Charter* and inevitably result in ill-considered opinions. The presentation of facts is not, as stated by the respondent, a mere technicality; rather, it is essential to a proper consideration of *Charter* issues.

[76] S. Weissner, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" (1999) 12 Harv. H. Rts. J. 57, at p. 121:

> … recognition [of collective rights] is indispensable in order to effectuate a workable system of protection of indigenous traditions and ways of life. To "individualize" these rights would frustrate the purpose they are supposed to achieve. Culture is a group phenomenon. It includes the

been vividly communicated by Indigenous representatives to Prime Minister Tony Blair in the following terms:

> Our collective rights are essential for the integrity, survival and well-being of our distinct nations and communities. They are inextricably linked to our cultures, spirituality and worldviews.[77] … [C]ollective rights are also critical to the effective exercise and enjoyment of the rights of Indigenous individuals.
>
> Failure to recognize and respect our collective human rights threatens our collective security[78], perpetuates our impoverishment and undermines a vast range of our other rights as self-determining peoples[79].[80]

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tribal ways of life and the natural and spiritual environment in which these traditions are maintained and developed. Prescriptions aiming at preserving such phenomena assume, of necessity, a collective character.

[77] See also F. MacKay, "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review", Forest Peoples Programme, 28 June 2004, available at http://forestpeoples.gn.apc.org/, at p. 17:

> For indigenous peoples, secure and effective collective property rights are fundamental to their economic and social development, to their physical and cultural integrity, and to their livelihoods and sustenance. Secure land and resource rights are also essential for the maintenance of their worldviews and spirituality and, in short, to their very survival as viable territorial and distinct cultural collectivities.

[78] Conference on Security and Co-operation in Europe, *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. Neglect of these rights has, in severe cases, contributed to extremism, regional instability and conflict.

[79] Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, Vol. I (*The World Bank Group and Extractive Industries*), December 2003, available at: http://www.eireview.org/eir/eirhome.nsf/be65a087e9e6b48085256acd005508f7/75971F6A8E5111385256DE80028BEE2?Opendocument, at p. 40

> For indigenous peoples, secure, effective, collective ownership rights over the lands, territories, and resources they have traditionally owned or otherwise occupied and used are fundamental to economic and social development, to physical and cultural integrity, to livelihoods and sustenance. *Secure rights to own and control lands, territories, and resources are also essential for the maintenance of the worldviews and spirituality of indigenous peoples – in short, to their very survival as viable territorial communities. Without secure and enforceable property rights, indigenous peoples' means of subsistence are permanently threatened.* Loss or degradation of land and resources results in deprivation of the basics required to sustain life and to maintain an adequate standard of living. Failure to recognize and respect these rights undermines efforts to alleviate indigenous peoples' poverty and to achieve sustainable development.

[80] 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", note 31, *supra*, paras. 46 and 47.

In view of growing criticisms, the UK government may have somewhat altered its position. On December 2, 2004, at the WGDD in Geneva, the UK government tabled the following amendment to the preamble of the draft *U.N. Declaration*:

> Recognising and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognised in international law, and that indigenous peoples are possessed collectively of other rights which are indispensable for their existence, well-being and integral development as peoples.[81]

While the UK government now proclaims that the collective rights of Indigenous peoples are "indispensable for their existence, well-being and integral development as peoples", the above proposal still seeks to ensure that these collective rights will not be characterized as human rights. This issue is examined under the sub-heading below.

III. Indigenous peoples' collective rights as human rights

It is important that the international community recognizes and respects *all* human rights.[82] It is generally recognized internationally that the principles of democracy, rule of law and respect for human rights are profoundly interrelated,[83] and commitments have

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[81] United Kingdom, "UK Statement on Issue of Collective Rights", UN Working Group on a Draft Declaration on the Rights of Indigenous Peoples, Geneva, 2 December 2004. This UK Statement also explains: "We also want to be clear that there is no question in our mind of seeing collective rights for indigenous peoples as second-rate rights. On the contrary, we recognise that they are crucial to the very existence and integrity of indigenous peoples as distinct peoples, and provide the political, social, economic and cultural context within which indigenous people can best enjoy their human rights."

See also *Proposed American Declaration on the Rights of Indigenous Peoples*, OEA/Ser/L/ V/.II.95, Doc. 6, 26 February 1997 (approved by the Inter-American Commission on Human Rights on February 26, 1997, at its 95th regular session, 1333rd meeting), Art. II, para. 2: "Indigenous peoples have the collective rights that are indispensable for full enjoyment of the individual human rights of their members."

[82] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), reprinted in (1993) 32 I.L.M. 1661, para. 4:

> The promotion and protection of *all human rights* and fundamental freedoms must be considered as *a priority objective of the United Nations* in accordance with its purposes and principles, in particular the purpose of international cooperation. [emphasis added]

[83] U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General*, note 52, *supra*, p. 8, para. 15: "The rule of law is ultimately enforced through the application of democratic principles and international human rights and humanitarian norms."

Treaty on European Union, February 7, 1992, Maastricht, O.J. No. C191/1 (1992), reprinted in 31 Int. Leg. Mat. 247, Art. 6, para. 1: "The [European] Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States."

been made by States to recognize *all* human rights.[84] In the global Indigenous context, this would include the collective rights of peoples and not only the rights of individuals. As R. Saganash explains:

> … Indigenous rights are human rights and are treated as such by the United Nations and its various treaty bodies. Our fundamental rights are clearly of an economic, social, cultural, spiritual and political nature. These same classes of rights are addressed in the two international human rights Covenants. *In relation to Indigenous peoples, these types of rights cannot suddenly lose their human rights quality simply because of their crucial collective dimensions.*[85]

While Prime Minister Tony Blair publicly speaks of fairness and how Britain must promote the human rights of "all peoples … wherever they are",[86] this is clearly not UK policy in relation to Indigenous peoples. Rather, the UK government relies upon a

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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 ... This is not only a political matter."

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

> The 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).

[84] *United Nations United Nations Millennium Declaration*, U.N. Doc. A/RES/55/2, 8 September 2000, para. 24: "We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development."

Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, U.N.G.A. Res. 53/144, U.N. Doc. A/RES/53/144, 8 March 1999, Annex, Art. 2, para. 1: "Each State has a prime responsibility and duty to protect, promote and implement all human rights and fundamental freedoms …"

[85] R. Saganash, "Lands, Territories and Resources: Indigenous Peoples' Human Rights and State International Obligations", paper presented at the Meeting of Indigenous Representatives with European States, United Nations, Geneva, April 6-7, 2004, p. 3. [emphasis added]

[86] T. Blair, "PM warns of continuing global terror threat", 05 March 2004, http://www.number-10.gov.uk/output/Page5461.asp: "Britain's role is try to find a way … to construct a consensus behind a broad agenda of justice and security and means of enforcing it. [new para.] *This agenda must be ... fair to all peoples by promoting their human rights, wherever they are.*" [emphasis added]

number of dubious factors or presumptions to conclude that Indigenous peoples do not possess collective human rights under international law.

These factors include: the collective rights of Indigenous "populations" are granted by national governments[87]; nationally granted collective rights must remain distinct from individual human rights under international law;[88] collective human rights do not exist in the core international human rights treaties, except for the right of self-determination;[89] human rights obligations developed over the last half century require states to treat individuals, rather than groups of people, in accordance with international standards;[90] the draft *U.N. Declaration* "seeks to create new collective human rights, specific to indigenous people";[91] and based on the principle of equality, it is unacceptable that some groups should benefit from human rights that are not available to others;[92]

With respect, all of the above reasons for denying Indigenous peoples full and just recognition of their collective rights as human rights are misleading and inaccurate. First,

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[87] United Kingdom (Foreign and Commonwealth Office), *Human Rights: Indigenous people*, http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1086624724300: "The UK recognises that the governments of many states with indigenous populations have granted them various collective rights at the national level in their constitutions, national laws and agreements."

[88] *Id.*: "… it is important that these [collective] rights bestowed nationally remain distinct from individual human rights, enjoyed by indigenous people and all others, which are founded in international law and which provide proper protection to the individual."

See also UK statement issued by the Foreign and Commonwealth Office to the British Broadcasting Corporation (BBC) (communication received by the authors from Survival International, London, 1 December 2004):

> *We welcome agreements by governments to grant their indigenous populations collective rights at national level*, and are fully ready to reflect this in the Declaration. But the UK stands by the fundamental principle that human rights are universal and equal for all. We do not accept that there can be a "two-tier" international human rights system in which some groups in society benefit from human rights that are not available to others. *Collective rights for indigenous people need to remain distinct from individual human rights founded in international law*. [emphasis added]

[89] United Kingdom (Foreign and Commonwealth Office), *Human Rights: Annual Report 2004* , note 58, *supra*, at p. 212:

> With the exception of the right to self-determination (which forms article one of the two international covenants on human rights), we do not accept the concept of collective rights.

[90] *Id.*: "Human rights obligations negotiated and developed over the last half century require states to treat individuals, rather than groups of people, in accordance with international standards."

[91] United Kingdom (Foreign and Commonwealth Office), *Human Rights: Indigenous people*, note 87, *supra*.

[92] *Id.*: "As equality is one of the fundamental principles underpinning human rights, we do not accept that some groups in society should benefit from human rights that are not available to others."

collective rights are not held by "Indigenous populations" or "people",[93] but by the "peoples" concerned. Nor are collective rights "granted" by national governments. The collective rights of Indigenous peoples have existed for centuries.[94] They are inherent[95] and, like other human rights, are inalienable.[96] In Canada, the Supreme Court of Canada

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[93] See also Letter, dated 13 January 2005, from the Foreign and Commonwealth Office (Ms. Judith Mann) to Grand Chief Dr. Ted Moses (on file with Grand Council of the Crees (Eeyou Istchee)), where FCO only uses the term "people" and does not use the term "peoples" except in quotation marks:

> Thank you for your letter of 15 December 2004 to the Prime Minister about the UN draft declaration on the rights of indigenous *people*. [emphasis added]

L. Frechette, "Permanent Forum is Milestone in Struggle for Rights of Indigenous Peoples, Says Deputy Secretary-General", address by Deputy Secretary-General Louise Fréchette to the first session of the Permanent Forum on Indigenous Issues in New York, DSG/SM/160, HR/4590, 13 May 2002, p. 2: "… all too often, governments have resisted the use of the word "peoples", with an "s". Instead they have preferred the singular, so as to avoid recognizing collective rights."

[94] *Delgamuukw* v. *British Columbia*, note 67, *supra*, para. 126: "…aboriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law."

[95] Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 8: "The Committee … recommends that the practice of extinguishing *inherent aboriginal rights* be abandoned as incompatible with article 1 of the Covenant." [emphasis added]

See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples (*Ottawa: Canada Communication Group, 1996), vol. 5, at pp. 1-2: "At the heart of our recommendations is recognition that Aboriginal peoples *are* peoples, that they form collectivities of unique character … *They are entitled to control matters important to their nations without intrusive interference. This authority is not something bestowed by other governments. It is inherent in their identity as peoples.*" [emphasis added]

[96] See, generally, P. Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec", (2000) 45 McGill L.J. 155, at pp. 182-188 (Aboriginal rights as inalienable human rights).

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, Rodolfo Stavenhagen, Addendum: Mission to Canada*, E/CN.4/2005/88/Add.3, 2 December 2004, p. 3 (Summary):

> The Special Rapporteur recommends, inter alia, … that it be clearly established in the text and spirit of any agreement between an aboriginal people and a government in Canada that no matter what is negotiated, the inherent constitutional rights of aboriginal peoples are inalienable and cannot be relinquished, ceded or released …

has clearly ruled that the collective rights of Indigenous peoples are pre-existing[97] and are not dependent for their existence on any law or executive instrument.[98]

Second, there is no justification for creating any separate category for Indigenous peoples' collective rights that would be distinct from the individual human rights of Indigenous persons or from international human rights law itself. As previously indicated in this article, individual rights often flow from Indigenous peoples' collective rights.[99] Further, as even the UK has conceded, the right of self-determination is a collective human right[100] and an integral part of both international human rights Covenants.[101] Thus, international human rights law is not restricted to individual rights and Indigenous peoples' collective rights should not be segregated from it.

Third, it is incorrect to for the UK to state that the right of self-determination is the sole collective human right that exists in international law. Nor is there justification for the UK to virtually restrict its analysis to the core international human rights instruments,

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[97] *Roberts* v. *Canada*, [1989] 1 S.C.R. 322, at p. 340: " … aboriginal title pre-dated colonization by the British and survived British claims of sovereignty …". See also *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, online: QL (S.C.C.), para. 20: "Treaties serve to reconcile pre-existing Aboriginal sovereignty with assumed Crown sovereignty, and to define Aboriginal rights guaranteed by s. 35 of the *Constitution Act, 1982*."

[98] *Calder* v. *A.G. British Columbia*, [1973] S.C.R. 313 at p. 390: "The aboriginal Indian title does not depend on treaty, executive order or legislative enactment." Similarly, in regard to New Zealand, see 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, p. 103.

[99] *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States,* Geneva, Switzerland, 16-20 January 1989, U.N. Doc. E/CN.4/1989/22, 8 February 1989, Conclusions, p. 8, para. (iv): "The effective protection of individual human rights and fundamental freedoms of indigenous peoples can not be fully attained without the recognition of their collective rights …"

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

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

[100] 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. 11: " … it is certain that self-determination is now a human right in international law".

[101] See Art. 1 of the *International Covenant on Civil and Political Rights*, G.A. Res 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 52, U.N. Doc. A/6316, Can. T.S. 1976 No. 47 (1966). Adopted by the U.N. General Assembly on December 16, 1966 and entered into force March 23, 1976; and the *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200 (XXI), 21 U.N. GAOR, Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966); Can. T.S. 1976 No. 46 (entered into force 3 January 1976, accession by Canada 19 May 1976).

since other important sources exist.[102] Other recognized collective human rights under international law include: the right of peoples and other groups to not be subjected to genocide;[103] and the right to development,[104] among others.[105]

Also, in the context of various human rights treaties and other instruments, collective human rights are being addressed. For example, the rights of "groups" are explicitly contemplated in such general instruments as the *International Convention on the Elimination of All Forms of Racial Discrimination*.[106] In addition, international human rights bodies are accommodating collective rights within existing human rights

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[102] A. Cassese, *International Law*, note 41, *supra*, at p. 149:

> Custom and treaties constitute the two most important sources of international law. … There are other sources to which [Article 38 of the *Statute of the International Court of Justice*] makes no reference, but which are nonetheless envisaged by international law and applied by the ICJ itself: unilateral acts of States creating rules, general principles of international law, and binding decisions of international organizations.

[103] M. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997), at p. 209: "Some rights are purely collective, such as the right to self-determination or the physical protection of the group as such through the prohibition of genocide …"

[104] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, Part I, para. 10: "The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights."

See also *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), Art.1, para. 1:

> The right to development is an *inalienable human right* by virtue of which *every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized. [emphasis added]

United Nations Millennium Declaration, note 84, *supra*, para. 24: "We will spare no effort to promote … respect for all internationally recognized human rights and fundamental freedoms, including the right to development."

[105] B. Boutros-Ghali, Opening Statement by the United Nations Secretary-General, "Human Rights: The Common Language of Humanity", in World Conference on Human Rights, *The Vienna Declaration and Programme of Action June 1993* UN DPI/1394-39399-August 1993-20 M, at p. 12:

> Since Article 1 of the Charter enunciated the right of peoples to self-determination, the General Assembly has proclaimed the right to a healthy environment, the right to peace, the right to food security, the right to ownership of the common heritage of mankind and, above all, the right to development.

[106] See *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, (1966) 5 I.L.M. 352. *Adopted by* U.N. General Assembly on December 21, 1965, opened for signature on March 7, 1966, and *entered into force* on January 4, 1969, where "groups" are referred to in Art. 1 (advancement, etc. of groups); Art. 2(1)(a) (prohibition against racial discrimination); Art. 4 (punishment for inciting racial discrimination); and Art. 14 (communications to CERD).

instruments.[107] However, in relation to Indigenous peoples, this does not make the existing international human rights system adequate.[108]

The term "human rights" in international law has a much broader meaning than the UK government is prepared to admit.[109] Moreover, it is erroneous to suggest that human rights obligations developed over the last half century require states to treat individuals, rather than groups of people, in accordance with international standards. For example, the *Indigenous and Tribal Peoples Convention, 1989* provides for State government obligations in relation to Indigenous peoples' human rights.[110]

It is also incorrect to state that the draft *U.N. Declaration* "seeks to create new human rights, specific to Indigenous people". By elaborating on the pre-existing and inherent[111] collective human rights of Indigenous peoples, the draft *Declaration* is at the same time

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[107] I/A Comm. H.R., *Mary and Carrie Dann v. United States*, note 63, *supra*, para. 124:

> … *in addressing complaints of violations of the American Declaration [on the Rights and Duties of Man] it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law.* Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. [emphasis added]

[108] Panel, "Are Indigenous Peoples Entitled to International Juridical Personality?" [1985] Proc. A.S.I.L. 189, at p. 191 (remarks of Howard Berman): "… the current system for the protection of human rights, centering on the relationship of the individual to the jurisdictional state, is incapable, even if fully implemented, of protecting the elements essential to the survival of indigenous societies."

[109] T.S. Orlin & M. Scheinin, "Introduction" in T.S. Orlin, A. Rosas & M. Scheinin, eds., *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach* (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 1, at p. 24:

> … the term 'human rights' refers to those rights presently found in widely existing and accepted international instruments generally recognized as human rights instruments and/or rights broadly accepted by judicial bodies and/or experts, in the form of either customary international law or *jus cogens* (a peremptory norm) in international law.

[110] *Indigenous and Tribal Peoples Convention, 1989*, I.L.O. Convention No. 169, I.L.O., 76th Sess., *reprinted in* (1989) 28 I.L.M. 1382. See, for example, Art. 2, para. 1:

> Governments shall have the responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the rights of these peoples and to guarantee respect for their integrity.

Art. 3, para. 2 refers to the rights of Indigenous peoples in this Convention as human rights: see note 130, *infra*.

[111] *U.N. Declaration on the Rights of Indigenous Peoples* (Draft), 6th preambular para., refers to "inherent" rights and not "new" rights:

> Recognizing the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources …

specifying human rights standards.[112] In the words of one author, "the Draft Declaration codifies and develops an aspect of the international law of human rights."[113] This standard-setting process is wholly consistent with international law and its progressive development.

Finally, the UK government is misconstruing the principles of universality and equality in international law. It is incorrect to assert "it is unacceptable that some groups should benefit from human rights that are not available to others". The fact that not all "groups" have the same rights does not offend universality and equality principles.[114] For example, all "peoples" have the human right of self-determination, while other groups such as "minorities" do not *per se* possess this right.[115]

In particular, it is incorrect to state that Indigenous peoples' collective human rights are inconsistent with universality. The draft *U.N. Declaration on the Rights of Indigenous Peoples*, which focuses primarily on collective rights, is intended to apply *universally* to all Indigenous peoples in all regions of the world.

In some ways, this is also similar to other human rights instruments that apply universally to all women[116], or to all children[117], or to all persons with disabilities,[118]

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[112] Netherlands Centre for Indigenous Peoples, "Impending Failure of the International Decade of the World's Indigenous People", Written statement submitted to the U.N. Commission on Human Rights, 60th Sess., E/CN.4/2004/NGO/247, 11 March 2004:

> It is important to underline that the draft *U.N. Declaration* does not "manufacture" new human rights standards. Rather, from an Indigenous Peoples' perspective, it elaborates upon international human rights law consistent with the principles of democracy, equality and non-discrimination. In this way, the *U.N. Declaration* fosters the progressive development of international law as contemplated in the *U.N. Charter* …

[113] A. Quentin-Baxter, "The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts", note 98, *supra*, at p. 87.

See also J.P. Kastrup, "The Internationalization of Indigenous Rights from the Environmental and Human Rights Perspective" (1997) 32 Tex. Int'l L.J. 97 at p. 106: "International indigenous rights may be considered as a more specific body of human rights, which target a more defined group of people and are derived from the more general body of human rights principles."

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

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

[115] D. Murswiek, "The Issue of a Right of Secession – Reconsidered" in C. Tomuschat, (ed.), *Modern Law of Self-Determination* (Boston: Martinus Nijhoff Publishers, 1993) 21, at p. 37: "Mere minorities are not subjects of the right to self-determination ... "

[116] *Convention on the Elimination of All Forms of Discrimination against Women*, 1249 U.N.T.S. 13; Can. T.S. 1982 No. 31, adopted by the General Assembly in resolution 34/180 of 18 December 1979 and entered into force on September 3, 1981.

among others,[119] so as to better achieve equality and enjoy their human rights. Human rights instruments do not have to apply to everyone in exactly the same way.[120] Rather, the principle of equality accommodates or otherwise includes the "right to be different".[121] In order to achieve equality, different peoples or people often have to be treated differently.[122]

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[117] *Convention on the Rights of the Child*, U.N. GAOR, 44th Sess., Supp. No. 49, at 166, U.N. Doc. A/RES/44/49 (1990), adopted by the General Assembly in resolution 44/25 of 20 November 1989 and entered into force on 2 September 1990.

[118] United Nations, "Human Rights Commissioner Says New Treaty Would be Further Step Towards Realizing Rights of Disabled Persons", *Press Release*, 3 December 2004, http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet: "The adoption of the new proposed convention on the rights and dignity of persons with disabilities … would, among other things, allow for tailoring the implementation of general human rights norms and standards to the particular needs of persons with disabilities."

[119] S. Gutto, "Current concepts, core principles, dimensions, processes and institutions of democracy and the inter-relationship between democracy and modern human rights", Office of the High Commissioner for Human Rights, Seminar on the Interdependence Between Democracy and Human Rights, Geneva, 25 – 26 November 2002, p. 12, para. 27:

> … specific "group rights" such as those applicable to women and children or to vulnerable "minority" populations such as "indigenous peoples", refugees and migrant workers, also form an integral part of modern human rights. This does not imply that the general norms and standards applicable to the general masses of people do not apply to groups and persons falling within the "group rights" categories. Self-determination and environmental rights are also regarded as forming part of the category of collective or group rights and solidarity rights.

[120] R. Abella, "From civil liberties to human rights: Acknowledging the differences", in K.E. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-first Century - A Global Challenge* (Dordrecht, Netherlands: Martinus Nijhoff Publishers, 1993) 61, at p. 66: "To be the same is not to be equal. To be equal is to be treated as equal based on relevant differences."

[121] *Declaration on Race and Racial Prejudice*, note 42, supra, Art. 1(2):

> All individuals and groups have the right to be different, to consider themselves as different and to be regarded as such. However, the diversity of life styles and the right to be different may not, in any circumstances, serve as a pretext for racial prejudice; they may not justify either in law or in fact any discriminatory practice whatsoever …

See also *U.N. Declaration on the Rights of Indigenous Peoples* (Draft), first preambular para.: "… indigenous peoples are equal in dignity and rights to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such …"

[122] A. Quentin-Baxter, "The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts", note 98, *supra*, p. 101:

> … we are suffering from an illusion if we think that we have always lived under a system in which the same law applies to everyone, in all circumstances. … The essence of unfair discrimination against a person on the ground of race, ethnic origin or other personal characteristic is not different treatment in itself, but different treatment which cannot be demonstrably justified in a free and democratic society. If people who share a common characteristic are affected by a difference in their circumstances, then there may be both a justification and a need for the law to take account of the difference.

In particular, the 1993 *Vienna Declaration* affirms that the principle of universality of human rights accommodates "national and regional particularities" and historical and cultural differences.[123] This is wholly consistent with the imperative of cultural diversity, which is inseparable from the human dignity of peoples.[124] Since all cultures form part of the common heritage of humankind,[125] it is unjustifiable and discriminatory[126] for the UK government to seek to exclude Indigenous peoples' collective rights from the international human rights system.

The collective and individual human rights of Indigenous peoples and individuals are interrelated and interdependent. They cannot be artificially separated, so that the individual rights dimensions are human rights and the collective rights aspects are excluded. Indigenous peoples' human rights are wholly consistent with international human rights law. As the *Vienna Declaration* confirms: "All human rights are universal, indivisible, interdependent and interrelated."[127]

These actions by the UK are especially contradictory, since the UK and other EU States have a legally binding commitment under the *Cotonou Agreement* to promote and protect "all … human rights" relating to individuals and peoples.[128] The EU States must fulfill this obligation as must other States signatories to this Agreement.

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[123] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, Part I, para. 5:

> The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. *While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.* [emphasis added]

[124] *UNESCO Universal Declaration on Cultural Diversity*, note 55, *supra*, Art. 4: "The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of … indigenous peoples."

[125] *Declaration of Principles of International Cultural Cooperation*, proclaimed by the General Conference of the United Nations Educational, Scientific and Cultural Organization, fourteenth session, 4 November 1966, Art. 1, para. 3: "In their rich variety and diversity, and in the reciprocal influences they exert on one another, all cultures form part of the common heritage of mankind."

[126] U.N. Commission on Human Rights, *Report of the Intergovernmental Working Group on the effective implementation of the Durban Declaration and Programme of Action on its third session: Chairperson-Rapporteur: Mr. Juan Martabit (Chile)*, note 27, *supra*, p. 21, para. 73, Recommendation 33:

> **In the fight against racism, racial discrimination … the legal human rights-based approach must be complemented by intellectual and cultural strategies aimed at reaffirming the value of multiculturalism within and among States, as well as respect for cultural diversity and for universal human rights.** [bold in original]

[127] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, Part I, para. 5.

[128] *Cotonou Agreement*, note 32, *supra*, Art. 9(2):

> The Parties refer to their international obligations and commitments concerning respect for human rights. *They reiterate their deep attachment to human dignity and human rights, which are legitimate aspirations of individuals and peoples.* Human rights are universal, indivisible and

International human rights law explicitly recognizes that the collective rights of Indigenous peoples constitute human rights.[129] For example, in the *Indigenous and Tribal Peoples Convention, 1989*, reference is made to the human rights of the "[Indigenous and tribal] peoples concerned".[130] It is only when the Convention specifically addresses the rights of individuals that the term "members" of the peoples concerned is used.

This ILO Convention explicitly addresses various collective human rights[131] of Indigenous peoples, including land and resource rights.[132] The Convention also obliges

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> inter-related. *The Parties undertake to promote and protect all fundamental freedoms and human rights*, be they civil and political, or economic, social and cultural. [emphasis added]

[129] I. Cotler, "Human Rights Advocacy and the NGO Agenda", note 3, *supra*, at p. 66: "...a ninth category [of human rights], one distinguishably set forth in the Canadian *Charter* – and increasingly recognized in international human rights law – is the category of *aboriginal rights*." [emphasis in original]

Declaration on Race and Racial Prejudice, note 42, *supra*, Art. 6, para. 1: "The State has prime responsibility for ensuring human rights and fundamental freedoms on an entirely equal footing in dignity and rights for all individuals and all groups."

United Nations, "Human Rights Protection a Must, UN Independent Experts Affirm on Human Rights Day", *Press Release*, 9 December 2004, Statement issued by 28 Independent Experts of the U.N. Commission on Human Rights, http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet:

> Over the years, we have witnessed the immense obstacles certain persons and groups face in enjoying their human rights fully. Among the groups most at risk and in need of protection are indigenous peoples, who have suffered perennial prejudice and discrimination.
>
> …
>
> We urge everyone, civil society, the private sector, the international community and every individual to step up efforts to promote and protect the human rights of indigenous peoples.

See also *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, where a wide range of collective rights are affirmed: Art. 19 (equality); Art. 20 (self-determination); Art. 21 (free disposal of natural resources); Art. 22 (economic, social and cultural development); Art. 23 (peace and security); and Art. 24 (satisfactory environment).

[130] *Indigenous and Tribal Peoples Convention, 1989*:

> Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. The provisions of the Convention shall be applied without discrimination to male and female *members* of these peoples. (Art. 3, para. 1)
>
> 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*. (Art. 3, para. 2) [emphasis added]

[131] See also World Commission on the Social Dimension of Globalization, *A fair globalization: Creating opportunities for all* (Geneva, Switzerland: International Labour Office, 2004), p. 107, para. 478 and accompanying footnote 90, where the Millennium Declaration goals are said to "reflect internationally agreed instruments [including this ILO Convention] which protect the basic rights of peoples" and which include "universal human rights".

[132] *Indigenous and Tribal Peoples Convention,* Arts. 13 *et seq.* See, for example, Art. 13, para. 1:

States to show "due regard" to Indigenous peoples' customs and customary laws,[133] which are recognized globally as referring to rights that are predominantly collective in nature. Under this Convention, State governments, with the participation of Indigenous peoples, have a general legal duty to "protect the rights of these peoples and to guarantee respect for their integrity".[134]

It is also worth noting that, within the United Nations, Indigenous peoples' collective rights are generally addressed in a human rights context. The WGDD that is considering the draft *U.N. Declaration*, and the WGIP that first formulated this instrument, were mandated by the U.N. Commission on Human Rights. As former U.N. Secretary-General Boutros Boutros-Ghali has affirmed:

> ... the situation of indigenous people must surely prompt us to ponder more deeply human rights as they are today. Henceforth, *we must realize that human rights are not only the rights of individuals. They are also collective rights - historic rights*.[135]

International human rights bodies also address the collective rights of Indigenous peoples in a human rights context. As the Inter-American Commission on Human Rights has underlined:

> Among the developments arising from the advancement of indigenous human rights has been recognition that rights and freedoms are frequently exercised and enjoyed by indigenous communities in a collective manner, in the sense that they can only be properly ensured through their guarantee to an indigenous community as a whole.[136]

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

[133] *Id.*, Art. 8, para. 1.

[134] *Id.*, Art. 2, para. 1.

[135] B. Boutros-Ghali, Statement to U.N. General Assembly, in "Living History: Inauguration of the 'International Year of the World's Indigenous People'", (1993) 3 Transnat'l L. & Contemp. Probs. 168, at p. 170. [emphasis added]

[136] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, note 45, *supra*, para. 112.

See also African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, *supra*, at p. 12: "Dispossession of land and natural resources is a major human rights problem for indigenous peoples."

All of the above aspects serve to reinforce the conclusion that the collective rights of Indigenous peoples constitute human rights under international law.[137] Regrettably, the UK government appears to have virtually ignored these diverse developments in human rights law.

Instead, on December 2, 2004, the governments of the UK and the Netherlands[138] apparently arranged what was intended to be a show of support among some EU States for the UK position that Indigenous peoples' collective rights are not human rights. At an informal meeting of the WGDD, certain European Union States – who rarely attend or actively participate in this standard-setting process[139] – suddenly appeared to express their opposition to collective rights being characterized as human rights. However these actions by States only serve to diminish their own credibility, since their positions remain unsubstantiated or based on erroneous premises.

IV. Indigenous peoples as self-determining peoples

In considering the central issue of Indigenous peoples as self-determining peoples under international law, there are two broad aspects to address. The first relates to which groups have the status of a "people" for purposes of self-determination. The second addresses matters relating to the right of self-determination itself.

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[137] International human rights organizations have expressed the same view. See, for example, Friends World Committee for Consultation (Quakers), the International Federation for Human Rights, and Rights and Democracy, "Human Rights of Indigenous Peoples are a Global Priority", Joint written statement, U.N. Commission on Human Rights, 61st sess., 14 March – 22 April 2005, Item 15 (Indigenous Issues), which refers to and emphasizes the "human rights of Indigenous peoples, particularly their collective rights".

[138] The Netherlands government has ratified the *Indigenous and Tribal Peoples Convention, 1989*, which recognizes the collective rights of Indigenous peoples as human rights. Also, in December 2004, the Netherlands was still the head of the European Union. Therefore, it was most disappointing to many Indigenous representatives at the WGDD that the Dutch government would ignore its international legal obligations under this ILO Convention and play such a negative role.

[139] These inactive States included the Czech Republic, Slovakia, Greece and Belgium. The regressive position taken by such States was also supported by France.

Immediately following this informal meeting, a representative of the Grand Council of the Crees (Eeyou Istchee) asked the French and Belgian government delegates how they can maintain their opposition to Indigenous peoples' collective human rights when the *Indigenous and Tribal Peoples Convention, 1989* recognizes such rights as human rights. The French delegate indicated that France was not bound by this Convention, since it has not ratified it. The Belgian delegate had never heard of this Convention, but nonetheless indicated that, if the ILO adopted it, this instrument must be labour legislation! Neither delegate offered any coherent reasoning for undermining existing Indigenous collective human rights. Neither delegate would alter her or his position.

In regard to the term "peoples" in the context of self-determination, there is no single accepted definition under international law.[140] At the same time, the United Nations generally has taken a very broad view of the term. Without being exhaustive or essential, objective elements to establish the existence of a "people" can include: common language, history, culture, race or ethnicity, way of life, and territory.[141] In addition, a subjective element is necessary, whereby a people identify itself as such.[142]

It is increasingly recognized by U.N. treaty monitoring bodies, jurists and other experts that Indigenous peoples meet both the objective and subjective criteria to constitute distinct "peoples" under international law.[143] Without exception, Indigenous peoples at the U.N. have expressed their continuing determination to identify as such.

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[140] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, note 7, *supra*, at p. 68: "There is no legal definition of *a* people. There is not even an accepted sociological or political definition of *a* people. The United Nations carefully avoided to define "people", even as it has conceded all peoples have the right of self-determination."

See also E. Stamatopoulou, "Indigenous Peoples and the U.N." (1994) 16 Hum. Rts. Q. 58: "… the United Nations in its forty-five-year-old history has not defined "minorities" nor "peoples" and the lack of definition was not crucial for its failures or successes in those domains."

[141] See, for example, Secretariat of the Int'l Commission of Jurists, *East Pakistan Staff Study*, (1972) 8 Int'l Comm. of J. 23 at p. 47.

[142] *Id.*: " … a people begins to exist only when it becomes conscious of its own identity and asserts its will to exist."

See also Y. Dinstein, *Collective Human Rights of Peoples and Minorities*, (1976) 25 Int'l & Comp. L.Q. 102 at p. 104: "Side by side with the objective element, there is also a *subjective* basis to peoplehood. It is not enough to have an ethnic link in the sense of past geneology and history. *It is essential to have a present ethos or state of mind. A people is both entitled and required to identify itself as such*." [emphasis added]

[143] 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]

R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, note 7, *supra*, at p. 8: "[I]ndigenous peoples … are not, strictly speaking, ethnic minorities at all …"

M. Tomei & L. Swepston, "Indigenous and Tribal Peoples: A Guide to ILO Convention No. 169", International Labour Office, Geneva, 1996, p. 7:

> The ILO worked for three years during the adoption of the Convention [No. 169] to decide whether or not to change the term "populations" in Convention No. 107 to the term "peoples" in the new Convention. … It was finally agreed that the only correct term was "peoples", because this term recognizes the existence of organized societies with an identity of their own rather than mere groupings sharing some racial or cultural characteristics.

In recent years, within the WGDD, the debate appears to have largely shifted from discussion of the term "peoples" to the substantive issue of the right of self-determination or collective rights. However, this is not the case for some States such as the United Kingdom and the United States.

Until their overall concerns are met, both the UK and U.S. government have respectively registered their objection to the use of the term "peoples" in relation to Indigenous peoples throughout the whole of the draft *U.N. Declaration*.[144] The UK currently describes its objections in part as follows:

> The fact that many indigenous peoples are anthropological "peoples" is clear, and is a vital part of their identity. … It is not generally accepted as a matter of international law that the right of self-determination in common Article 1 [of the two international human rights Covenants] applies to indigenous peoples per se, particularly considering that "indigenous peoples" are defined in the draft Declaration by reference to self-defining criteria.[145]

However, the draft *U.N. Declaration* does not provide that *any* people can identify itself as Indigenous. Rather, it in effect states that peoples who are Indigenous have a right to identify as such.[146]

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, note 95, *supra*, vol. 2(1), at p. 176: "For purposes of self-determination, Aboriginal peoples should be seen as organic political and cultural entities, not groups of individuals united by racial characteristics."

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

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

[144] F. MacKay, "The UN Draft Declaration on the Rights of Indigenous Peoples and the Position of the United Kingdom", note 60, *supra*, at p. 1: "The FCO [Foreign and Commonwealth Office] states that … it cannot accept … the use of the term 'indigenous peoples' in a human rights context. We believe that this position as a matter of fact, law and principle is incorrect …"

[145] Letter, dated January 16, 2005, from UK Secretary of State, Hilary Benn, to Dr. Jo Woodman, Survival International (on file with the authors).

[146] Draft *United Nations Declaration on the Rights of Indigenous Peoples*, Art. 8: "Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such."

See also N. Rouland, S. Pierré-Caps & J. Poumarède, *Droit des minorities et des peuples autochtones* (Paris: Presses Universitaires de France, 1996), at p. 434 (this capacity of self-definition permits Indigenous peoples to distinguish themselves from groups to which they have for a long time been assimilated: minorities).

While the UK concludes that many Indigenous groups clearly meet the objective anthropological criteria of "peoples", the government appears to object that Indigenous peoples have the right to identify as "Indigenous peoples".[147] Yet, this subjective criterion of "self-identification" is already recognized in international law and is essential in the self-determination context.[148] Collectivities that do not choose to identify as "peoples" would not meet the subjective criterion necessary to exercise the right of self-determination under international law.

In international law, the status of Indigenous peoples as "peoples" is not a matter that is dependent on the arbitrary discretion or political choice of States.[149] As one eminent international law expert cautions, to define the term "peoples" for international purposes "in such a way that it reflects neither normal usage nor the self-perception and identity of diverse and long-established human groups … would make the principle of self-determination into a cruel deception".[150] For States to deny Indigenous peoples the status

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[147] *Cf.* B. Kingsbury, *Whose International Law? Sovereignty and Non-State Groups*, [1994] Am. Soc. Int'l L. Proc. 1 at p. 3: "Features often associated with indigenous peoples include *self-definition*, common ethnicity, non-dominance in the state, existence in the territory or region prior to more recent arrivals who have become dominant, and particularly close connections with land." [emphasis added.]

See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, note 95, *supra*, vol. 2(1), at p. 182: "Aboriginal peoples are entitled to identify their own national units for purposes of exercising their right of self-determination. ... [A]ny self-identification initiative must necessarily come from the people actually concerned."

[148] *Indigenous and Tribal Peoples Convention, 1989*, Art. 1, para. 2: "Self-identification as indigenous or tribal shall be regarded as *a fundamental criterion* for determining the groups to which the provisions of this Convention apply." [emphasis added]

Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, United Nations Meeting of Experts, Nuuk, Greenland, 24-28 September 1991, U.N. Doc. E/CN.4/1992/42 and Add.1 at 11, para. 54: "[Indigenous peoples] constitute distinct peoples and societies, with the right to self-determination, self-government, and self-identification."

O. Schachter, "The Decline of the Nation-State and its Implications for International Law" (1997) 36 Col. J. Transnat'l L. 7, at p. 16: "Whether they are "a nation" or "a people" is seen as a matter of self-identification usually based on language, culture, and historic links to a particular territory."

[149] Similarly, States cannot deny groups their status as "minorities" if this has been factually established. See, for example, P. Thornberry, "Treatment of Minority and Indigenous Issues in the European Convention on Human Rights" 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) 137, at p. 138:

> International law insists that the existence of minorities is a question of fact, not law. What this means is that the State does not have the last word in deciding if minorities exist on its territory – this is to be decided on the basis of the factual situation.

[150] J. Crawford, "The Right of Self-Determination in International Law: Its Development and Future" in P. Alston, ed., *Peoples' Rights* (Oxford: Oxford University Press, 2001) 7, at p. 64.

of "peoples" in order to deny them the right of self-determination would be clearly discriminatory.[151]

We now turn to the second broad aspect - the right of self-determination. The right of self-determination is widely recognized as a "prerequisite" and "essential condition" for the effective enjoyment of all other human rights.[152] As confirmed by the U.N Human Rights Committee, this right of peoples is also an "essential condition" for the guarantee and observance of individual human rights.[153] In the case of the UK government, it repeatedly expresses its deep concern about, and commitment to, the human rights of Indigenous individuals.[154] Yet it has not been prepared to apply to Indigenous peoples the right of self-determination under international law.

All States, including the UK and the U.S., that have ratified at least one of the international human rights Covenants, have an affirmative legal obligation to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations".[155] All Member States have a duty to honour their affirmative obligations under the *Charter of the United Nations*,

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[151] *International Convention to Eliminate All Forms of Racial Discrimination*, Art. 1. See also C. Scott, *Indigenous Self-Determination and Decolonization of the International Imagination: A Plea*, (1996) 18 Human Rts. Q. 814, at p. 817: "The exclusion of an indigenous people from the status of being a "people" has at least the effect of creating discriminatory access to the special kind of freedom that other peoples enjoy, namely that of the human right to self-determination."

B. Butler, "Sydney Meeting: Neglecting Collective Rights is Racism" in Netherlands Centre for Indigenous Peoples (NCIV), ed., *Final Report Indigenous Peoples' Millennium Conference*, 7-11 May 2001, Panama, Republic of Panama, C.A., (Amsterdam: NCIV, 2001) 31, at p. 32:

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

[152] 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.

[153] Human Rights Committee, *General Comment No. 12, Article 1*, 21st sess., A/39/40 (1984), para. 1:

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

[154] See, for example, United Kingdom (Foreign and Commonwealth Office), *Human Rights: Indigenous people*, note 87, *supra*: "The UK is concerned that many indigenous people do not enjoy their full human rights, and is committed to helping improve this situation."

[155] See identical Art. 1, para. 3 of both international human rights Covenants.

namely, to promote universal respect for, and observance of, human rights and freedoms, based on respect for the principle of equal rights and self-determination of peoples.[156]

Indigenous peoples at the WGDD have underlined that the right of self-determination is a core element of the draft *U.N. Declaration* and that this right must be affirmed in a manner consistent with principles of equality and non-discrimination. The human right of self-determination is a democratic entitlement.[157] To apply only part of the right to Indigenous peoples or to create a new and lesser right would be discriminatory.[158]

Clearly, racial discrimination is incompatible with democracy.[159] Yet some States, including the UK and the United States, have sought to create a new and lesser right for Indigenous peoples that would be limited to "internal" self-determination. In the contemporary global context, aspects of "internal" and "external" self-determination are interrelated and interdependent.[160] In many vital ways, they are indivisible elements of

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[156] Arts. 1, 2 and 55c).

[157] T. Franck, "The Emerging Right to Democratic Governance", (1992) 86 Am. J. Int'l L. 46, at p. 52: "... *self-determination is the oldest aspect of the democratic entitlement* ... Self-determination postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement. [emphasis added]

R. Stavenhagen, "Self-Determination: Right or Demon?" in D. Clark & R. Williamson, eds., *Self-Determination: International Perspectives* (New York: St. Martin's Press, 1996) 1, at p. 8: "... the denial of self-determination is essentially incompatible with true democracy. Only if the peoples' right to self-determination is respected can a democratic society flourish ..."

[158] International Centre for Human Rights and Democratic Development, *Libertas*, Summer 2001, vol. 11, No. 1, p. 3 (quoting its then President, the Hon. Warren Allmand): "Failure to recognize indigenous peoples' right to self-determination, when this right is readily accorded to other, non-indigenous peoples, is clearly racism."

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

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

[159] U.N. Commission on Human Rights, *The incompatibility between democracy and racism*, Res. 2003/41, 23 April 2003, para. 2: "*Condemns* legislation and practices based on racism, racial discrimination, xenophobia and related intolerance as incompatible with democracy and transparent and accountable governance … "

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

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

the human right to self-determination.[161] Indigenous peoples have described the importance of external self-determination in the following terms:

> In an era of globalization, Indigenous peoples are necessarily expanding the exercise of our self-determination beyond State borders. We are substantially expanding our role in standard-setting and other international forums. We are utilizing international complaints processes. We are engaging in international relations with a wide range of State governments and Indigenous peoples. Regardless of transnational boundaries, we are using and managing our lands, territories and resources. These are positive contributions to the international community, as well as to our own nations and people. These are also essential manifestations of our external right of self-determination.[162]

Since all human rights are universally recognized as indivisible, interdependent and interrelated,[163] it undermines the integrity of human rights law to apply solely a part of the right of self-determination to Indigenous peoples.[164]

See also National Security Council (U.S.), "The National Security Strategy of the United States of America", September 2002, at p. 31: "*Today, the distinction between domestic and foreign affairs is diminishing.* In a globalized world, events beyond America's borders have a greater impact inside them." [emphasis added]

[161] F. Przetacznik, "The Basic Collective Right to Self-Determination of Peoples and Nations as a Pre-Requisite to Peace" (1990) 8 N.Y.L.Sch. J. of H. Rts. 49, at p. 55: "Both the internal and external aspects of the right to self-determination of peoples and nations are constitutive and inseparable elements of this basic collective human right."

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

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

[162] 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", note 31, *supra*, para. 136.

[163] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, para. 5.

[164] A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, note 41, *supra*, at p. 144:

> It would be artificial and illogical to argue that in the case of external self-determination the Covenants grant an international right, whilst in the case of internal self-determination this right would only exist and manifest itself within the municipal system of each Contracting State. The

It is important to emphasize that the treaty monitoring bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, have recognized Indigenous peoples as "peoples" with the right of self-determination under international law. These expert bodies have applied the right of self-determination on an equal footing to Indigenous peoples worldwide.[165] Some States such as the UK and the U.S. still choose to disregard the conclusions or rulings of the treaty monitoring bodies and refuse to fully recognize the right of Indigenous peoples to self-determination under the international human rights Covenants.[166]

As already indicated, the right of self-determination under international law is the sole collective human right that the UK claims to recognize. On November 30, 2004, at the WGDD meeting in Geneva, rather than recognize that Indigenous peoples have the right of self-determination under the international human rights Covenants, the UK government delegate announced at an informal meeting of the WGDD in Geneva that the UK was proposing to create "a new right" of self-determination for "Indigenous populations".[167] To create a new and lesser right of self-determination in relation to

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better view is that Article 1 common to the Covenants addresses itself directly to peoples, whatever the 'dimension' (internal or external) of the legal entitlement it provides for.

[165] See, for example, Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112, 5 November 1999, para. 17; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105, 7 April 1999, para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Mexico*, UN Doc. CCPR/C/79/Add.109, 27 July 1999, para. 19; Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, U.N. Doc. A/55/40, paras. 498-528, 28 July 2000 (Heading 3: Principal subjects of concern and recommendations); and 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.

[166] In the United States, the right of self-determination of Indigenous peoples globally is unjustifiably characterized as a national security issue in the absence of any specific circumstances or facts. See National Security Council (United States), "Position on Indigenous Peoples", January 18, 2001, para. 3: "The US delegation should support use of the term "internal self-determination" in both the UN and OAS declarations on indigenous rights … "

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

[167] At the end of the November 30 meeting, representatives from the Grand Council of the Crees and the Inuit Circumpolar Conference approached the UK delegates to ask the UK representatives why they had referred to "Indigenous populations" as opposed to "Indigenous peoples" in the context of self-determination. The legal counsel for the UK government responded that, in regard to Indigenous peoples, the UK does not refer to "rights" when they use the term "peoples". When the UK representatives were requested to provide a written analysis justifying the UK position on self-determination, they flatly declined.

While these draconian positions may have since been modified, they demonstrate a strong intent by the UK to deny Indigenous peoples their human rights under international law.

"Indigenous populations" or "Indigenous peoples" would clearly be contrary to the peremptory norm that prohibits racial discrimination.

It is curious that the UK government vociferously opposes the "creation" of new collective human rights in the draft *U.N. Declaration* (although new rights are not in fact being fabricated). Yet, rather than apply the collective human right of self-determination to Indigenous peoples without discrimination, the UK explicitly proposes to create a *new* right of self-determination for "Indigenous populations" under international law.

It is also worth noting that the right of self-government is generally recognized as a political manifestation of the right of self-determination.[168] Thus, if the UK recognizes that self-determination is a collective human right, then the same must be true of the right of self-government. Yet, in regard to Indigenous peoples, the UK insists that the collective rights of self-government are not human rights but are "rights bestowed nationally" and, as such, must "remain distinct" from individual human rights.[169] This UK position is both contradictory and incorrect.

In addition, the UK government implies (wrongly in our view) that *all* of the collective rights of Indigenous peoples are rights of self-government. If that is correct, then how are these rights being newly created? Indigenous peoples have exercised such rights for centuries.[170] Moreover, how can the UK conclude that these are rights that are "specific

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[168] S. J. Anaya, *Indigenous Peoples in International Law* (Oxford/New York: Oxford University Press, 1996), at 109: "Self-government is the overarching political dimension of ongoing self-determination." See also A. Buchanan, *Federalism, Secession, and the Morality of Inclusion*, (1995) 37 Arizona L. Rev. 53, at p. 54: "Rights of self-determination in the strict sense ... are *political* rights. These include not only rights of self-administration, but genuine rights of self-government, including rights to regulate the use of land and the development of natural resources ..."

Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, note 95, *supra*, vol. 2(1), at p. 175: "Self-government...is one natural outcome of the exercise of self-determination … Self-determination refers to the collective power of choice; self-government is one possible result of that choice."

[169] United Kingdom, "UK Statement on Issue of Collective Rights", note 81, *supra*:

> We do not want to confuse [two groups of rights – individual and collective] such that their interpretation can be manipulated or misunderstood in the future. Rather, we wish to see them set out clearly, so that we understand that we are talking *both* about ensuring that indigenous people can enjoy all their human rights, *and* about recognising - in addition - certain collective rights of self-government that are particular to indigenous peoples.

See also United Kingdom (Foreign and Commonwealth Office), *Human Rights: Indigenous people*, note 87, *supra*: " … it is important that these [collective] *rights bestowed nationally remain distinct from individual human rights*, enjoyed by indigenous people and all others, which are founded in international law and which provide proper protection to the individual." [emphasis added]

[170] U.N. General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), note 14, *supra*, p. 8, para. 22: "Since time immemorial, indigenous communities have had their own forms of self-government."

to Indigenous people"[171]? All peoples – Indigenous and non-Indigenous – have the right of self-determination and this includes self-government rights.[172]

At this point, this article has examined the international obligations of the U.N. and Member States to respect and promote all human rights; the significance of Indigenous peoples' collective rights; reasons why Indigenous peoples' collective rights must be characterized as human rights; and the status of Indigenous peoples as "peoples" with the right to self-determination under international law.

All of these aspects are critical in establishing the appropriate legal context for examining Indigenous peoples' rights to lands, territories and resources. Without an appreciation of this context, it would be easy to understate the status[173] of Indigenous peoples and misconstrue the nature and scope of their land and resource rights.

Let us now turn to the crucial issue of the rights of Indigenous peoples to lands, territories and resources.

V. Indigenous peoples' rights to lands, territories and resources

The overall issue of Indigenous peoples' rights to lands, territories and resources remains a highly controversial matter for many of the participating States in the WGDD. Yet many of these same States give inadequate consideration to the essential human rights dimensions of these rights. Clearly, a human rights standard-setting process that is subject to the *U.N. Charter* should aspire to much higher norms.

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[171] United Kingdom (Foreign and Commonwealth Office), *Human Rights: Indigenous people*, note 87, *supra*: "…the Declaration seeks to create new collective human rights, specific to indigenous people."

[172] U.N. General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), note 14, *supra*, p. 8, para. 22:

> During the period of colonization and the expansion of nation States, indigenous peoples were incorporated into State structures, generally against their will, and their forms of local government were modified or adapted to bring them into line with the interests and needs of the State. … Indigenous organizations seek to preserve or regain the right to local (and sometimes regional) *self-government, justly considering this right as part of the fundamental freedoms which international law accords to all peoples*." [emphasis added]

[173] See, for example, Inuit Circumpolar Conference, *Principles and Elements for a Comprehensive Arctic Policy* (Montreal: Centre for Northern Studies, McGill University, 1992), at p. 7, cited in W. Moss, "Inuit Perspectives on Treaty Rights and Governance" in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 55, at p. 64: "Inuit are not mere 'populations' or 'minorities'. These latter terms serve to unfairly deny or undermine the true status, rights, and identity of Inuit as Indigenous peoples. Inuit rights will be advanced only if states use accurate terminology and concepts and respect Inuit perspectives."

Rights to lands, territories and natural resources are of critical importance to Indigenous peoples in the various regions of the globe and should be the subject of urgent attention[174] by the U.N.[175] Indigenous lands, territories and resources have also always been subject to widespread dispossessions[176] and unjust exploitations by States and others.[177] As H.-K. Trask describes:

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[174] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations* (M. Alfonso Martínez, Special Rapporteur, Final Report), E/CN.4/Sub.2/1999/20, 22 June 1999, p. 39, para. 252:

> The first general conclusion concerns the issue of recognition of indigenous peoples' right to their lands and their resources, and to continue engaging, unmolested, in their traditional economic activities on those lands. This is the paramount problem to be addressed in any effort to establish a more solid, equitable and durable relationship between the indigenous and non-indigenous sectors in multinational societies. Owing to their special relationship, spiritual and material, with their lands, the Special Rapporteur believes that very little or no progress can be made in this regard without tackling, solving and redressing - in a way acceptable to the indigenous peoples concerned - the question of their uninterrupted dispossession of this unique resource, vital to their lives and survival.

[175] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, U.N. Doc. E/CN.4/Sub.2/2001/21, 11 June 2001, para. 9:

> Reports and statements by indigenous peoples from all parts of the world delivered during sessions of the Working Group on Indigenous Populations and information received in the preparation of the working paper have made it clear that land and resource issues, particularly the dispossession of indigenous peoples from their lands, are issues of the most urgent and fundamental nature.

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

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

[176] In regard to doctrines of dispossession used against Indigenous peoples, see generally: U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, note 175, *supra*, paras. 21-32. See also P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, A study prepared for the Royal Commission on Aboriginal Peoples, vol. 1, 1995, c. 5.

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

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

U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on treaties, agreements and other constructive arrangements between States and indigenous populations*, note 174, *supra*, at p. 34:

> …[indigenous peoples] are surrounded by other, more powerful nations that desperately want our lands and resources and for whom we pose an irritating problem. This is just as true for the Indians of the Americas as it is for the tribals of India and the aborigines of the Pacific. This economic reality is also a political reality for most if not all indigenous peoples. The relationship between ourselves and those who want control of us *and* our resources is not a *formerly* colonial relationship but an *ongoing* colonial relationship.[178]

Whether Indigenous peoples are majority[179] or minority *in number* in their respective States or territories,[180] their legal status goes beyond[181] that of "minorities" under

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> Various methods were utilized to achieve dispossession of the land. They, unquestionably, included treaties and agreements, at least if we accept the non-indigenous interpretation of these documents (and, in general, that version is the only one available in written form). (para. 220)
>
> Coercion - either by armed force or by judicial and legislative means, or both - was very frequently resorted to. This was true whether or not its employment was preceded by formal juridical commitments to the contrary. (para. 221)

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

[178] H.-K. Trask, *From a Native Daughter: Colonialism and Sovereignty in Hawai'i*, revised ed., note 6, *supra*, at p. 103. [emphasis in original]

[179] In some countries, such as Greenland, Guatemala and Bolivia, Indigenous peoples constitute the majority population.

[180] *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States*, note 99, *supra*, conclusions, p. 10, paras. 40(k) & 40(l):

> (k) Indigenous peoples are not racial, ethnic, religious and linguistic minorities;
>
> (l) In certain States the indigenous peoples constitute the majority of the population; and in certain States indigenous peoples constitute the majority in their own territories.

M.C. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, note 4, *supra*, at p. 4: "Both [indigenous and tribal peoples] are … conceptually distinguished from ethnic minorities and majorities since they could be either."

In Canada, see *R*. v. *Van der Peet*, [1996], 2 S.C.R. 507, para. 30, where Lamer C.J. on behalf of the majority states: "... when Europeans arrived in North America, Aboriginal peoples were already here, living in communities on the land, and particularly in distinctive cultures, as they had done for centuries. It is this fact, and this fact above all others, which separates Aboriginal peoples from all other minority groups in Canadian society and which mandates their special legal, and now constitutional, status."

[181] D. Murswiek, "The Issue of a Right of Secession – Reconsidered" in C. Tomuschat, (ed.), *Modern Law of Self-Determination*, note 115, *supra*, at p. 37:

international law.[182] As discussed earlier in this article, Indigenous peoples are peoples with the right of self-determination. Indigenous peoples are also not treated as minorities within the United Nations human rights system.[183] As evident from the WGDD and WGIP, Indigenous peoples have their own standard-setting processes within the U.N. that are wholly separate from those for minorities.[184]

From a human rights perspective, the starting point for consideration of Indigenous peoples' rights to lands, territories and resources must be the right of self-determination *under international law*. Indigenous rights to lands,[185] territories and resources[186] are

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> Mere minorities are not subjects of the right to self-determination ... But it is important to recognize that the *terms minority' and people' do not totally exclude one another; rather they partly overlap*: one group that is a minority in relation to the whole population of a State can, on the one hand, be *a national minority* in the meaning of the law relating to minorities. But *on the other hand, it can be a people in the meaning of the right of self-determination at the same time*. [emphasis added]

[182] P. Macklem, "Normative Dimensions of an Aboriginal Right of Self-Government", (1995-96) 21 Queen's L.J. 173, at p. 213:

> Normatively grounding a right of self-government in international principles respecting rights of minorities would ignore important historical and contemporary differences between Aboriginal people and other cultural minorities in Canada, namely, that Aboriginal people lived on, occupied, and exercised sovereign authority over, the North American continent before European contact.

R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, note 7, *supra*, at p. 88: "[I]ndigenous peoples … are not, strictly speaking, ethnic minorities at all … ."

[183] See, for example, *Convention on the Rights of the Child*, art. 30: "In those States in which *ethnic, religious or linguistic minorities or persons of indigenous origin* exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."[emphasis added.]

[184] S. J. Anaya, *Indigenous Peoples in International Law*, note 168, *supra*, at p. 100:

> International practice ... has tended to treat indigenous peoples and minorities as comprising distinct but overlapping categories subject to common normative considerations. The specific focus on indigenous peoples through international organizations indicates that groups within this rubric are acknowledged to have distinguishing concerns and characteristics that warrant treating them apart from, say, minority populations of Western Europe. At the same time, indigenous and minority rights intersect substantially in related concerns of non-discrimination and cultural integrity.

[185] U.N. General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), note 14, *supra*, at p. 7, para. 17:

> The land rights issue cannot be separated from the issue of access to, and use of natural resources by indigenous communities, and is an essential issue for the survival of indigenous peoples, which must be carefully studied, since access to the natural resources present in their habitats is essential to their economic and social development.

E.-I. Daes, "The Spirit and Letter of the Right to Self-Determination of Indigenous Peoples: Reflections on the Making of the United Nations Draft Declaration", in P. Aikio & M. Scheinin, eds., Operationalizing the Right of Indigenous Peoples to Self-Determination (Turku/Åbo, Finland: Institute for Human Rights, Åbo Akademi University, 2000) 67, at p. 81: "A fundamental aspect of the true spirit of self-determination is

inextricably linked[187] to the human right to self-determination[188] and the right to development.[189] Without adequate lands and resources, Indigenous peoples will be "pushed to the edge of economic, cultural and political extinction".[190] Indigenous peoples

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respect for the *land* without which indigenous peoples cannot fully enjoy their cultural freedom or cultural integrity."

[186] S.J. Anaya, "The Native Hawaiian People and International Human Rights Law: Toward a Remedy for Past and Continuing Wrongs" (1994) 28 Georgia L. R. 309, at p. 346:

> The importance of lands and resources to the survival of indigenous cultures is widely acknowledged. Relevant to indigenous peoples' linkage with lands and resources is the self-determination provision common to the International Human Rights Covenants, which affirms: "In no case may a people be deprived of its own means of subsistence."

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, Rodolfo Stavenhagen, Addendum: Mission to Canada*, note 96, *supra*, p. 31, para. 95 (Conclusions):

> **While Aboriginal persons may eventually attain material standards of living commensurate with other Canadians, the full enjoyment of all their human rights, including the right of peoples to self-determination, can only be achieved within the framework of their reconstituted communities and nations, in the context of secure enjoyment of adequate lands and resources.** [bold in original]

[187] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes*, E/CN.4/Sub.2/2004/30, 13 July 2004, p. 13, para. 38:

> Logically arising from these property rights, as well as their right to self-determination and the right to development, there is also an increased recognition of indigenous peoples' right to give or withhold their prior and informed consent to activities within their lands and territories and to activities that may affect their lands, territories, and resources.

[188] See identical Art. 1, para. 2 in the *International Covenant on Civil and Political Rights* and I*nternational Covenant on Economic, Social and Cultural Rights*:

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

[189] *Declaration on the Right to Development*, note 104, *supra*, Art. 1, para. 2:

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

[190] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, note 95, *supra*, vol. 2(2), at p. 57:

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

must not be deprived of their means of subsistence – which for them has "vital economic, social, cultural, spiritual and political dimensions".[191]

The lands, territories and resources of Indigenous peoples are essential for their survival and well-being, as well as the effective exercise of self-government.[192] It is now well-established that denial or infringements of their *collective* land and resource rights result in a potentially wide range of human rights violations.[193] In particular, disputes

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Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, note 95, *supra*, para. 8:

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

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

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

[192] R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, note 7, *supra*, at p. 105: "Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*." [emphasis added]

Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government, note 148, *supra*, para. 4:

> Indigenous territory and the resources it contains are essential to the physical, cultural and spiritual existence of indigenous peoples and to the construction and effective exercise of indigenous autonomy and self-government.

[193] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, note 45, *supra*, at para. 5:

> In the present report, … the Commission concluded that the State violated the *right to property* enshrined in Article XXIII of the American Declaration, and the *right to equality* enshrined in Article II of the American Declaration, to the detriment of the Maya people, by failing to take effective measures to delimit, demarcate, and officially recognize their *communal property right to the lands that they have traditionally occupied and used*, and by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled, without consultations with and the informed consent of the Maya people. The Commission also concluded that the State violated the right to judicial protection enshrined in Article XVIII of the American Declaration to the detriment of the Maya people, by rendering judicial proceedings brought by them ineffective through unreasonable delay. [emphasis added]

concerning land title and land use have been held to entail "distinct human rights considerations", based on the "broader corpus of international law [that] includes the developing norms and principles governing the human rights of indigenous peoples".[194]

It must be emphasized here that the right to natural resources is not limited to States.[195] The two international human rights Covenants explicitly refer to the right of "all peoples"[196] to enjoy and utilize fully and freely their natural wealth and resources as "inherent"[197] rights.

Article 1 of the international human rights Covenants is said to include the right of peoples to "permanent sovereignty over their natural resources".[198] "Permanent

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[194] I/A Comm. H.R., *Mary and Carrie Dann v. United States*, note 63, *supra*, at para. 124:

> … in addressing complaints of violations of the American Declaration it is necessary for the Commission to consider those complaints in the context of the evolving rules and principles of human rights law in the Americas and in the international community more broadly, as reflected in treaties, custom and other sources of international law. Consistent with this approach, in determining the claims currently before it, the Commission considers that this broader corpus of international law includes the developing norms and principles governing the human rights of indigenous peoples. As the following analysis indicates, these norms and principles encompass distinct human rights considerations relating to the ownership, use and occupation by indigenous communities of their traditional lands. Considerations of this nature in turn controvert the State's contention that the Danns' complaint concerns only land title and land use disputes and does not implicate issues of human rights.

[195] See also *Permanent Sovereignty over Natural Resources*, adopted by the U.N. General Assembly, 14 December 1962, GA Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/5217 (1963), reprinted in 2 I.L.M. 223 (1963), para. 1:

> The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned.

[196] A. Cassese, "The Self-Determination of Peoples", in L. Henkin, (ed.), *The International Bill of Rights: The Covenant on Civil and Political Rights*, *supra*, 92 at p. 103: "This paragraph [in Art. 1], however, is not merely a reaffirmation of the right of every state over its own natural resources; it clearly provides that the right over natural wealth belongs to *peoples*." [emphasis added]

[197] *International Covenant on Civil and Political Rights*, Art. 47 and *International Covenant on Economic, Social and Cultural Rights*, Art. 25: "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."

[198] J. Crawford, "The Right of Self-Determination in International Law: Its Development and Future", note 150, *supra*, at p. 27:

> Just as a matter of ordinary treaty interpretation, one cannot interpret Article 1 as limited to the colonial case. Article 1, paragraph 1 does not say that some peoples have the right of self-determination. Nor can the term 'peoples' be limited to colonial peoples. [Paragraph] 3 deals expressly, and non-exclusively, with colonial territories. … *Any remaining doubt is removed by paragraph 2, which deals with permanent sovereignty over natural resources. … No one has ever suggested that the principle of permanent sovereignty over natural resources is limited to colonial territories.* So far as the interpretation of Article 1 goes, that surely settles the point. [emphasis added]

sovereignty over resources" is a collective human right. It is a right of peoples to "long-term control over their resources".[199] The principle of permanent sovereignty over resources is said to be a peremptory norm or *jus cogens*.[200]

A recent U.N. study on this subject concludes that this right applies to Indigenous peoples.[201] The term "sovereignty" in this context is said to mean "legal, governmental control and management authority over natural resources, particularly as an aspect of the exercise of the right of self-determination."[202] Marginalization from the benefits of natural resources or related forms of discrimination would be a violation of Indigenous peoples' right of self-determination.[203]

In addition, in regard to Indigenous peoples, the U.N. Human Rights Committee and the Committee on Economic, Social and Cultural Rights have explicitly applied the natural resource rights aspects of self-determination in Article 1, para. 2 of the international human rights Covenants.[204] The U.N. "treaty bodies through their general comments

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[199] J. Crawford, "The Right of Self-Determination in International Law: Its Development and Future", note 150, *supra*, at p. 21:

> Self-determination was a right of peoples, but if it was the first to be accepted it was by no means the only such right. For example, the principle of permanent sovereignty over natural resources could be seen as a right of peoples to long-term control over their own resources, including the right of a later generation to review earlier agreements for the exploitation of natural resources in the light of changed circumstances.

[200] I. Brownlie, *Principles of Public International Law*, note 102, *supra*, at p. 515: "Other rules that have this special status [of *jus cogens*] include the principle of permanent sovereignty over natural resources and the principle of self-determination."

[201] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes*, note 187, *supra*, at p. 17, para. 56 (Principal Conclusions):

> **The right of indigenous peoples to permanent sovereignty over natural resources may be articulated as follows: it is a collective right by virtue of which States are obligated to respect, protect, and promote the governmental and property interests of indigenous peoples (as collectivities) in their natural resources.** [bold in original]

[202] *Id.*, p. 7, para. 18.

[203] A.A. Forno, "Indigenous Peoples and the Right of Self-Determination: A Governmental Perspective" in International Centre for Human Rights and Democratic Development, *Seminar: Right to Self-Determination of Indigenous Peoples* (Montreal: ICHRDD, 2002) 38 at p. 42:

> It cannot be forgotten that the right of peoples to dispose freely of natural wealth and resources so as to pursue their development is granted by virtue of the exercise of self-determination on the part of both indigenous and national peoples. A violation of the right to self-determination would occur … if indigenous peoples were discriminated against or marginalized from the benefit of natural wealth and resources, especially when the latter are located in the territory where they live …

[204] Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, note 95, *supra*, para. 8: "… the [Human Rights] Committee emphasizes that the right to self-determination requires, *inter alia,* that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)."

contribute to the clarification of the legal and policy ramifications of the implementation of the human rights standards".[205]

From an equality and non-discrimination perspective, the U.N. Committee on the Elimination of Racial Discrimination has underlined that Indigenous peoples have the "right to own, develop, control and use their communal lands, territories and resources".[206] This is wholly consistent with equal application of the right of self-determination, which entails the right to choose.[207]

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. 39:

> The Committee, recalling the right to self-determination enshrined in article 1 of the Covenant, urges the State party to intensify its efforts to improve the situation of the indigenous peoples and to ensure that they are not deprived of their means of subsistence.

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. 7:

> Taking note of the duty in article 1, paragraph 2, of the Covenant, which provides that a people may not "be deprived of its means of subsistence", States parties should ensure that there is adequate access to water for subsistence farming and for securing the livelihoods of indigenous peoples.

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

> The activities of human rights treaty monitoring bodies contribute to the implementation of the [U.N. Millennium] goals. While analysing reports of States parties, the treaty bodies consider country policy, law and practice, and advise Governments on shortcomings and possible improvements. This dialogue, although focusing on treaty obligations, provides, given the link between human rights and the goals, an important support to the latter. *The treaty bodies through their general comments contribute to the clarification of the legal and policy ramifications of the implementation of the human rights standards* and thus provide an invaluable input to the concretization and realization of the goals. [emphasis added]

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

> The Committee [on the Elimination of Racial Discrimination] especially calls upon States parties to *recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources* and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories. [emphasis added]

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

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

Similarly, see 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; and Committee on the Elimination of Racial Discrimination, *Concluding observations of the*

In regard to Indigenous peoples, the Committee on the Rights of the Child has explicitly endorsed the self-determining approach of the three treaty monitoring bodies referred to above.[208] In terms of improving the conditions affecting Aboriginal children in Canada, the Committee has explicitly highlighted the importance of the observations and recommendations on lands and resources by these bodies.

Under the complaints procedure in *ICCPR Optional Protocol*,[209] the Human Rights Committee has interpreted its mandate as not permitting the right to self-determination to be the subject of a complaint.[210] Nevertheless, the Committee is using the collective right of Indigenous peoples to self-determination as a normative standard to interpret

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Committee on the Elimination of Racial Discrimination: Sri Lanka, A/56/18, 14 September 2001, paras. 321-342, at para. 335.

[207] R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), at p. 118: "It has been clear from the outset that self-determination was not tied only to independence. *The peoples of an independent territory have always had the right to choose the form of their political and economic future*." [emphasis added]

E.-I. Daes, "Some Considerations on the Right of Indigenous Peoples to Self-Determination" (1993) 3 Transnat'l L. & Contemp. Probs. 1, at pp. 4-5: "The right to self-determination is best viewed as *entitling a people to choose* its political allegiance, to influence the political order under which it lives, and to preserve its cultural, ethnic, historical, or territorial identity." [emphasis added]

P. Juviler, *Contested Ground: Rights to Self-Determination and the Experience of the Former Soviet Union*, (1993) 3 Transnat'l L. & Contemp. Probs. 71, at p. 72: "The collective right to self-determination as spelled out in the International Human Rights Covenants ... means the *right to the free choice of political status and economic, social, and cultural development*." [emphasis added]

[208] Committee on the Rights of the Child, *Concluding observations: Canada*, U.N. Doc. CRC/C/15/Add.215, 27 October 2003, para. 59:

> The Committee urges the Government to pursue its efforts to address the gap in life chances between Aboriginal and non-Aboriginal children. In this regard, it reiterates in particular the observations and recommendations with respect to land and resource allocation made by United Nations human rights treaty bodies, such as the Human Rights Committee (CCPR/C/79/Add.105, para. 8), the Committee on the Elimination of Racial Discrimination (A/57/18, para. 330) and the Committee on Economic, Social and Cultural Rights (E/C.12/1/Add.31, para. 18). The Committee equally notes the recommendations of the Royal Commission on Aboriginal Peoples and encourages the State party to ensure appropriate follow-up.

[209] *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, entered into force March 23, 1976

[210] S. Lewis-Anthony, "Treaty-Based Procedures for Making Human Rights Complaints within the UN System" in H. Hannum, ed., *Guide to International Human Rights Practice*, 3rd ed. (Ardsley, New York: Transnational Publishers, 1999) 41 at p. 44:

> The right to self-determination, which is set forth in article 1 of the Covenant, cannot be the subject of a complaint under the Optional Protocol. The Committee has consistently held that, since the right to self-determination is conferred on peoples, an individual cannot claim to be a victim of a violation of that right.

individual rights under the Covenant.[211] Thus, any State that seeks to deny or otherwise undermine the recognition of the right of Indigenous peoples to self-determination – including the right to natural resources – is also impairing the full and just recognition of the human rights of Indigenous individuals.

The abuse of Indigenous peoples' human rights is principally a development issue.[212] The human rights of Indigenous peoples are inseparable from environment and development issues.[213] Peace, development and environmental protection are interdependent and indivisible.[214] Safeguarding the integrity of the environment is essential to the well-being

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

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

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

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

[212] Human Rights Committee, *Concluding observations of the Human Rights Committee: Philippines*, UN Doc. CCPR/CO/79/PHL, 1 December 2003, para. 16: "The Committee … is … concerned at the human rights implications for indigenous groups of economic activities, such as mining operations. [new para.] The State party should ensure effective enforcement of the above legislation and ensure that indigenous peoples' land and resource rights enjoy adequate protection in relation to mining and other competing usage …"

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

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

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

of peoples and individuals, and to the enjoyment of human rights, including the right to life.[215]

Denial of Indigenous peoples' rights to lands and resources, as well as the overall exercise of their right to self-determination, has resulted in a legacy of debilitating poverty[216] in the various regions of the world.[217] These are primary root causes of severe disadvantage that must be urgently addressed.[218]

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

[216] U.N. General Assembly, *Road map towards the implementation of the United Nations Millennium Declaration, Report of the Secretary-General*, note 52, *supra*, p. 36, para. 195: "All human rights — civil, political, economic, social and cultural — are comprehensive, universal and interdependent. They are the foundations that support human dignity, and any violations of human rights represent an attack on human dignity's very core. Where fundamental human rights are not protected, States and their peoples are more likely to experience conflict, poverty and injustice."

African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, *supra*, p. 7: "Along with the negative stereotyping and discrimination comes dispossession of [Indigenous] peoples' land and resources, which leads to impoverishment and threatens their cultures and survival as peoples."

[217] Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, Vol. I, note 79, *supra*, at p. 40:

> For indigenous peoples, secure, effective, collective ownership rights over the lands, territories, and resources they have traditionally owned or otherwise occupied and used are fundamental to economic and social development, to physical and cultural integrity, to livelihoods and sustenance. *Secure rights to own and control lands, territories, and resources are also essential for the maintenance of the worldviews and spirituality of indigenous peoples – in short, to their very survival as viable territorial communities. Without secure and enforceable property rights, indigenous peoples' means of subsistence are permanently threatened.* Loss or degradation of land and resources results in deprivation of the basics required to sustain life and to maintain an adequate standard of living. Failure to recognize and respect these rights undermines efforts to alleviate indigenous peoples' poverty and to achieve sustainable development. [emphasis added]

Committee on Economic, Social and Cultural Rights, General Comment No. 14, *The right to the highest attainable standard of health*, adopted 11 May 2000, 22nd sess., U.N. Doc. E/C.12/2000/4 (2000), para. 27: "The Committee notes that, in indigenous communities, the health of the individual is often linked to the health of the society as a whole and has a collective dimension."

U.N. General Assembly, *Right to Development: Note by the Secretary-General*, A/55/306, 17 August 2000 (Report of the independent expert on the right to development), p. 14, para. 49:

> From the perspective of a rights-based approach to human development, the concept of poverty goes much beyond just income poverty. It signifies *an unacceptable level of deprivation of well-being*, a level that a civilized society considers incompatible with human dignity. It is a gross violation of human rights. [emphasis added]

[218] P. Joffe & W. Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms", note 56, *supra*, at p. 12-11:

> Severe poverty can inhibit significantly the enjoyment of human rights. It is well-established that Indigenous peoples and individuals who live in debilitating poverty - even those living in

Nevertheless, despite all these important ramifications and interrelationships, some States choose to ignore their international human rights obligations. For example, in regard to Indigenous peoples globally, the U.S. government has a discriminatory policy that seeks to restrict their right of self-determination and to not apply the resource rights under the Covenants to them.[219] This also contradicts the U.S. Senate, which has formally declared that the right to natural resources in the *International Covenant on Civil and Political Rights* "may be exercised only in accordance with international law."[220]

Attempts by States to compel international law standards to conform to their domestic law or policy severely impede the standard-setting process within the WGDD.[221] States cannot invoke their constitutions[222] or other domestic laws, in order to avoid including

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developed countries such as Canada - are precluded from the effective exercise or enjoyment of fundamental human rights.

In Indigenous communities and nations, denials of Indigenous peoples' collective human rights, including self-determination, are root causes and major contributors to deep-seated health and other socio-economic problems. Land and resource dispossessions entail highly serious and far-reaching human rights abuses. They endanger the survival and well-being of distinct Indigenous peoples and cultures. Both peoples and individuals are impacted. [emphasis added]

[219] National Security Council (United States), "Position on Indigenous Peoples", January 18, 2001, para. 4:

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

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

> That it is the view of the United States that States Party to the Covenant should wherever possible refrain from imposing any restrictions or limitations on the exercise of the rights recognized and protected by the Covenant, even when such restrictions and limitations are permissible under the terms of the Covenant.
>
> …
>
> That the United States declares that the right referred to in Article 47 [inherent right of all peoples to their natural wealth and resources] may be exercised only in accordance with international law.

[221] F. MacKay, "Report on the Organisation of American States' Working Group on the Proposed Inter-American Declaration on the Rights of Indigenous Peoples", Forest Peoples Programme, Washington, D.C., 8-12 November 1999, Conclusion:

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

[222] A. Quentin-Baxter, "The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts", note 98, *supra*, 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

human rights norms in a U.N. Declaration consistent with their international obligations.[223] Simply put, States cannot invoke their constitutions so as to avoid fulfilling their international legal duties.[224]

As recognized in a recent case involving the Maya people in Belize,[225] the property rights protected by the inter-American human rights system are "not limited to those property interests that are already recognized by states or that are defined by domestic law". Rather, "the right to property has an autonomous meaning in international human rights

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> 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.

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 …

[223] A. Cassese, *International Law*, note 41, *supra*, at pp. 166-167:

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

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

Free Zones Case (France v. Switzerland), (1932), P.C.I.J., Ser. A/B, No. 46, at p. 167: "… it is certain that France cannot rely on her own legislation to limit the scope of her international obligations …"

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

[224] 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]

[225] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, note 45, *supra*.

law."[226] This interpretive principle has international, and not just regional,[227] application.[228]

These conclusions pertaining to the interpretation of international human rights law are relevant to another issue that is directly related to lands, resources and development matters. This is the norm of "free, prior and informed consent", which is discussed in the sub-heading below.

VI. "Free, prior and informed consent" – a crucial international standard

Indigenous peoples globally have been described as the "most vulnerable of all categories of vulnerable peoples".[229] This is largely a result of the rampant human rights violations

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[226] *Id*., at para. 116. The Commission then adds:

> In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition. Consistent with this approach, the Commission has held that the application of the American Declaration to the situation of indigenous peoples requires the taking of special measures to ensure recognition of the particular and collective interest that indigenous people have in the occupation and use of their traditional lands and resources and their right not to be deprived of this interest except with fully informed consent, under conditions of equality, and with fair compensation.

[227] See also 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.

[228] E. Heinze, "Beyond Parapraxes: Right and Wrong Approaches to the Universality of Human Rights Law", (1994) 12 Neth. Q. H. Rts. 369, at p. 381: "Unlike most traditional branches of law, international human rights law is not intended merely to recapitulate the wishes and practices of States. It arises from the positive consent of nations; yet, once born, it is not necessarily constrained by those nations' individual objectives. It does, so to speak, take on a life of its own."

See also T.S. Orlin & M. Scheinin, "Introduction" in T.S. Orlin, A. Rosas & M. Scheinin, eds., *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*, note 109, *supra*, at p. 6:

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

[229] R. Falk, "Forward" in M.C. Lâm, *At the Edge of the State: Indigenous Peoples and Self-Determination*, note 4, *supra*, p. xiii.

See also World Commission on the Social Dimension of Globalization, *A fair globalization: Creating opportunities for all*, note 131, *supra*, p. 46, para. 211:

that they have faced historically and often continue to face in contemporary times. This situation is severely compounded by the diverse and far-reaching impacts of major development projects on Indigenous lands and territories. As Special Rapporteur Rodolfo Stavenhagen describes:

> The principal effects of these projects for indigenous peoples relate to loss of traditional territories and land, eviction, migration and eventual resettlement, depletion of resources necessary for physical and cultural survival, destruction and pollution of the traditional environment, social and community disorganization, long-term negative health and nutritional impacts as well as, in some cases, harassment and violence.[230]

These stark realities make the standard of "free, prior and informed consent" (FPIC) a crucial one for Indigenous peoples in the context of development.[231] The appropriateness of this norm is further reinforced, since the right of peoples to natural resources is inextricably linked to the human right of self-determination and right to development.[232]

As already described, development and environmental protection are interdependent and indivisible.[233] In relation to Indigenous peoples, "forced development has deprived them

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> A particularly vulnerable group is indigenous peoples. Where their integration into the global economy has occurred without their free and prior informed consent and without adequate protection of their rights, livelihoods, and culture, they have suffered severely.

[230] U.N. General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, note 14, *supra*, at p. 7, para. 20.

[231] *Id.*: "It is also essential to respect the right of indigenous peoples to be consulted and give their free, informed and prior consent to any development project having such effects."

[232] See text accompanying and following note 188, *supra*. See also U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes*, note 187, *supra*, p. 13, para. 38:

> *Logically arising from these property rights, as well as their right to self-determination and the right to development*, there is also an increased recognition of indigenous peoples' right to give or withhold their prior and informed consent to activities within their lands and territories and to activities that may affect their lands, territories, and resources. [emphasis added]

See also F. MacKay, "Indigenous Peoples' Right to Free, Prior and Informed Consent and the World Bank's Extractive Industries Review", note 77, *supra*, at p. 20:

> Although not spelled out, FPIC is certainly required pursuant to the right to self-determination as set forth in common article 1 of the International Covenants on Human Rights as part of indigenous peoples' right to feely determine their political status, freely pursue the economic, social and cultural development and freely dispose of their natural wealth and resources.

[233] *Rio Declaration on Environment and Development*, note 214, *supra*, Principle 25.

of their human rights, in particular the right to life and the right to their own means of subsistence, two of the most fundamental of all rights."[234]

Free, prior and informed consent is essential to the enjoyment of the human rights of Indigenous peoples[235]. FPIC also empowers Indigenous peoples to exercise important choices concerning development in a self-determination context.[236] Therefore, it is not surprising that the World Commission on the Social Dimension of Globalization has recently concluded:

> An important issue at both the local and national level is the need to recognize and defend the rights of indigenous and tribal peoples to their territories and resources, their cultures and identity, their traditional knowledge and their right to self-determination. Their free and prior informed consent should be sought before any development project is brought into their communities.[237]

Similarly, the principle of FPIC has been highlighted by the renowned international law expert Erica-Irene Daes in her 2004 study on Indigenous peoples' permanent sovereignty over natural resources.[238] The same norm of Indigenous consent is emphasized by the

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[234] U.N. Commission on Human Rights, *Global Consultation on the Realization of the Right to Development as a Human Right: Report prepared by the Secretary-General pursuant to Commission on Human Rights resolution 1989/45*, note 213, *supra*, para. 104.

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

> Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector.

[236] U.N. Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, *Preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation*, U.N. Doc. E/CN.4/Sub.2/AC.4/2004/4, 8 July 2004, para. 9:

> The principle of free, prior and informed consent is central to indigenous peoples' exercise of their right of self-determination with respect to developments affecting their lands, territories and natural resources. The substantive and procedural norms underlying free, prior and informed consent empower indigenous peoples to meaningfully exercise choices about their economic, social and cultural development …

[237] World Commission on the Social Dimension of Globalization, *A fair globalization: Creating opportunities for all*, note 131, *supra*, at p. 70, para. 311.

[238] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes*, note 187, *supra*, p. 5, para. 8:

World Commission on Dams,[239] as well as by the independent Extractive Industries Review[240] commissioned by the World Bank Group. Specialized agencies within the United Nations are also increasingly adopting FPIC as a key standard.[241]

In addition, both the Committee on the Elimination of Racial Discrimination[242] and the Committee on Economic, Social and Cultural Rights[243] have underlined the importance of FPIC in development matters. In regard to Indigenous peoples, the U.N. Sub-

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> … it has become clear that meaningful political and economic self-determination of indigenous peoples will never be possible without indigenous peoples' having the legal authority to exercise control over their lands and territories.

[239] World Commission on Dams, *Dams and Development: A new framework for decision-making. The Report of the World Commission on Dams.* (London: Earthscan, 2000), at p. 112 (see also pp. 267, 271, 278):

> In a context of increasing recognition of the self-determination of indigenous peoples, the principle of free, prior, and informed consent to development plans and projects affecting these groups has emerged as the standard to be applied in protecting and promoting their rights in the development process.

[240] Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, Vol. I (*The World Bank Group and Extractive Industries*), December 2003, available at: http://www.eireview.org/eir/eirhome.nsf/be65a087e9e6b48085256acd005508f7/75971F6A8E5111385256DE80028BEE2?Opendocument, at p. 21:

> *The EIR concludes that indigenous peoples and other affected parties do have the right to participate in decisionmaking and to give their free prior and informed consent throughout each phase of a project cycle.* … However, the EIR also acknowledges that there are real issues that need to be worked out to make FPIC a clearer and more effective tool. [emphasis added]

To date, in the Indigenous context, the World Bank Group has not supported the norm of free, prior and informed consent.

[241] U.N. Permanent Forum on Indigenous Issues, *Inter-agency Support Group on Indigenous Issues Report on Free Prior and Informed Consent*, E/C.19/2004/11, 12 March 2004, para. 1:

> In a context of increasing recognition of the rights of Indigenous Peoples (IPs), the principle of free, prior and informed consent (FPIC) of IPs to development projects and plans that may affect them, has emerged as the desired standard to be applied in protecting and promoting their rights in the development process.

[242] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Argentina*, CERD/C/65/CO/1, 18 August 2004, para. 18:

> The Committee recalls its General Recommendation 23 on the rights of indigenous peoples which calls upon State parties to ensure that no decisions directly relating to their rights and interests are taken without their informed consent …

See also Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII (51) concerning Indigenous Peoples*, CERD/C/51/Misc.13/Rev.4, (adopted at the Committee's 1235th meeting on 18 August 1997), para. 4.

[243] Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, U.N. Doc. E/C.12/1/Add.100, 7 June 2004, para. 12:

> The Committee is deeply concerned that natural extracting concessions have been granted to international companies without the full consent of the concerned communities.

Commission on the Promotion and Protection of Human Rights has applied FPIC to transnational corporations and other business enterprises.[244]

In relation to Indigenous peoples, the Inter-American Commission on Human Rights utilizes the standard of FPIC.[245] In particular, the Commission has concluded it is a "general international legal principle" that the consent of Indigenous peoples is required for States to alter their property and user rights.[246]

It is worth noting that while FPIC may increasingly be the standard relating to Indigenous peoples in some countries,[247] it is not a universally applied norm within national legal systems. For example, the Supreme Court of Canada has stated that in some cases "full

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[244] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Commentary on the Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights*, E/CN.4/Sub.2/2003/38/Rev.2, 26 August 2003, p. 12, para. 10 (c):

> [T]ransnational corporations and other business enterprises shall respect the rights of local communities affected by their activities … respect the rights of indigenous peoples and similar communities to own, occupy, develop, control, protect and use their lands, other natural resources … [and] respect the principle of free, prior and informed consent of the indigenous peoples and communities to be affected by their development projects.

[245] I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize*,* note 45, *supra*, at para. 5:

> … the State violated the right to property enshrined in Article XXIII of the American Declaration, and the right to equality enshrined in Article II of the American Declaration, to the detriment of the Maya people, by failing to take effective measures to delimit, demarcate, and officially recognize their communal property right to the lands that they have traditionally occupied and used, and by granting logging and oil concessions to third parties to utilize the property and resources that could fall within the lands which must be delimited, demarcated and titled, without consultations with and the informed consent of the Maya people.

[246] I/A Comm. H.R., *Mary and Carrie Dann v. United States*, note 63, *supra*, para. 130:

> Of particular relevance to the present case, the Commission considers that general international legal principles applicable in the context of indigenous human rights to include:
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> > …
> > • where property and user rights of indigenous peoples arise from rights existing prior to the creation of a state, recognition by that state of the permanent and inalienable title of indigenous peoples relative thereto and to have such title changed only by mutual consent between the state and respective peoples when they have full knowledge and appreciation of the nature or attributes of such property.

[247] 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. 8, para. 15:

> In the late 1990s, the Constitutional Court of Colombia upheld the rights of the U'wa indigenous community against a licence for oil prospection on indigenous territory which the Government had given to a multinational corporation without the prior consent of the community. In another case, the Court upheld the rights of the Emberá-Katío with respect to the activities of an energy company which were damaging the environment and threatening the survival of this indigenous community.

consent"[248] may be required from Indigenous peoples, but it is not required in every instance.[249] Regrettably, Canada's highest court does not generally adopt a human rights approach in determining the nature and scope of Aboriginal rights in Canada.[250] This glaring omission opens the door to a more casual treatment of rights violations.[251] However, in international human rights law, rights are accorded an autonomous meaning and are not restricted to understandings under the domestic law of States.[252]

Based on all of the above considerations, the principle of "free, prior and informed consent" is a norm that is crucial to Indigenous peoples and the enjoyment of their human rights. It is also the standard that is most consistent with international law and its progressive development.

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[248] *Delgamuukw* v. *British Columbia*, [1997] 3 S.C.R. 1010, para. 68: "Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."

[249] *Haida Nation* v. *British Columbia (Minister of Forests)*, [2004] S.C.J. No. 70, 2004 SCC 73, online: QL (S.C.C.), para. 48: "The Aboriginal "consent" spoken of in *Delgamuukw* is appropriate only in cases of established rights, and then by no means in every case. Rather, what is required is a process of balancing interests, of give and take."

[250] The need for increased human rights education is not simply a Canadian problem. It has global proportions. In regard to Indigenous peoples' rights, most scholars, teachers, lawyers and judges at the domestic level do not consistently engage in human rights analyses. Both Indigenous and non-Indigenous communities need to become more familiar with human rights and related strategies.

See "Plan of Action for the United Nations Decade for Human Rights Education, 1995-2004: Human rights education - lessons for life", in *Note by the Secretary-General: Addendum*, A/51/506/Add.1, 12 December 1996, Appendix, para. 24:

> Special attention shall be given to the training of police, prison officials, lawyers, judges, teachers and curriculum developers, the armed forces, international civil servants, development officers and peacekeepers, non-governmental organizations, the media, government officials, parliamentarians and other groups that are in a particular position to effect the realization of human rights.

[251] P. Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec", note 96, *supra*, at p. 183: "If a human rights analysis were fully and consistently applied to Aboriginal rights, it is likely that their denial or infringement would be treated more seriously by governments and the judiciary."

See also 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, Rodolfo Stavenhagen, Addendum: Mission to Canada*, note 96, *supra*, p. 31, para. 95 (Conclusions):

> **Section 35 of the Constitution Act, 1982 establishes the basic framework for the full enjoyment of existing aboriginal and treaty rights of Aboriginal peoples, but the interpretation of these rights and their implementing legislation has lagged far behind. … [T]he full enjoyment of all their human rights, including the right of peoples to self-determination, can only be achieved within the framework of their reconstituted communities and nations, in the context of secure enjoyment of adequate lands and resources.** [bold in original]

[252] See text accompanying note 225, *supra*.

VII. Impacts of "individualizing" collective rights in Indigenous territories

The ongoing attempts of the State governments, such as the UK, to "individualize" or otherwise devalue the collective rights of Indigenous peoples constitute actions of forced assimilation or cultural genocide.[253] If successful, these actions could prove highly destructive.

As recently described by Grand Chief Ted Moses: "Current UK policies on Indigenous peoples' human rights are relics of colonial policies that have failed."[254] The historical record confirms that converting collective land rights to individual rights has had long-lasting, devastating results.

For example, in New Zealand, it is said that the principal tool for appropriating Indigenous lands is the *Maori Land Court* created in 1865. [255] This Court has been "used to define and resolve Maori rights on lands held by virtue of customary law and to convert the Maori land regime into an Anglo-Saxon type of regime, which has

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

> Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:
> (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
> (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
> …
> (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures …

"Statement of Reconciliation" in Indian Affairs and Northern Development, *Gathering Strength – Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997), at p. 4:

> Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices ... We must acknowledge that *the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations*. [emphasis added]

[254] Grand Council of the Crees (Eeyou Istchee) *et al.*, "UK Human Rights Policies are 'Shameful'", *News Release*, November 24, 2004.

See also U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples' permanent sovereignty over natural resources: Final report of the Special Rapporteur, Erica-Irene A. Daes,* note 187, *supra*, p. 18, para. 60 (Principal Conclusions): "**State laws and policies that arbitrarily deny or limit indigenous peoples' interests in the natural resources pertaining to their lands appear to be vestiges of colonialism that ought to be abandoned.**" [bold in original]

[255] I. Schulte-Tenckhoff, "*Te Tino Rangatiratanga*: Substance ou apparence? Réflexion sur le dilemme constitutionnel de l'État néo-zélandais", (2004) 23 Politiques et Sociétés 89, at p. 108.

considerably disadvantaged the Maoris."[256] As a result, almost none of the customary lands subsist, which have become acquired private property, in many cases, by the Pakeha, *i.e.* New Zealanders of European origin.[257] The British were not without complicity in this whole scheme, since they were the colonizers in New Zealand and other parts of the Pacific region during that historical period.[258]

A second example relates to the land titling project in Kenya that was sponsored by the World Bank in the 1970s. The intention was "to increase agricultural productivity through the introduction of individuation of [land] tenure. However, the resultant effect was decreased productivity, serious insecurity of tenure, landlessness and economic vulnerability."[259]

A third major example is also highly instructive. In the United States, 90 million acres of Indian land were lost, after the U.S. government unilaterally adopted the *General Allotment Act* of 1887[260] and divided tribal lands into small parcels and allocated them to individual Indians and non-Indians.[261]

As recently described by the U.S. Bureau of Indian Affairs, this "policy was a failure" and has shattered the integrity of many Indigenous territories with ongoing destructive impacts:

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[256] *Id.* [unofficial translation]

[257] *Id*.

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

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

[259] African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, *supra*, p. 21. The Commission adds: "Policies of individuation of tenure are continuing in Kenya and this has in many cases had disastrous effects for the pastoralists, especially the Maasai, who have ended up losing the land that is crucial for sustaining their livelihood and many now find themselves completely impoverished."

[260] *General Allotment Act* (Dawes Act), ch. 119, 24 Stat. 338 (1887) (codified as amended at 25 U.S.C. §§ 331-334, 336, 339, 341-342, 348-349, 381 (1988)).

[261] 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.

See also B.W. Dippie, *The Vanishing American: White Attitudes and U.S. Indian Policy* (Middletown, Connecticut: Wesleyan University Press, 1982), at p. 308 (loss of more than 90 million acres of land).

> 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 … . Interests in these allotted lands started to "fractionate" as interests divided among the heirs of the original allottees, expanding rapidly with every generation.
>
> 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. Moreover, there are an estimated 1.4 million fractional interests of 2 percent or less involving 58,000 tracks of individually-owned trust and restricted lands. There are now single pieces of property with ownership interests that are less than 0.000002 percent of the whole interest.[262]

In light of these and other historical and contemporary actions to dispossess Indigenous peoples of their lands, territories and resources,[263] it would seem clear that a primary focus of the draft *U.N. Declaration* should necessarily be the safeguarding of the integrity of Indigenous territories and their revitalization. Yet the apparent priority of a number of States in the WGDD has been to seek further confirmation, if not also extension, of the principle of territorial integrity of States.

VIII. Principle of territorial integrity – State and Indigenous aspects

In regard to the draft *U.N. Declaration*, the focus in the WGDD has not been primarily on reinforcing the integrity of Indigenous territories. For some States, the mere use of the term "territories" in relation to Indigenous peoples is being resisted if not also opposed. Instead, many States continue to emphasize the principle of territorial integrity of States and have initiated a number of proposals in this regard.

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[262] 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.

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

> Having dispossessed aboriginal nations, settler nations then set out to civilize them. Assimilation was to be the solution for aboriginal inferiority. …
>
> This policy had catastrophic results, and these results are plain to see not just in Canada, but also in Australia, New Zealand, the United States, and Brazil – wherever aboriginal peoples were denied the right to rule themselves. This is more than a story of the damage done by racist contempt and imperialist arrogance. It is also a terrible demonstration of why rights matter.

For example, in September 2003, the Nordic States proposed an amendment to the preamble of the draft *U.N. Declaration* that would have subjected the whole of the Declaration – including all of the rights of Indigenous peoples – to the principle of territorial integrity of States.[264] This Nordic proposal was strongly rejected by a large number of Indigenous representatives in the WGDD.[265] Among the diverse reasons elaborated, Indigenous representatives were of the firm view that the proposed Nordic amendment was self-serving. It would serve to expand the notion of territorial integrity, lead to increased restrictions on Indigenous rights and create discriminatory double standards under international law.[266]

As an alternative, an overwhelming majority of Indigenous peoples proposed two preambular amendments at the September 2003 meeting of the WGDD.[267] The first confirmed that the right of self-determination in the international human rights Covenants would be applied equally to Indigenous and non-Indigenous peoples.[268] As subsequently explained by a representative of the Inuit Circumpolar Conference:

> … the whole effort of th[is] amendment … is to ensure equality. I am convinced that every state member represented and engaged in this process doesn't disagree with that principle. That in fact, you all in your efforts, whether it is here in the halls of the United Nations or within your own home communities and capitals engage in dialogue with Indigenous

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[264] "Proposals by the Nordic countries (Denmark, Finland, Iceland, Norway and Sweden)", Conference Room Paper, Working group established in accordance with Commission on Human Rights resolution 1995/32, 9th Sess., Geneva, 15-26 September 2003:

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

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

[266] *Id.*, especially paras. 39-46.

[267] The two proposed amendments are reproduced in U.N. Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32*, U.N. Doc. E/CN.4/2004/81, 7 January 2004 (Chairperson-Rapporteur: Mr. Luis-Enrique Chávez (Peru)), Annex, p. 20.

[268] Proposed amendment is in the underlined portion:

> *Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights affirm the fundamental importance of the right of self-determination of all peoples, and that this right applies equally to indigenous peoples, (draft *U.N. Declaration*, preambular para. 14)

> Peoples based on the principle of equality. I would be shocked to find out otherwise.[269]

The second proposed amendment affirmed that the right of self-determination by Indigenous peoples would be exercised in accordance with principles of international law.[270] This would confirm that, in the Indigenous self-determination context, States would in effect be able to invoke any principle under international law, including the principle of territorial integrity. However, no specific reference to territorial integrity would be made in the draft *U.N. Declaration*.

The unqualified right to self-determination in Article 3 of the draft *Declaration* is an accurate reflection of the same unqualified right in the international human rights Covenants.[271] The principle of territorial integrity is well-established in international law,[272] so there is no need to expressly refer to this principle in the draft *U.N. Declaration*.[273] As other commentators have concluded,[274] this rationale is wholly consistent with international law. The specific approach on self-determination proposed by the overwhelming majority of Indigenous peoples is fully supported by various

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[269] Inuit Circumpolar Conference (Dalee Sambo Dorough), Statement on Self-Determination, Article 3, Working group established in accordance with Commission on Human Rights resolution 1995/32, 10th Sess., 29 November 2004, available at: http://www.dialoguebetweennations.com/ddd/StatementsArticle3.htm#WayneLord.

[270] Proposed amendment (as revised by Guatemala and accepted by the Indigenous representatives concerned) is in the underlined portion:

> *Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in accordance with principles of international law, including the principles contained in this Declaration, (draft *U.N. Declaration*, preambular para. 15)

[271] U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical review of the United Nations draft declaration on the rights of indigenous peoples: Note by the secretariat*, UN Doc E/CN 4/Sub 2/1994/2, 5 April 1994, p. 7, para. 30 (in regard to Art. 3 of the draft *Declaration*):

> The text of this article is precisely based on article 1, paragraph 1, of the two International Covenants.

[272] See, for example, *Charter of the United Nations*, Art. 2, para. 4; and *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, note 47, *supra*.

[273] In addition, Art. 45 of the draft *U.N. Declaration* 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."

[274] See, for example, A. Quentin-Baxter, "The UN Draft Declaration on the Rights of Indigenous Peoples – The International and Constitutional Law Contexts", note 98, *supra*, at p. 92:

> The fact that the International Covenants recognise the unqualified right of self-determination of *all* peoples has not deterred states from becoming parties. In my view they should be able to accept such a right for *indigenous* peoples now, in the expectation that international law will continue to set parameters for its exercise. [emphasis in original]

international human rights organizations.[275] Further, the approach is virtually identical to that recommended by the Advisory Council on International Affairs (Netherlands) and the eminent members of its Human Rights Committee.[276]

In September 2004, the Nordic States, New Zealand and Switzerland jointly proposed a whole new set of amendments to the draft *U.N. Declaration*.[277] This new document (referred to as "CRP.1") failed to support the Indigenous amendment affirming the equal application to Indigenous and non-Indigenous peoples of the right of self-determination under the international human rights Covenants. Among the proposed changes, it was suggested that the existing Article 3 on the right of self-determination be modified, so as to explicitly refer to the principle of territorial integrity of States.[278]

This new proposal on territorial integrity had little support among Indigenous representatives. Again, an overwhelming majority of Indigenous peoples and organizations endorsed the proposed amendments put forward in September 2003, along with a new preambular paragraph "encouraging cooperative and harmonious relations between Indigenous peoples and States".[279] The government of Canada,[280] as well as

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[275] Friends World Committee for Consultation (Quakers), the International Federation for Human Rights, and Rights and Democracy, "Human Rights of Indigenous Peoples are a Global Priority", note 137, *supra*.

[276] As described above, Indigenous representatives proposed that the exercise of the right to self-determination would be "in accordance with international law". To the same effect, see Advisory Council on International Affairs (Human Rights Committee), "The Draft Declaration on the Rights of Indigenous Peoples: From Deadlock to Breakthrough?" Advisory Letter, Netherlands, adopted by the Advisory Council on 10 September 2004, p. 7:

> The inclusion of a phrase like 'in conformity with the principles of international law, as it develops' has many advantages. … [I]ndigenous peoples would not be discriminated against in relation to other peoples … [A]ny future developments in law in the field of the right to self-determination would already be accounted for in the article.

[277] Nordic States, New Zealand and Switzerland, "Draft Declaration on the Rights of Indigenous Peoples: Amended Text", Working group established in accordance with Commission on Human Rights resolution 1995/32, 10th Sess., Geneva, E/CN.4/2004/WG.15/CRP.1, 13-24 September 2004.

[278] *Id.*, at p. 5. The proponents of CRP.1 suggested that two new paras. (adapted from the *Vienna Declaration*, para. 2) be added after the existing text in Art. 3 of the draft *U.N. Declaration*, as follows:

> Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, it is recognised that peoples have the right to take any legitimate action, in accordance with the Charter of the United Nations, to realise their inalienable right of self-determination. The denial of the right of self-determination is a violation of human rights and underlines the importance of the effective realisation of this right.
>
> In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, this shall not be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind.

[279] The new preambular para. proposed by Indigenous representatives provides:

Mexico, Guatemala and Brazil, also expressed their support for this "package" of amendments by Indigenous peoples on the right of self-determination.

The inclusion of a specific reference to the principle of territorial integrity has been consistently opposed by most Indigenous peoples participating in the WGDD in Geneva. There are a number of compelling reasons.

First, it should be a key objective of the draft *U.N. Declaration* to ensure the integrity of Indigenous territories, not reinforce the position of States.[281] Second, singling out[282] the principle of territorial integrity of States could erroneously imply that this principle has some special status or significance above a host of other international law principles. In the context of self-determination, other principles such as democracy, rule of law, respect for human rights, equality and non-discrimination, and justice are highly important. It is important to avoid any hierarchy that might wrongfully place the principle of territorial integrity above respect for human rights or other international law principles identified in international instruments.[283]

> *Encouraging* harmonious and cooperative relations between States and indigenous peoples based on principles of justice, democracy, respect for human rights, nondiscrimination and good faith …

[280] Government of Canada (Wayne Lord), Statement on Self-Determination, Article 3, Working group established in accordance with Commission on Human Rights resolution 1995/32, 10th Sess., 29 November 2004, available at: http://www.dialoguebetweennations.com/ddd/StatementsArticle3.htm#WayneLord:

> Mr. Chairman, at the time when this was proposed to the group … Canada expressed its support for this proposal by Indigenous Peoples. We would like to reaffirm our support for that statement … From Canada's perspective, Mr. Chairman, we feel comfortable with the proposal put forward by the Indigenous Peoples caucus and … that this was supported by the vast majority … and we would like to associate ourselves with them.

[281] See, for example, National Chief Matthew Coon Come, Assembly of First Nations (Canada), "Statement to the United Nations Working Group on the Draft Declaration on the Rights of Indigenous Peoples", 2-13 December 2002:

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

[282] Inuit Circumpolar Conference, "Statement of Aqqaluk Lynge", U.N. Commission on Human Rights, Working Group on the draft Declaration, 24 September 2003:

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

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

Third, in relation to Indigenous peoples and their lands, territories and resources, the principle of territorial integrity is being used by States and others[284] in increasingly abusive ways. For example, this principle is being unjustifiably invoked in respect to Indigenous status,[285] Indigenous traditions,[286] language and cultural rights,[287] and treaty negotiations with Indigenous peoples relating to a wide range of key issues, such as self-government,[288] lands and resources,[289] taxation powers, and Indigenous institutions.[290]

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

[284] Although Québec is not a "State" as understood under international law, it has adopted a law incorporating its own principle of territorial integrity. See *An Act respecting the exercise of the fundamental rights and prerogatives of the Québec people and the Québec State* (Bill 99), S.Q. 2000, c. 46, s. 9: "The Government must ensure that the territorial integrity of Québec is maintained and respected."

However, see also T. Bartoš, *Uti Possidetis, Quo Vadis?*, (1997) 18 Australian Yearbook of International Law 37, at p. 73: "...this principle [of territorial integrity] applies only with respect to limits established between existing States, not to administrative boundaries within a State."

[285] M. Christie, "Amazon Indians Demand Development Rights", 31 August 1997, http://forests.org/archive/brazil/indammt.htm: "Activists in Boa Vista said Venezuela was a century behind in recognizing Indian rights. Its laws seek to assimilate indigenous people and any attempt to give them special status is seen as a threat to the nation's territorial integrity."

[286] "Indigenous People", Statement by the Brazilian Delegation, New York, 1 November 1999, UNGA, 54th sess., Third Committee (Item 113): "Creative solutions will have to be worked out in a number of key issues, including the need to ensure respect for indigenous traditions without resorting to crystalized concepts that might be construed as an open door to impairing the territorial integrity of States."

[287] African Commission on Human and Peoples' Rights, *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities*, note 15, *supra*, p. 29: "The failure of many African states to recognize cultural and language rights is based on the fear that it is bound to 'open up a can of worms'. This is believed that it could lead to separatist demands …

[288] K. Dougherty, "Province Backtracking on Innu Deal", *The [Montreal] Gazette* (20 August 2003) p. A12. See also P. Breton, "L'entente avec les Innus remise en question", *La Presse* (20 août 2003) p. A6: "[Aboriginal Affairs Minister] Pelletier said he wants assurances the territorial integrity of Quebec is not limited by the agreement, which would give Innu self-government and power to levy taxes in their territory."

[289] M. Cloutier, "Le ministre Pelletier se questionne toujours sur l'entente", *La Presse* (13 March 2004) p. A8: "According to [Aboriginal Affairs] Minister Benoît Pelletier, the actual participation of the Innu in the management of the territory, their governmental autonomy and revenue-sharing will all be subjected to the territorial integrity of Quebec." [unofficial translation] Revenue-sharing refers to lands, resources and development issues in Innu territory.

[290] In regard to all of these specific issues listed, see, for example, Québec's current policy on Aboriginal affairs: Secrétariat aux affaires autochtones, *Partnership, Development, Achievement* (Québec: Gouvernement du Québec, 1998). At p. 12, it is stated that future negotiations on Aboriginal self-government are subject to "fundamental reference points: territorial integrity, sovereignty of the National Assembly, legislative and regulatory effectivity".

Fourth, no State in the WGDD has ever explained what is the meaning and scope of the principle of territorial integrity in the Indigenous context.[291] This is especially important since this principle originated and has generally been articulated as an obligation among States.[292]

An essential aspect of the principle of territorial integrity should be to safeguard the interests of the peoples in the territory concerned.[293] Yet, to date, the principle appears to be solely invoked as a limitation against Indigenous peoples and their rights.

Clearly, the principle of territorial integrity should not continue to be a barrier in the WGDD to the affirmation of the right of Indigenous peoples to self-determination in the draft *U.N. Declaration*. The draft *Declaration*, if adopted, would not have the effect of excluding the existing principle of territorial integrity under international law. In any event, Indigenous representatives are proposing to confirm that the right of Indigenous peoples to self-determination is exercised in accordance with international law principles.

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[291] Inuit Circumpolar Conference (Dalee Sambo Dorough), Statement on Self-Determination, Article 3, note 269, *supra*: "We have put forward and advanced as many arguments as we possibility can and substantiated them. In our private discussions with some states, we have asked them to substantiate their positions. Most recently, at the September session, we sat down with the government representative of the United Kingdom asking them to substantiate their views and their positions. Thus far, we have yet to hear an explanation from states as to their position on territorial integrity and their understanding of territorial integrity in the context of the Declaration."

[292] *Charter of the United Nations*, Art. 2, para. 4: "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

A. Randelzhofer, "Article 2(4)" in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 106, at p. 116: "Art. 2(4) proscribes the threat or use of force in the international relations between states."

See also *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, note 47, *supra*; and *Final Act of the Conference on Security and Co-operation in Europe (Helsinki Final Act)*, signed by 35 states (including Canada and the United States) on August 1, 1975, *reprinted in* (1975) 14 I.L.M. 1295, Part I (a) (Declaration on Principles Guiding Relations between Participating States).

[293] U. Umozurike, *Self-Determination in International Law* (Hamden, Connecticut: Archon Books, 1972), at p. 234: "*... the ultimate purpose of territorial integrity is to safeguard the interests of the peoples of a territory*. The concept of territorial integrity is therefore meaningful so long as it continues to fulfill that purpose to all the sections of the people." [emphasis added]

See also *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, (1998) 161 D.L.R. (4th) 385, 228 N.R. 203, *reprinted in* (1998) 37 I.L.M 1342 (Supreme Court of Canada), para. 154:

> A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states.

Nevertheless, Australia, New Zealand, and a number of other States are insisting that the principle of territorial integrity of States be explicitly included in the operative paragraphs of the draft *Declaration*. Under both international human rights Covenants, States have an affirmative duty to "promote the realization of the right of self-determination".[294] It is unconscionable that some States participating in the WGDD are preventing progress towards reaching consensus on a *Declaration*, based on unjustifiable, unsubstantiated and inflexible positions.

IX. Need to eliminate State discrimination

As this article illustrates, strong elements of discrimination continue to undermine the U.N. standard-setting process relating to Indigenous peoples' human rights. In order to better understand this ongoing situation, the past experiences of Indigenous peoples are instructive and worthy of brief mention here.

Throughout history, Indigenous peoples worldwide have been discriminated against in every way possible. They have been deprived of their lands, territories and resources through so-called doctrines of dispossession – such as "discovery" and *terra nullius*[295] – and by labeling Indigenous peoples as "savages", "heathens" or "infidels".[296] For most of their history, Indigenous land and resource rights did not qualify as property rights.[297] Their traditional land tenure systems were *different* from non-Indigenous

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[294] See the identical Art. 1, para. 3 in the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights*.

[295] See, for example, A. Anghie, "Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law" (1999) 40 Harv. Int'l L.J. 1, at p. 76: "The doctrine of *terra nullius* is now understood to have been used over the centuries to dispossess and destroy indigenous peoples throughout the non-European world." See also *Mabo et al.* v. *State of Queensland [No. 2]*, (1992) 175 C.L.R. 1, 107 A.L.R. 1 (High Court of Australia).

[296] U.N. Sub-Commission on the Promotion and Protection of Human Rights, *Indigenous peoples and their relationship to land: Final working paper prepared by the Special Rapporteur, Mrs. Erica-Irene A. Daes*, note 175, *supra*, p. 11, para. 31:

> The doctrines of dispossession which emerged in the subsequent development of modern international law, particularly terra nullius and "discovery", have had well-known adverse effects on indigenous peoples. … Only recently has the international community begun to understand that such doctrines are illegitimate and racist. [emphasis in original]

In regard to doctrines of dispossession used against Indigenous peoples, see P. Joffe & M.E. Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, note 176, *supra*, vol. 1, c. 5. See also *International Convention on the Elimination of All Forms of Racial Discrimination*, preamble:

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

[297] In view of this widespread problem, the property rights of Indigenous peoples are explicitly addressed in current standard-setting processes. See, for example, *American Declaration on the Rights of Indigenous*

systems and, therefore, their land and resource rights were unjustly deprived of equal recognition and protection.[298]

Within the U.N. and its specialized agencies, there are many experts and bodies that have refused to perpetuate racial or other forms of discrimination against Indigenous peoples. Clearly, the principled positions of these many authorities and entities constitute the strong majority point of view within the U.N. system.

However, Indigenous peoples have faced, and continue to face, profound systemic discrimination from some within the United Nations. While wholly unacceptable and contrary to the *U.N. Charter*, this may have been foreseeable. Many of the same States that have profoundly discriminated against Indigenous peoples in domestic contexts have carried their same "baggage" of biases with them to the United Nations.

For example, in order to deny Indigenous peoples their rightful legal status as "peoples", the WGIP that was created in 1982 is called the Working Group on Indigenous *Populations*. Many States have always believed – and some still do[299] – that if they deny the legal status of Indigenous peoples, it will be easier to deny them their right to self-determination and other human rights.

This abhorrent rationale was the basis for not adding an "s" on the term "people", when referring to Indigenous peoples in the *Vienna Declaration and Programme of Action* in 1993. Such shameful actions were carried out by States, despite the vigorous protests of Indigenous representatives at the World Conference on Human Rights and despite the fact that States were in the process of formulating and adopting a human rights instrument. This was also why no "s" was added when the U.N. General Assembly

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Peoples, note 81, *supra*, Art. XVIII – "Traditional forms of property ownership and cultural survival. The rights to land and territories".

[298] See also Human Rights Committee, *General Comment No. 18, Non-discrimination*, 37th sess., (1989), para. 7:

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

[299] See, for example, the web site of the UK's Foreign and Commonwealth Office at http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1086624724300. When referring to Indigenous peoples, the FCO generally uses the term "people" and not "peoples". Unless the whole title is put in quotation marks, the draft *U.N. Declaration on the Rights of Indigenous Peoples* is written with the term "people" and not "peoples".

Apparently, the UK pays little attention to the *Harare Commonwealth Declaration, 1991*, issued by Heads of Government in Harare, Zimbabwe, 20 October 1991. In particular, para. 4 provides: "[Commonwealth] members … share a commitment to certain fundamental principles. … we recognise racial prejudice and intolerance as a dangerous sickness and a threat to healthy development".

proclaimed the *International Year of the World's Indigenous People* in 1993 or the *International Decade of the World's Indigenous People*.

Similarly, upon the insistence of such States as the U.S.[300] and Canada,[301] a paragraph[302] was added to the *Indigenous and Tribal Peoples Convention, 1989* with the hope of limiting the meaning of the term "peoples" in international law. However, the Chair of the International Labour Organization revision process indicated in the minutes of the proceedings that this issue was "outside the competence of the ILO".[303] Therefore, a neutral position was maintained on this matter in relation to the Convention.[304]

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[300] International Labour Office, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report IV (2A), Indigenous Labour Conference, 76th Sess., 1989, Geneva, at p. 11 (position of U.S.):

> Adoption of the term "peoples" could be used to argue for an interpretation of international law to include an absolute right of indigenous groups not only to self-determination in the political sense of separation from the State but also to absolute independence in determining economic, social and cultural programmes and structures, which would also be unacceptable to many States.

Cf. U.S. Commission on Security and Cooperation in Europe, *Fulfilling Our Promises: The United States and the Helsinki Final Act* (Washington, D.C.: U.S. Government Printing Office, 1979), at p. 148:

> [Indian tribes'] unique status as distinct political entities within the U.S. federal system is acknowledged by the U.S. Government in treaties, statutes, court decisions and executive orders, and recognized in the U.S. Constitution. *This nationhood status and trust relationship has led American Indian tribes and organizations, and the U.S. Government to conclude that Indian rights issues fall under … Principle VIII, which addresses equal rights and the self-determination of peoples*. [emphasis added]

[301] International Labour Office, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, note 300, *supra*, at p. 9 (position of Canada):

> … self-determination under international law can imply the absolute right to determine political, economic and social [and] cultural programmes and structures without *any involvement whatsoever* from States. Consequently, any use of the term "peoples" would be unacceptable without a qualifying clause which would indicate clearly that the right of self-determination is not implied or conferred by its use. [emphasis in original]

While the government of Canada currently takes a much more accurate and enlightened position consistent with international human rights law (see note 280, *supra*, and accompanying text), the United States still appears to be mired in discriminatory positions.

[302] *Indigenous and Tribal Peoples Convention, 1989* (No. 169), Art. 1, para. 3: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

However, see L. Swepston, "The Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption" in C. Price Cohen, *Human Rights of Indigenous Peoples*, ed. (N.Y.: Transnational Publishers, 1998) 17 at p. 23: "Another criticism is that Article 1(3) somehow limits the rights of indigenous peoples to self-determination. Again, this patently is not so. Convention No. 169 simply refers the decision on the content of this right to the United Nations, where it rightly belongs."

[303] International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, p. 8, para. 42:

> The Chairman considered that the text was distancing itself to a certain extent from a subject which was *outside the competence of the ILO*. In his opinion*, no position for or against self-*

Clearly, discrimination by States within the U.N. and other international institutions must be eradicated. The same is equally important within the domestic contexts of States.

In regard to the WGDD, current proposals from the UK and other States to exclude or segregate the collective rights of Indigenous peoples from the international human rights system should not be tolerated. Such a regressive step would severely blacken the reputation of the United Nations and its Member States. It would be contrary to existing international human rights instruments, the conclusions and rulings of international human rights bodies, and international law as a whole.

It would severely undermine the integrity of Indigenous peoples' rights, cultures and legal systems. It would create an inherent incoherency – that the indispensable collective rights of Indigenous peoples, from which diverse individual human rights flow, are not in themselves human rights. States would feel emboldened to continue the condemned[305] practice of "extinguishing"[306] Indigenous peoples' collective rights. Since

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> *determination* was or could be expressed in the Convention, *nor could any restrictions be expressed in the context of international law*. [emphasis added]

[304] See also R. Barsh, "Indigenous Peoples in the 1990s: From Object to Subject of International Law?", (1994) 7 Harvard Human Rts. J. 33, at p. 44:

> Working under a two-year deadline for completing the text [of ILO Convention No. 169], the negotiating committee agreed to the use of the term "peoples," subject to a clarification that it was not intended to convey any implications under international law. The committee felt that the ILO lacks competence to interpret Article I of the United Nations Charter …

[305] See, for example, D. Sambo, "Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?", (1993) 3 Transnat'l L. & Contemp. Probs. 13, at p. 31: "The ongoing implementation of state extinguishment policies constitutes a very serious threat to indigenous societies. It is another relic of colonialism. Extinguishment is used to ensure state domination of indigenous peoples and to sever their ancestral ties to their own territories. No other people are pressured to 'extinguish' their rights to lands. This is racial discrimination."

[306] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada,* CERD/C/61/CO/3,23 August 2002, para. 17:

> The Committee views with concern the direct connection between Aboriginal economic marginalisation and the ongoing dispossession of Aboriginal people from their land, as recognized by the Royal Commission [on Aboriginal Peoples]. The Committee notes with appreciation the assurance given by the delegation that Canada would no longer require a reference to extinguishment of surrendered land and resources rights in any land claim agreements.

See also Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, note 9, *supra*, para. 18:

> The Committee … endorses the recommendations of [the Royal Commission on Aboriginal Peoples] that policies which violate Aboriginal treaty obligations and the *extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party*. [emphasis added]

P. Joffe & W. Littlechild, "Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms", note 56, *supra*, at p. 12-9:

these rights would purportedly not constitute human rights,[307] Indigenous collective rights would be made susceptible to destruction.[308]

Consequently, the exclusion or segregation of Indigenous peoples' collective rights from international human rights law would not only violate the peremptory norm that prohibits racial discrimination. This invalid action would also undermine Indigenous collective rights in a manner not permitted for all other human rights referred to in the international human rights Covenants. The collective human right of all peoples to self-determination and the diverse individual human rights in the Covenants are not subject to destruction.[309]

> … a human rights approach should serve to ensure a more coherent and consistent interpretation and treatment of Indigenous peoples' fundamental rights. To date, Canadian courts have not engaged in comprehensive human rights analyses in interpreting Aboriginal and treaty rights. Two U.N. committees concerned with human rights have linked Canada's extinguishment policies to "economic marginalization" and "dispossession". Yet the Supreme Court of Canada continues to apply the discriminatory and anachronistic doctrine of extinguishment to Aboriginal rights, despite far-reaching adverse human rights considerations.

See also C. Charters, "Report on the Treaty of Waitangi 1840 Between Maori and the British Crown", note 62, *supra*, at p. 16: "The possibility of bringing communications to international human rights treaty bodies is particularly relevant at present as it appears that the Aotearoa/New Zealand government is proposing to legislate to extinguish Maori rights to the foreshore and seabed."

[307] 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, Rodolfo Stavenhagen, Addendum: Mission to Canada*, note 96, *supra*, at p. 32, para. 99 (Recommendations):

> **… from a human rights perspective, it should be clearly established in the text and spirit of any agreement between an aboriginal people and a government in Canada, and supported by relevant legislation, that no matter what is negotiated, the inherent and constitutional rights of aboriginal peoples are inalienable and cannot be relinquished, ceded or released, and that Aboriginal peoples should not be requested to agree to such measures in whatever form or wording.** [bold in original]

[308] See identical Art. 5, para. 1 in the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*: "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 …"

Eliminating the recognition of Indigenous peoples' collective rights as human rights would also run counter to explicit intentions expressed in the draft *U.N. Declaration*. See, for example, Art. 44: "Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights indigenous peoples may have or acquire."

P. Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec", note 96, *supra*, at p. 183: "Human rights instruments generally include provisions for some limitation to, or derogation from, certain rights, but not the actual destruction of fundamental rights."

[309] See identical Art. 5, para. 1 of the two international human rights Covenants, quoted in note 308, *supra*.

Conclusions

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, the impoverishment of Indigenous peoples by States and others will be perpetuated. In addition, the survival and well-being of distinct Indigenous peoples and the integrity of their nations, communities, cultures and legal systems will be severely jeopardized.

In order to effectively address lands, resources and other key human rights issues of Indigenous peoples, it is necessary to confront the matter of discrimination. One of the principal objectives of achieving the adoption of a *U.N. Declaration on the Rights of Indigenous Peoples* is to deal with the consequences of past and contemporary racism and racial discrimination impacting upon Indigenous peoples.

An essential first step is to ensure strong and uplifting human rights standards in the draft *U.N. Declaration* that is currently being considered in the WGDD. As required by the principles of equality and non-discrimination (including the right to be different), these norms must generally be consistent with the status, rights, cultures and worldviews of Indigenous peoples globally.

The consequences of racism and racial discrimination against Indigenous peoples have been recognized as "serious challenges to global peace and security, human dignity and the realization of [their] human rights".[310] These latter values are universal and are integral aspects of the Purposes and Principles of the *U.N. Charter*.

As illustrated in this article, in order to address the consequences of racism and racial discrimination against Indigenous peoples, it is vital to eliminate the discrimination exhibited by a number of States within the WGDD. Discriminatory State positions are likely the largest impediment to a successful conclusion in the standard-setting process. After ten years of discussion in the WGDD, it is unacceptable that there has been provisional adoption of only 2 articles of the draft *U.N. Declaration*.

In regard to affirming the right of Indigenous peoples to self-determination in the draft *Declaration*, it is inexcusable that States are not respecting their legal obligations under the *U.N. Charter* and the two international human rights Covenants. These actions also fail to respect the interpretations and conclusions of the treaty monitoring bodies, such as the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.

Another key example of discrimination relates to the refusal of the United Kingdom, France, United States, Netherlands, Belgium, Greece and certain other States to recognize

[310] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, note 8, *supra*, para. 103.

that the collective rights of Indigenous peoples are human rights. As stated in the Durban *Declaration*, freedom from discrimination necessarily entails respect for the human rights of Indigenous *peoples*:

> … in order for indigenous peoples freely to express their own identity and exercise their rights, *they should be free from all forms of discrimination, which necessarily entails respect for their human rights … . Efforts are now being made to secure universal recognition for those rights* in the negotiations on the draft declaration on the rights of indigenous peoples, including … to manage their lands and resources …[311]

To a significant extent, we have focused in this article on the positions of the United Kingdom. The UK has been quite vocal and resolute in its opposition. It has repeatedly declared that it will not recognize the collective rights of Indigenous peoples as human rights under international law. In particular, Indigenous property rights relating to lands, territories and resources will only be recognized by the UK as human rights if these rights are characterized as individual rights that may be exercised collectively.

Such a characterization would run counter to international law, as expressed in the *Indigenous and Tribal Peoples Convention, 1989*. It would serve to devalue or deny the rights, cultures, traditions, legal systems and worldviews of Indigenous peoples. It would contradict the rulings and conclusions of domestic courts, Special Rapporteurs and diverse human rights bodies at the international and regional levels. It would also be in opposition to the collective human rights in the historical treaties entered into by the British government with Indigenous peoples in different regions of the world.

In defence of its positions, the UK has conjured up a number of erroneous arguments that are replete with discrimination. These arguments are generating confusion and division. They include the following: treaties entered into prior to 1948 have no human rights significance; collective rights are "granted" by national governments (i.e. not inherent or pre-existing); the draft *U.N. Declaration* seeks to "create" new collective rights specific to Indigenous peoples; collective rights are a threat to the individual human rights of Indigenous persons; and individual human rights must always prevail over collective rights.

Indigenous peoples have provided the UK government detailed and substantiated reasons as to why its positions are unjustified. Should future disputes arise, the UK suppositions would seriously impede courts or other tribunals from engaging in fair and balanced analyses, based on the particular law and facts in each case. However, the UK continues to recite its "mantra" of anachronistic[312] and inaccurate arguments. The concerns and

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[311] World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, note 8, *supra*, para. 42 [emphasis added].

[312] R. McCorquodale, "Human Rights and Self-Determination", note 100, *supra*, at p. 15: "...any consideration of a human right must be in the context of current international standards."

explanations of Indigenous representatives[313] – including any basic errors and contradictions highlighted in relation to UK positions – have been virtually ignored.[314]

The UK demonstrates extreme insensitivity to the far-reaching adverse impacts of "individualizing" the collective rights of Indigenous peoples, despite its own involvement in past situations. In view of the widespread and ongoing human rights violations against Indigenous peoples, the UK shows little regard for the urgent need to adopt a strong *Declaration*.

As a result of this indefensible conduct, the UK is viewed by representatives of Indigenous and non-Indigenous organizations at the WGDD as "obstructionist" and playing a negative role.[315] When one also considers the UK's diverse international obligations, it would be difficult to conclude that the UK is acting in good faith.

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[313] 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", note 31, *supra*.

[314] See, for example, the Letter, dated 13 January 2005, from the Foreign and Commonwealth Office (Ms. Judith Mann) to Grand Chief Dr. Ted Moses (on file with Grand Council of the Crees (Eeyou Istchee)). Although a specific written request had been made by the Grand Chief to Prime Minister Tony Blair to respond to the diverse concerns jointly submitted to him by Indigenous peoples, the FCO letter of January 13 only restates once again the positions of the UK:

> You [Grand Chief] are clearly familiar with aspects of UK's position. However, it may be helpful if I set this out again.

[315] S. Pritchard, *Setting International Standards: An Analysis of the United Nations Declaration on the Rights of Indigenous Peoples and the first six sessions of the Commission on Human Rights Working Group*, paper, 3rd ed., June 2001, p. 28:

> In assessing the relative influence of each of these [State government] positions, it is important to note that two members of the Security Council – the UK and the USA - belong to the bloc which raised fundamental objections. … There were surprisingly unhelpful and obstructionist [interventions] by the UK. Australia and the US continued to be regarded as the "hard-liners".

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

> In its public statements, Canadian officials have been relatively supportive of the draft Declaration, however in negotiations at the UN working group Canada persists in allying with the *States that have shown the greatest resistance to recognition of a strong Declaration: Australia, the United Kingdom, and the United States of America.* [emphasis added]

U.N. Sub-Commission on the Promotion and Protection of Human Rights, Working Group on Indigenous Populations, *Report of the Working Group on Indigenous Populations on its twenty-second session, Chairperson-Rapporteur: Mr. Miguel Alfonso Martínez*, E/CN.4/Sub.2/2004/28, 3 August 2004, 20, para. 100:

> In a joint statement, an indigenous participant referred to the position of the United Kingdom that the collective rights of indigenous peoples were not recognized under international law. … He further noted that the United Kingdom had failed to recognize that the draft declaration elaborated the rights of the indigenous as peoples, and not as individuals.

All States, including the UK, must fully respect the *U.N. Charter* and fundamental principles of justice, fairness, democracy and respect for human rights. They must respect the rule of law, not only domestically but also at the international level.[316]

Those States that refuse to recognize Indigenous peoples' collective rights as human rights are failing to respect the inherent dignity of Indigenous peoples. Although Indigenous peoples are distinct and equal "members of the human family",[317] their collective human rights are being disrespected and devalued. This conduct constitutes a serious and ongoing violation of the most basic values and principles of international law.[318] As UK Parliamentary Under Secretary Bill Rammell has publicly declared:

> … I would like to recall, if I may, the opening words of the Universal Declaration on Human Rights which state that 'recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace'.
>
> In other words, *without the observance of human rights by all states, freedom, justice and peace are fundamentally threatened*.[319]

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[316] U.N. General Assembly, *Implementation of the United Nations Millennium Declaration: Note by the Secretary-General*, A/59/282, 27 August 2004, p. 3, para. 13: "… the international community must be conscious of the need to respect and uphold the international rule of law — in all spheres — ranging from maintaining international peace and security to managing international trade and protecting human rights."

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

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

[317] U.N. Secretary-General, "Indigenous Peoples Rich and Integral Part of Human Tapestry, Have Much to be Proud of, Much to Teach, Secretary-General Says", *Press Release*, SG/SM/8799, HR/4683, OBV/363, 29 July 2003:

> The human family is a tapestry of enormous beauty and diversity. The indigenous peoples of the world are a rich and integral part of that tapestry. They have much to be proud of and much to teach the other members of the human family. *The protection and promotion of their rights and cultures is of fundamental importance to all States and all peoples.* [emphasis added]

[318] *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, preamble:

> … in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the *inherent* dignity and of the equal and inalienable rights of all members of the human family is the *foundation of freedom, justice and peace in the world* … [emphasis added]

[319] B. Rammell (UK Parliamentary Under Secretary), "'We are Determined to Succeed' – Bill Rammell Speaks at the UN Commission on Human Rights", Geneva, 18 March 2004, http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391647&a=KArticle&aid=1078995799540. [emphasis added]

The global geopolitical implications of the regressive and illegitimate positions being taken by the UK and certain other States in the WGDD transcend the Indigenous context. As described and concluded by Indigenous peoples:

> … in the current geo-political context … [t]he U.N. and its Member States are implementing a diverse range of measures internationally. These include promotion of international peace, security and cooperation; combatting terrorism; prosecution of crimes against humanity; and addressing other issues of global concern.[320]
>
> States who selectively apply, or fail to comply with, the principles of democracy, rule of law, peace, justice, non-discrimination and respect for human rights can hardly demand full respect for these same precepts and values from other States.[321]
>
> On human rights issues, the lack of impartiality in the positions of the UK, U.S. and certain other States have grave implications that go far beyond the more than 300 million Indigenous people in different regions of the globe. **Selective**[322] **or discriminatory application of the *Charter*'s Principles – whether by developed or developing States – substantially weakens the United Nations and the international human rights system as a whole.**[323]

In order to effect positive change, Indigenous peoples have recommended specific reforms in the functioning of the WGDD. These include the introduction of explicit criteria within the Working Group, so as to ensure strict adherence to the Purposes and Principles of the *U.N. Charter* when any participant proposes new or modified human

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[320] 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", note 31, *supra*, para. 217.

[321] *Id.*, para. 218.

[322] B. Boutros-Ghali, *An Agenda for Peace: Report of the Secretary-General*, note 83, *supra*, p. 23:

> The principles of the Charter must be applied consistently, not selectively, for *if the perception should be of the latter, trust will wane and with it the moral authority which is the greatest and most unique quality of the instrument*. [emphasis added]

United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, Part I, para. 32: "The World Conference on Human Rights reaffirms the importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues."

[323] 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", note 31, para. 219. [bold in original]

rights norms.[324] In particular, proposals to undermine the human rights of Indigenous peoples or create discriminatory double standards should not be afforded any credibility within the Working Group.[325]

Too often, States fail to provide any substantiation for their positions or proposals. More effective checks and balances are needed within the WGDD to address the erroneous and discriminatory arguments of some States.

The duty of States to respect human rights is an *erga omnes* obligation[326] and a peremptory norm.[327] States should be calling attention to proposals that would violate international human rights standards. The performance of State obligations is a legitimate interest of the international community.[328] Consistent with democratic principles, human rights organizations and other human rights defenders in civil society also have an essential role.[329]

Thus, ensuring the affirmation of and respect for Indigenous peoples' human rights is not solely an Indigenous responsibility. It is also a matter of international concern[330] and

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[324] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Assessing the International Decade: Urgent Need to Renew Mandate and Improve the U.N. Standard-Setting Process on Indigenous Peoples' Human Rights", note 26, *supra*, para. 178 i).

[325] *Id.*, para. 178 ii), which recommends that discriminatory proposals not be permitted or tolerated.

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

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

[327] See note 41, *supra*.

[328] See, for example, Human Rights Committee, *General Comment No. 31, Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80th sess., UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, para. 2 :

> … every State Party has a legal interest in the performance by every other State Party of its obligations. … Accordingly … violations of Covenant rights by any State Party deserve their attention. To draw attention to possible breaches of Covenant obligations by other States Parties and to call on them to comply with their Covenant obligations should, far from being regarded as an unfriendly act, be considered as a reflection of legitimate community interest.

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

> Human rights defenders are on the front lines of democratic development, striving for the recognition of the rights of the marginalized and the excluded. The process of formulation, demand, recognition and enforcement of rights is at the very heart of democratic development.

[330] United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, note 82, *supra*, para. 4: "... the promotion and protection of all human rights is a legitimate concern of the international community"

cooperation.[331] In terms of the overall strengthening of all human rights, there is too much at stake for all.

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[331] International cooperation is important in relation to the human rights of peoples and individuals. See, for example, *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, note 84, *supra*, preamble:

> *Acknowledging* the important role of international cooperation for, and the valuable work of individuals, groups and associations in contributing to, the effective elimination of all violations of human rights and fundamental freedoms of peoples and individuals …