ESSENTIAL VALUES OF AN INDIGENOUS RIGHTS DECLARATION

Indigenous peoples worldwide have worked for decades to ensure that our pre-existing human rights are recognized and upheld by the nations of the world. Clearly, domestic laws have not protected the ability of Indigenous peoples and communities to live secure lives as self-determining peoples. As a result of their persistent efforts, Indigenous representatives slowly began to open doors to the United Nations and the world community.[1]

At stake are the same issues that have been at risk for hundreds of years: ownership and control of lands and resources, self-government and decision-making authority, as well as the right of Indigenous peoples to live in peace and security as distinct peoples. Indigenous leaders, advocates, and organizations have worked with great determination. A most important result of their specific efforts since 1984 is the draft *U.N. Declaration on the Rights of Indigenous Peoples*. The adoption of this U.N. document in 2006 is now being widely promoted by Indigenous peoples globally.

However, a recently published claim implies that unless the *U.N. Declaration on the Rights of Indigenous Peoples* is adopted by consensus, it might never become legally binding. It further implies that unless the Chair's proposed text[2] is reopened to accommodate certain governments, the *Declaration* would remain just a statement of theoretical or proposed rights. This claim misstates the nature of our inherent rights. It also narrowly defines the force of the international *Declaration* and creates misleading conclusions about legally binding international law.

As the *Declaration* now approaches consideration in the new Human Rights Council and a possible vote in the U.N. General Assembly, it might be helpful to ask ourselves certain questions. What is a U.N. declaration? Is there a relationship between a vote in the U.N. General Assembly and eventual acceptance of a declaration's provisions as legally binding international law? Can the intentions of a few governments diminish the legal effectiveness of an international declaration?

It is true that the *Declaration*, when adopted, will not be legally binding. Declarations are generally considered to be "soft law" at the international level; that is, they may have some legal weight but do not have the same legal force as international treaties. But declarations adopted by the U.N. General Assembly do have multiple layers of value:

> Adoption of this instrument will give the clearest indication yet that the international community is committing itself to the protection of the individual and collective rights of indigenous peoples. While this Declaration would not be legally binding on States, and would not, therefore, impose legal obligations on governments, the declaration would carry considerable moral force.[3]

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[1] See, for example, Basic Call to Consciousness, edited by Akwesasne Notes, Revised Edition, Summertown TN, Book Publishing Company, (2005).

[2] The Chairman's proposed text is the result of years of negotiations between Indigenous peoples and governments on the text of the *Declaration* (Annex 1 of U.N. Document E/CN.4/2006/79). Revised Chairman's Summary and Proposal, Draft *Declaration on the Rights of Indigenous Peoples* at: http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.79.pdf

[3] United Nations Guide for Indigenous Peoples, Leaflet No. 5, page 1. *The* United Nations Guide *series is published by the Office of the High Commissioner for Human Rights, United Nations Office at Geneva, 2001.*

Eleanor Roosevelt, in addressing the 1948 U.N. General Assembly, described another declaration, the Universal Declaration of Human Rights (UDHR) as follows: "In giving our approval to the declaration today it is of primary importance that we keep clearly in mind the basic character of the document … It is a declaration of basic principles of human rights and freedoms … to serve as a common standard of achievement for all peoples of all nations."[4]

Declarations of the General Assembly can often articulate perceived principles of international law before those principles have become the usual practice of States. This contributes to the progressive development of international law. Declarations can also incorporate already existing – not just developing – international law.

Additionally, the provisions of a declaration can influence various U.N. agencies, shaping policy decisions and programme priorities in important and practical ways. For instance, many U.N. agencies have already adopted the principle of Free, Prior, and Informed Consent (FPIC) as part of their operational policy. Other vital concerns of Indigenous peoples, such as lands and resources, treaties, and the protection of cultural diversity have advanced within agencies via policies, programmes, studies, and conferences. The responses of agencies to an adopted *Declaration* can, in turn, beneficially influence public opinion.

International declarations may be invoked by courts in interpreting human rights within some domestic legal systems. For example, the Supreme Court of Canada consistently refers to international instruments for interpretive purposes, regardless of whether Canada has signed or ratified such instruments. U.N. declarations can be, and are, used by human rights treaty monitoring bodies of the United Nations in interpreting international treaties. Declarations may also be used beneficially by Indigenous peoples in standard-setting processes, if an existing declaration helps to reinforce the basic rights and values of Indigenous peoples.

Noting the many positive aspects of an international declaration, can its eventual effectiveness be predicted by the number of votes in the General Assembly? Clearly, the greater the level of support, the more likely it is that the provisions of the draft *Declaration* can become, in time, legally binding. Indigenous representatives and advocates worldwide seek this strong support from States.

However, returning to the UDHR as one example, a story emerges that illustrates some surprising turns. The 58 members of the 1948 General Assembly had strong differences regarding various provisions of the declaration.[5] Divergent political and philosophical approaches raised real questions regarding support from States.

Eleanor Roosevelt, recognizing this uncertain dynamic when she addressed the members before the vote, did not ask for consensus. She asked the General Assembly to approve the declaration by an "overwhelming majority … as a statement of conduct for all."[6] Forty-eight nations voted for the

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[4] At: http://www.udhr.org/history/ergeas48.htm. Roosevelt was the U.S. representative to the U.N. Commission on Human Rights, and the Commission's Chairperson. Speech originally published by the U.S. Department of State in "Human Rights and Genocide: Selected Statements; United Nations Resolution Declaration and Conventions," 1949.

[5] Glendon, Mary Ann, *The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea*, Harvard Human Rights Journal, Vol. 16, 2003. At: http://www.law.harvard.edu/students/orgs/hrj/iss16/glendon.shtml

[6] At: http://www.udhr.org/history/ergeas48.htm

UDHR, eight abstained (the Soviet bloc countries, South Africa and Saudi Arabia), and two were absent. The community of nations adopted the declaration 'without dissent.'

Did the lack of unanimity affect the ability of the provisions of the UDHR to become legally effective? There are two basic paths for a declaration to become legally binding international law. First, the provisions of the declaration can be molded into a treaty (covenant or convention). Those States that become a party to the treaty (through ratification or accession) *voluntarily* accept a legal obligation to uphold the articles of the treaty. The treaty is binding on those States.

By 1966, eighteen years later, most of the provisions of the UDHR had been drafted into two treaties, the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR). In 1976, when the Covenants entered into force, the ICESCR was binding for 34 States; the ICCPR for 32. Today, 152 States are party to the IESCR, and 154 to the ICCPR. Together with the UDHR, the three documents became known as the International Bill of Human Rights. It might be useful to compare the 1948 UDHR vote with eventual support for the two Covenants.

- All of the Soviet bloc countries became 'Parties' to both Covenants.
- Saudi Arabia did not sign or ratify either Covenant.
- South Africa signed, but did not ratify the ICESCR. It became a party to the ICCPR.
- Several of the 'pro' votes did not translate into later support for the two Covenants. Of the 48 members of the General Assembly who originally supported the UDHR, Cuba, Myanmar, and Haiti have not signed or ratified the ICESCR. Cuba, Myanmar, and Pakistan have not signed or ratified the ICCPR.
- Pakistan and the United States of America have signed, but not ratified the ICESCR. China has signed, but not ratified the ICCPR.

Nevertheless, the worldwide acceptance of the principles enshrined in the UDHR has continued to grow and to inspire many other human rights instruments. The IESCR and the ICCPR are considered to be core international human rights instruments. Four other treaties that are 'core' are the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW), *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), and the *Convention on the Rights of the Child* (CRC). All of these Conventions are considered to have originated in provisions of the UDHR, followed by their own specific U.N. declarations. See ANNEX for the 1948 member's eventual acceptance or rejection of these six core treaties.

A second way for the provisions of a declaration to become legally effective is for them to become customary international law. They are then legally binding in international law to all States. In time, a provision of a declaration can be viewed as customary international law, if States repeatedly act in accordance with it, and if it can be shown that they believe it is their legal obligation to do so. And, again, it is important to note that certain provisions of a U.N. declaration may already be considered customary international law.

State practice does not have to be unanimous. If a State violates or does not accept a rule, that State cannot prevent the rule from becoming customary international law. But it is necessary for a

'representative majority of States' to consider a rule or provision to be their legal obligation. Many of the provisions of the UDHR have now become so respected by States that upholding them has become their usual practice, their custom. Therefore, at least portions of the UDHR now have the status of customary international law.[7]

Even so, some States may consider themselves as not legally bound by certain UDHR provisions. A government might claim to have consistently objected to a particular rule or rules, and not intend to change its position. When Eleanor Roosevelt addressed the General Assembly in 1948, she stated before the vote:

> … my Government has made it clear in the course of the development of the declaration that it does not consider that the economic and social and cultural rights stated in the declaration imply an obligation on governmental action … .[8]

Regretfully, the United States continues to echo this position almost 60 years later. In the 2005 Commission on Human Rights (CHR) discussion of the "*Right of everyone to the enjoyment of the highest attainable standard of physical and mental health"* the U.S. representative said, "the United States believes that while the progressive realization of economic, social, and cultural rights requires government action, these rights are not an immediate entitlement to a citizen."[9] He then asked that the adoption of the resolution "be decided by a recorded vote" and cast the lone vote against it (with no abstentions).

Additionally, an August 30th, 2005 letter from Ambassador John Bolton shares "key concepts" of the United States government regarding the new Human Rights Council. He writes:

> Our changes reflect the fact that States are only obliged to fulfill obligations under international law. The UDHR is a non-binding document; therefore, as a legal matter, States have no obligations under it.[10]

What, then, is the duty of a State to uphold provisions that have become customary international law, if the State persistently objected to it from the outset? In international law, it is not clear that consistent objections to an emerging rule of customary international law would prevent that rule from applying to an opposing State. Also, a State's general objection to the adoption of a Declaration could well be based on procedural grounds. It would not mean that the State is opposed to some or all of its provisions.

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[7] See, for example, *Proclamation of Teheran*, proclaimed by U.N. member States at the International Conference on Human Rights at Teheran on 13 May 1968, U.N. Doc. A/CONF. 32/41 at 3 (1968), Article 2**:** "The Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and *constitutes an obligation for the members of the international community*." [Emphasis added]

[8] At: http://www.udhr.org/history/ergeas48.htm

[9] E/CN.4/2005/L.28, U.N. Commission on Human Rights, Sixty-first session, Agenda item 10, April 15, 2005. Audio files, Commission on Human Rights, 5th week, April 15th, 51st meeting, Original Version, at 38:20 – 41:33.
At: http://www.ohchr.org/chr61/audio/20050415am.rm

[10] At: http://www.usunnewyork.usmission.gov/reform-un-jrb-ltr-rights-8-05.pdf (Page two, second paragraph)

In the case of the draft *Declaration*, any State objections have been limited to specific provisions. State objections have not always been consistent and, in some instances, the provision objected to may already be considered as customary international law.

It also is worth noting that all human rights are inherent (pre-existing) and inalienable (cannot be taken away)**.** It is important to remember that the collective and individual human rights of Indigenous peoples are not being *given* to us:

> [T]he law does not establish human rights. Human rights are entitlements that are accorded to every person as a consequence of being human. Treaties and other sources of law generally serve to protect formally the rights of individuals and groups against actions or abandonment of actions by governments that interfere with the enjoyment of their human rights.[11]

The draft *U.N Declaration on the Rights of Indigenous Peoples* does not create rights. This historic document affirms the pre-existing and inalienable human rights of the Indigenous peoples of the world. It elaborates essential human rights standards and principles. It takes into account and reflects existing human rights as proclaimed in countless human rights resolutions, treaties and other international instruments or rulings. "A discrete body of international human rights law upholding the collective rights of indigenous peoples has emerged and is rapidly developing."[12] In fact, some of the draft *Declaration's* provisions and rules are already becoming customary State practice.[13]

Perhaps not all governments will support the adoption of the *U.N. Declaration on the Rights of Indigenous Peoples*. However, after decades of intensive discussion and effort, an overwhelming majority of the members of the U.N. General Assembly can ensure that the rights recognized in the Declaration **"**constitute the minimum standards for the survival, dignity and well-being of the Indigenous peoples of the world.**"**[14]

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[11] United Nations Guide for Indigenous Peoples, Leaflet No. 2, page 1.

[12] S. James Anaya and Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*, Harvard Human Rights Journal, Volume 14, Spring 2001. At: http://www.law.harvard.edu/students/orgs/hrj/iss14/williams.shtml

[13] See Fergus MacKay, (Forest Peoples Programme), *The UN Draft Declaration on the Rights of Indigenous Peoples and the Position of the United Kingdom*, May 26 2003.
At: http://www.forestpeoples.org/documents/law_hr/un_dft_decl_ips_rights_may03_eng.pdf

[14] Revised Chairman's Summary and Proposal, Draft *Declaration on the Rights of Indigenous Peoples, Article 42.* At: http://www.ohchr.org/english/bodies/chr/docs/62chr/E.CN.4.2006.79.pdf

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