The Collective Right of Indigenous Peoples to Self-Determination

In Accordance with

the United Nations Declaration on the Rights of Indigenous Peoples

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Abstract

The Declaration on the Rights of Indigenous Peoples was adopted by the General Assembly on 13 September 2007, after more than twenty years of negotiations between states, indigenous representatives, lawyers, and academics. Although the resulting document is controversial and complex in its treatment of several important issues, its ambiguous characterization of the collective legal right of indigenous peoples to self-determination has been chosen as the focus of this work because it is the primary right from which all other rights, and problems, are derived. The work commences with a critique of the position held by certain states that the categorization of indigenous populations as legal ‘peoples’ in the Declaration is inappropriate. Secondly, the juxtaposition between internal and external self-determination is used as a framework for analyzing the extent of self-determination that indigenous peoples are entitled to, with the conclusion that neither may states limit the right to a pre-defined outcome, nor may indigenous peoples claim an unqualified external right under international law. Thirdly, this paper argues that the historical relationship of indigenous peoples to (international) law makes the latter an insufficient tool for determining how their future rights as outlined in the Declaration should be interpreted. When the voice of reason is employed to compensate for the law’s shortfalls, it is found that an inherent right of indigenous peoples to freedom of existence accompanies and fortifies their legal right. Finally, the author speculates upon how the translation of the above interpretation of the rights of indigenous peoples into treaty law could summon a dramatic makeover of state visage throughout the international community.
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‘The draft Declaration is not a short or simple document, but long and complicated, as befits the complexity of the subject matter.’

– Erica-Irene Daes, Chairperson/Rapporteur of the Working Group on Indigenous Populations, United Nations\(^1\)

\(^1\) Kly Y.N. & Kly D., p56
1 INTRODUCTION

International attention on the rights of indigenous peoples has increased in recent years, funneling itself through the first and second United Nations International Decades of the World’s Indigenous People in 1994-2004 and 2005-2015 respectively, the creation of the United Nations Permanent Forum on Indigenous Issues in 2000, and the taking of office by the first UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples in 2001. What may be viewed as the zenith of this focus was attained on September 13 of this year through the long-awaited adoption of the United Nations Declaration on the Rights of Indigenous Peoples (hereafter referred to as “the Declaration”) by the General Assembly, with 143 nation-states in favor, 4 countries voting against, and 11 abstentions.²

The adoption of the declaration is the result of more than twenty years of negotiations between nation-states and indigenous peoples. The United Nations Working Group on Indigenous Populations (WGIP), established in 1982 as a subsidiary organ of the Sub-Commission on the Protection and Promotion of Human Rights in part to focus on the evolution of international standards concerning indigenous rights (EcoSoc resolution 1982/34), submitted a draft Declaration to the Sub-Commission in 1993, who adopted it by resolution 1994/45 and then sent it on to the Working Group on the Draft Declaration (WGDD: an inter-sessional working group established by the Commission on Human Rights) for review. The WGDD was in conflict over several issues (which will soon be outlined), and it wasn’t until their eleventh meeting in February 2006 that the Chairperson-Rapporteur proposed that a revised version of the text would be presented to

² GA/10612, p1 The four countries voting against were Canada, the United States, Australia and New Zealand
the Commission on Human Rights (now the Human Rights Council) for adoption.\footnote{Gilbert, p9-10} The Human Rights Council adopted the declaration by 30 votes to 2 (with 12 abstentions) on 29 June 2006, and recommended it for adoption to the General Assembly where it was recently passed.

In spite of the fact that more than two decades have been devoted to its development, the Declaration in its final form is controversial, complex and ambiguous. That its wrinkles are ironed out, or at least mulled over in greater depth, is of high importance because the Declaration itself is a significant document: it can be treated as \textit{coherent} summary of the rights of indigenous peoples in international law,\footnote{Coherence has become a problem for the development of indigenous rights in international law, see ibid p7} which have up until now been articulated in a piecemeal fashion through various organizations such as the International Labor Organization (ILO), the World Bank (WB), the United Nations Development Program (UNDP), the World Intellectual Property Organization (WIPO), and different UN Human Rights Monitoring Bodies.\footnote{Ibid p7} Further, while the Declaration does not create any immediate binding obligations under international law, it is important because it may contribute to a growing body of customary international law. It also establishes a moral framework which is likely to have an impact on domestic legislation and political affairs.

Given the significance of the Declaration, it is useful to skim the surface of some of its most important complications before approaching the substantive issue of this work, in order that my final study is understood to be but one of several topics in the field of indigenous rights requiring further analysis. First, the controversies surrounding the
meaning of indigenous peoples in international law have resulted in the absence of a
definition in the Declaration, which some argue is a necessary part of allowing the
indigenous to determine their own identity, but others maintain leaves the rights within
the document available for use by anyone who identifies themselves as indigenous,
thereby removing the specificity of their claims.  
Second, the collectivity of rights within
the Declaration is a departure from the traditional occupation of human rights law with
the rights of individuals. While an international consensus on the applicability of human
rights to collectivities is certainly developing, concern that this new approach will lead to
the erosion of individual rights remains. Third, the issue of land rights remains a source
of confrontation between the interests of indigenous peoples in retaining their spiritual,
ancestral, medicinal, and economic links to land, and states who prize the economic value
of the often-richly-laden territories that indigenous peoples lay claim to.  
Fourth, debate
exists over whether the components of the Declaration will be generative of customary
law or not, in which experts such as S. James Anaya and Siegried Wiessner argue in the
affirmative, but several state representatives (and particularly those from the U.S, New
Zealand, Australia and Canada) argue in the negative.  
Fifth, while indigenous
participation was prominent in the WGIP, there are grievances aimed at the Commission
on Human Rights for failing in its “real task … to guarantee the greatest possible degree
of indigenous participation in the further consideration…of the Draft Declaration.  

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6 Although imperfect, the definition used by Jose Martinez Cobo in his study of the Problem of
Discrimination against Indigenous Populations (1986) is broadly accepted as being helpful, and is included
in part 2.2 of this work
7 Interview with Morse Flores, 21 November 2007
8 Anaya and Wiessner, p1-6
9 Hagen (Observations), p1
10 Professor E-I Daes, Chairperson, UN Working Group on Indigenous Populations, at a seminar on “The Draft
Declaration on the Rights of Indigenous Peoples - Current Developments and their Implications for the United Nations
such, the governance over the contents of the final product has been taken out of the hands of exactly those stakeholders whom it most concerns.

While all of these debates are relevant and to some extent interconnected, they are deliberately marginalized in this work to make room for a focus on the conflict regarding the nature and extent of the right of indigenous peoples to self-determination as articulated in the Declaration. This is commonly regarded as being the most controversial aspect of the Declaration and also its cornerstone, for self-determination is the primary collective right which enables the exercise of all other rights.

The work commences with a questioning of whether indigenous peoples are ‘peoples’ under international law, which has implications on their right to self-determination. The negating arguments of states and experts are critiqued through reference to a conglomerate of definitions as well as the evolution of international law to affirm that the categorization of indigenous populations as ‘peoples’ is valid.

Second, this categorization is used to examine the extent of the right to self-determination in the Declaration as interpreted by stakeholders, using the distinction between internal and external self-determination as a unit of analysis. The professed reasons of States to seek to limit the right to an internal dimension are proven to be invalid, while the preference of indigenous peoples for an unqualified right is also not permissible.

Third, the limitations of the law as a tool of analyzing the rights of indigenous peoples are acknowledged. When these are remedied through the application of common sense, it is found that an additional inherent right of indigenous populations to self-
determination exists beyond that derived from their categorization as peoples. This fattens up their case.

Fourth, the impact of implementing the Declaration’s principles as interpreted in this work on the visage of the state are examined, with the conclusion that some dramatic changes to our societal organization may lie on the horizon.

2 THE CATEGORIZATION OF INDIGENOUS POPULATIONS AS ‘PEOPLES’ UNDER INTERNATIONAL LAW

2.1 Introduction

An exploration of the nature of the indigenous right to self-determination begins with an examination of whether or not they meet the criteria of ‘peoples’ with an ‘s’ under international law. What may at first glance be a trivial question of semantics is in fact a crucial determiner in our discussion because the right to self-determination in international law is solely derived from the holder’s status as a ‘peoples.’ This is firmly entrenched in General Assembly resolutions, human rights treaties, international instruments, and international jurisprudence.  

2.2 The use of ‘peoples’ in the Declaration

The Declaration is crafted from the standpoint that the categorization of indigenous populations as ‘peoples’ is appropriate. Pre-ambular paragraph 2 of the declaration affirms that

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11 Bohre, 21
‘indigenous peoples are equal to all other peoples…’,12

while Article 2 states that
‘indigenous peoples and individuals are free and equal to all other peoples and individuals.’

Furthermore, Article 3 of the Declaration is constructed in reflection of Articles 1 of the United Nations International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR):

Article three of the declaration states that:

“In Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social, and cultural development.”

While Articles 1 of the covenants state that:

“All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

At this point, it is necessary to mention the claim made by the United States that such excerpts were “not intended…to indicate that indigenous peoples automatically qualify as ‘peoples’ for the purposes of common articles 1.”13 The present author rejects this claim on the basis of the absence of a disclaimer attached to the final document similar to the one attached to ILO Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, Article 1 (3) in guarantee that such a

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12 All excerpts of legislation in this work are replicated in the annex and cited in the bibliography
13 Hagen, (Observations), p3
qualification would not be made. If the intention did not exist, it could have been easily and clearly indicated.

2.3 The validity of the categorization in the Declaration

Important parties question whether this categorization of indigenous peoples as “peoples” is legally and historically correct. The United States has argued that “peoples” in international law are entire peoples of a state, or those who constitute themselves as a sovereign independent state, and not particular groups within existing states. Robert T. Coulter of the Indian Law Resource Center supports this view by arguing that no “people” within an existing state has ever been given a distinct right of self-determination by the UN and state practice beyond ordinary access to government.

In order to respond to these contentions, it is necessary to look at international legal practice and doctrine, and also the definitions of ‘peoples’ which have accumulated over the decades. Addressing the first requirement, it is the response of this paper that both the United States and Coulter seem to be narrowly focused on the original intentions behind Articles 1 of the covenants, which were crafted during the decolonization period and were therefore primarily concerned with bestowing the right to self-determination upon groups living in territories under foreign domination or occupation so that they could reach national independence. They were also applied to entire national...

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14 ILO Convention 169 1(3) reads that ‘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.’
15 International Center Seminar, Marie Leger, ‘Recognition of the Right to Self-Determination of Indigenous Peoples: Asset or Threat?’ p4
16 DDWG3, Pritchard p73
17 Coulter, p2-3
18 Bohre, p22
populations of independent states,\textsuperscript{19} as the U.S has rightly pointed out. However, it is important to note that the reason why the aim of Articles 1 was originally not \textit{deliberately} inclusive of indigenous peoples (although notably not exclusive either) was that the concept of indigenous rights had not been born yet; indeed, indigenous populations still held the status of ‘minorities’ or ‘the un-christianized.’\textsuperscript{20}

However, it is not sufficient to merely examine where international law was five decades ago, but how it has developed in state practice since then. Indeed, recent international practice and doctrine demonstrates that the meaning of ‘peoples’ as pertaining to Articles 1 of the covenants now applies to ethnic sub-groups within encompassing states or crossing such states’ international borders.\textsuperscript{21}

Secondly, although single legal definitions of ‘peoples’ and ‘indigenous peoples’ do not exist, an application of a conglomerate of the commonly used definitions of ‘peoples’ to the commonly used definitions of ‘indigenous peoples’ leaves no reason to believe that the categorization is not a snug fit.

The Chairperson/Rapporteur of the WGIP has defined a people according to “the extent to which the group…shares ethnic, linguistic, religious or cultural bonds, although the absence or weakness of one of these bonds need not invalidate a claim, [and by] the extent to which members within the group perceive the group’s identity as distinct from the identities of other groups.”\textsuperscript{22}

Similarly, Vincent A. Bohre has taken the common denominators of past and present definitions of peoples to summarize that the subjects must feature most or all of

\begin{footnotes}
\footnote{Ibid, p22}
\footnote{Interview Morse Flores, 21 November 2007}
\footnote{Bohre, p17}
\footnote{Daes, p5}
\end{footnotes}
the following: a common history, a historical territorial connection, a common ethnic identity or origin, cultural homogeneity, linguistic unity, a common religion or spiritual tradition or ideology, common social, political and economic attributes, and the subjective criterion of a “collective belief of being a distinct people and a wish to be recognized as such, as well as the desire to live together and to share a common future.”

Indigenous populations clearly meet the requirements of these definitions, and the lack of a singular legal conceptualization of indigenous should not impede the integrity of such recognition. In her Explanatory Note on the UN Draft Declaration, the Chairperson of the WGIP asserted that, “[i]ndigenous groups are unquestionably ‘peoples’ in every political, social, cultural and ethnological meaning of this term” and that “it is neither logical nor scientific to treat them as the same ‘peoples’ as their neighbors, who obviously have different languages, histories and cultures.” The Indigenous Caucus supports this view in stating that “we are united by our histories as distinct societies, by our languages, laws, traditions and unique spiritual and economic relationships with our lands and territories.”

Further, the most commonly-used definition of indigenous peoples, being that of Martinez Cobo, incorporates all critical aspects including a “historical continuity,” a self-perception of being “distinct,” a desire to preserve for “future generations…ancestral territories,” and a shared “ethnic identity” and “own cultural patterns, social institutions and legal systems.” While it is not within the scope of this work to conduct detailed studies of the characteristics of different indigenous populations around the world, the validity of these definitions and the consequent

23 Bohre 18
24 Mackay, 15
25 WGDD 5, Pritchard, 41
categorization can be confirmed by considering the defining features of the Maori in New Zealand, the 12 indigenous nationalities of Ecuador, the Aboriginal and Torres Strait Islanders of Australia, the Hill Tribes of Thailand, the Inuit of Alaska, and so forth.

Finally, it should be noted that the alternative to categorizing indigenous peoples as ‘peoples’ would be to leave them in the recently-used category of minorities, which is inappropriate because minority rights are individual rights, and therefore lack the strong political component necessary to protect a collective unit of humanity.\(^{27}\)

It is thus logical to conclude that the Declaration correctly derives a right of indigenous peoples to self-determination from their categorization as ‘peoples’ under international law.

3 THE EXTENT OF THE RIGHT OF INDIGENOUS PEOPLES TO SELF-DETERMINATION IN THE DECLARATION

3.1 An ambiguous articulation

Even with the categorization recognized in the above section, the navigation through the grey mists of the Declaration’s references to the extent of the right to self-determination is difficult. In at least two respects, its ambiguity is appropriate: Given the diverse array of indigenous peoples all around the world, each of which has a unique relationship and legal history with encompassing or neighboring states, it is ambitious to reach a consensus on an international Declaration that accommodates the preferences of all stakeholders. For this reason, ‘constructive ambiguity’ has been seen as an appropriate

\(^{27}\) Bohre p14. An additional categorization of indigenous peoples is proposed in section 4 of this work
tool.\textsuperscript{28} Furthermore, given that the document at hand is a declaration and not a treaty, priority is given to expressing the general essence of the rights and not the intricate details of their manifestation and implementation.\textsuperscript{29} In spite of these justifications, the ambiguities in my view attribute the Declaration with the potential to exacerbate state-indigenous relations rather than clarify them. While this section argues against the perspectives held by some states on the meaning of self-determination in the text, it is recognized that the debate is far from exhausted.

3.2 The distinction between internal and external self-determination

The distinction between internal and external self-determination – though imperfect –\textsuperscript{30} is a useful tool for framing the debate over the extent of the right as it pertains to indigenous peoples. Internal self-determination is a right within the borders of encompassing states. Conversely, external self-determination is commonly associated with secession, but this is neither an accurate nor an exclusive translation. First, secession implies the reassertion of sovereignty which was once relinquished, and yet much dispossession of indigenous land occurred without indigenous consent. As such, separation and independence are more precise usages. Second, external self-determination could and should also include independent relationships that indigenous peoples may exercise in the international sphere; e.g international supervision of decisions by indigenous peoples about their political status, and a role for states and organs of the United Nations to provide financial/technical assistance and mechanisms for dialogue, treaty enforcement,

\begin{flushleft}
\textsuperscript{28} Littlechild, p4
\textsuperscript{29} Ibid, p4
\textsuperscript{30} The shortfall of this approach is that it has a tendency of expressing self-determination in terms of predefined outcomes instead of the ongoing, evolving concept which many indigenous peoples wish it to be.
\end{flushleft}
and dispute resolution between peoples and states.\textsuperscript{31} Considering the broader meaning of external self-determination, this juxtaposition will be used as a framework for analysis.

### 3.3 The claims for internal self-determination only

Many states have issued specific statements limiting the right of self-determination articulated in the Declaration to an application within the internal context. Robert Hill from Australia has asserted that “nothing in the Declaration should authorize the impairment of the territorial integrity of a state,”\textsuperscript{32} and Takahiro Shinyo from Japan claims that the Declaration does not bestow “a right to be separate from the country of residence.”\textsuperscript{33} The U.S delegation has supported the use of the term “internal self-determination,”\textsuperscript{34} the United Kingdom has contended that the right is “only to be exercised within the territory of the state,”\textsuperscript{35} while Jordan, Mexico and Sweden have also proposed that self-determination only applies within the state structure.\textsuperscript{36}

The \textit{publicly expressed} rationale for this viewpoint is threefold. First, it is asserted that since most indigenous peoples don’t push for anything beyond internal self-determination,\textsuperscript{37} it is not necessary to become concerned about the arguable potential for the Declaration to authorize the impairment of a state’s territorial integrity or political unity. Even the WGDD, they point out, premised its discussions on the assurances of some indigenous delegations that they did not want to secede.\textsuperscript{38}

\begin{footnotesize}
\begin{itemize}
\item [\textsuperscript{31}] Pritchard, p86
\item [\textsuperscript{32}] GA/10612, p5
\item [\textsuperscript{33}] Ibid., p9
\item [\textsuperscript{34}] Coulter, p4
\item [\textsuperscript{35}] Ibid., p10
\item [\textsuperscript{36}] Ibid., p11
\item [\textsuperscript{37}] Bohre, p30. See also Pritchard 77, and Coulter ‘Indigenous Peoples and the Law of Self-Determination’ p6
\item [\textsuperscript{38}] Chairperson’s summaries, WGDD 5, Prichard p80
\end{itemize}
\end{footnotesize}
Second, Article 43 of the Declaration states that

‘The rights recognized herein constitute the minimum standards for the survival, wellbeing, and dignity of the indigenous peoples of the world.’

This suggests to some that limiting the right of self-determination in the Declaration to an ‘internal’ dimension only would not detract from the claims of some indigenous peoples that they are entitled to self-determination which spills over state borders.

Third, and most substantially, they claim that this limitation on the right to self-determination is clearly articulated in the Declaration. Article 4 of the Declaration, which confers the ‘right to autonomy or self-government in matters relating to their internal and local affairs...’ was deliberately placed in tandem with Article 3,\(^{39}\) which suggests that Article 4 is actually an exhaustive definition of the broad right articulated in Article 3.\(^{40}\) Self-determination for indigenous peoples is therefore seen to be limited to autonomy or self-government over internal affairs. Furthermore, Article 46 concludes the Declaration by staking out that

‘Nothing in this Declaration may be...construed as authorizing...any action which would...impair...the territorial integrity or political unity of sovereign and independent States.” As Robert Coulter summarizes, the principle of territorial integrity has always had the paramount place, and still does today.\(^{41}\)

3.4 The invalidity of the argument for a limited ‘internal’ self-determination

The arguments put forth by states and experts seeking to limit the right of indigenous peoples to self-determination to an internal dimension do not hold. They will

\(^{39}\)E/CN.4/2006/79, p7
\(^{40}\) See Appendix or section 1 for a refresher of the content of Article 3
\(^{41}\) Coulter (Indigenous Peoples and the Law of Self-Determination), p5
be dealt with in the order in which they have been introduced; however, attention will be allocated according to the fact that the last point bears far greater significance than its predecessors.

It is true that the majorities of indigenous peoples around the world recognize and prioritize the benefits of partnerships with existing states. Furthermore, many define self-determination in terms of a subjective feeling of being control over their way of life, rather than through the existence of tangible institutions and statuses. However, this in itself removes neither their desire nor their entitlement to the right to full and unqualified self-determination. That the desire still exists was evident when indigenous representatives in the WGIP vehemently opposed any attempt to limit or qualify their right to self-determination; when the International Indian Treaty Council stated that “indigenous...peoples who so desire should be granted the full rights and obligations of external self-determination; and when Lars Anders Baer of the Saami Council challenged the suggestion that only the internal aspects of the right of self-determination applied to indigenous peoples. That the entitlement still exists is clear in the simple fact that rights and obligations are generally not diminished nor exalted due to the reactions they invoke in their subjects.

The second argument is also dubious: Although it is true that the Declaration is a minimum standard, it is also a coherent summary. If indigenous peoples do have an essential right to self-determination, then a diluted and qualified expression of this right

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42 International Center Seminar, Marie Leger, ‘Understanding the Right to Self-Determination and its Attendant Obligations,’ p26
43 Pritchard, p59
44 Ibid, p60
45 DDWG 1997, ibid p71
46 See Introduction
in the Declaration would suggest that only the latter is truly bullet-proof in international law, significantly problematizing any attempts by indigenous parties to lay legal claims based on the former.

Before addressing the third point raised by ‘doubters,’ it is important to briefly introduce an additional argument against an expression of a limited right in the Declaration, being, a violation of the equal rights of all ‘peoples.’ Some indigenous representatives have argued that the a priori exclusion of the option of independent statehood would discriminatorily relegate them to a category inferior to the self-determination of other colonized peoples. This has been labeled a violation of article 2 of the UN Charter which expresses the principles of equality and self-determination of peoples as “two complementary parts of one standard of conduct.”\(^47\) In other words, all the different peoples in the world have equal rights to self-determination.

The final argument relating to what the declaration expresses about the right brings us to the heart of the debate between the relationship of the principle of territorial integrity and the principle of self-determination. In address of the issue of the tandem situation of Article 3 and Article 4, to my knowledge there is no evidence in reports of the Working Group that suggest that this deliberate consecution was intended to provide an exhaustive effect. It could indicate a preference or an example of the essential principle’s manifestation, and need not be interpreted as a comprehensive definition. Nowhere is external self-determination expressly excluded in the Declaration.

Article 46 is an abbreviated ‘copy-and-paste’ of international legislation which inaccurately suggests the superiority of the principle of territorial integrity over the right

of peoples to self-determination. To correct this implication, it is necessary to consult the legal documents from which the Article has been derived. Article 1 of the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations (the “Friendly Relations Declaration”) provides that:

[nothing in the Declaration related to the rights of peoples to self-determination]

“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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.”

[Emphasis added]

This qualification is reinforced by the 1993 ‘Vienna Declaration and Programme of Action’ and the 1995 ‘Declaration on the Occasion of the Fiftieth Anniversary of the United Nations.’

As such, international law can be interpreted as requiring states to represent the whole people belonging to the territory and to act in compliance with the concept of equal rights and self-determination in order to be eligible to their right of territorial integrity and political unity. The Chairperson/Rapporteur of the Working Group supports this by employing the criterion of being “effectively representative;” and Bohre uses the

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48 See Annex for relevant excerpts of this legislation
49 McKay, p15
expression that “only as long as this internal spirit of self-determination is allowed to prosper will its external ghost remain concealed.” \(^{50}\) (Bohre’s quotation should be modified to incorporate the idea that the ‘first’resort’ concept of internal self-determination should not preclude the opportunity for indigenous peoples to exercise external relations with international bodies such as the UN in conjunction.) And yet, in spite of all of these qualifications, secession remains neither forbidden nor warranted in international law.

3.5 Conclusion

The conclusion must be that the arguments put forward by states that only the internal dimension of self-determination applies to indigenous peoples is invalid, and yet an unqualified right to violate territorial borders does not apply to indigenous peoples under current international law either. Instead, states must be effectively representative in order to preserve their territorial integrity.

4 AN INHERENT RIGHT BEYOND THAT OF ‘PEOPLES’?

4.1 Introduction

Up until now, the right of indigenous peoples to self-determination has been analyzed in a strictly legal sense; e.g it has been derived from their categorization as legal ‘peoples’ and from the body of law addressing the right to self-determination and the

\(^{50}\) Bohre, p40
principle of territorial integrity. While the present author appreciates the importance of law in international and domestic relations, she is also aware that the evolution of international law has marginalized and deliberately oppressed indigenous peoples, thus making it a state-biased source of reference as to what their future rights should be. It is therefore considered an insufficient resource of analysis which needs to be supplemented by common sense and reason. When this is done, it is found that the legal right of indigenous populations is ‘padded’ by a natural right which they may have due to their unique characteristics above and beyond those which are consistent with the features of ‘peoples.’ This does not significantly change the direction of my argument; it merely reinforces the right of indigenous populations to self-determination and compensates for the lack of clarity in the legal sphere.

4.2 The law: a state-biased source of deriving the rights of indigenous peoples

While it is ordinary to derive our understanding of what our rights and responsibilities are according to what the law says, it is also necessary that we sometimes use our understanding of what our natural and reasonably expected rights and responsibilities are in order to verify that the law is being crafted in a legitimate direction. It is often difficult to know whether the time is appropriate to consult only the chicken (the standardization of reason, e.g. the law) or also the egg (the reason itself), but in the case of indigenous peoples, it is clearly the egg which must be considered on par with its descendant.

This is because indigenous peoples have been categorically excluded as subjects of positivist international law, and as such, the international legal framework’s coverage of the rights of indigenous peoples lags behind its coverage of other rights, and also lags
behind academic and common-sense thinking. The development of the “Law of Nations,” or inter-nation-al law as it is today known, lead to a framework of the state versus the individual, in which the former monopolized the concept of group autonomy rights and left no place for the rights of alternative associational groupings.\textsuperscript{51} Not only were indigenous peoples in “legal limbo”\textsuperscript{52} (or, otherwise put, somewhere between the ‘rock’ of state rights and the ‘hard place’ of individual rights); but the law actually became a rationalizing force for their oppression through colonization. To give but two examples, the ‘Great Debate’ between Las Casas and Sepulveda over the Spanish Conquest was framed by critical arguments of medieval theology, Christocentric and philosophical natural law, the Ius Gentium, Canon Law, and Roman law, rendering it ‘Eurocentric, Christian, provincial and aggressive in its incorporation of those who played no part in its making.’\textsuperscript{53} Later, three early 19\textsuperscript{th} century Supreme Court decisions legitimized the U.S title to Indian land on the basis of discovery alone.\textsuperscript{54}

The very idea of international law, therefore, has undermined the existence of indigenous peoples. While this cannot forever render the use of law in determining indigenous rights as obsolete, it does mean that the use of common sense alongside the use of law is fair and appropriate.

\textsuperscript{51} Bohre, p7
\textsuperscript{52} Ibid, p2
\textsuperscript{53} Thornberry, ‘Ambiguous discourses’ p4
\textsuperscript{54} Bohre, p8
4.3 Indigenous ‘peoples’ are more than just ‘peoples’

While it has already been established that indigenous peoples fit the criteria of ‘peoples’ in international law, it is hereby argued that they embody more than that minimum standard of a collective. As Coulter points out (although with a different end-point in mind), indigenous populations typically bear the following traits in addition to those of ‘peoples’: 55 Firstly, they tend to exist as functioning societies and political entities. Second, they often still have a definite territory with legally defined membership. In my view most importantly, they pre-date the states in which they are located. In other words, their existence is not derived from the state, and so to solely subject them to their rights as groups subordinate to states would be inappropriate. It should also be noted that they have their own laws and governments or other institutions of social control, and were often excluded from participating in the constitutional creation of the state.

The result of these ‘bonus-features’ is that indigenous peoples are typically far more cohesive as a distinct collective unit than what the standard of ‘peoples’ requires. Their territorial ownership and political organization which pre-dates the existence of the state suggests that they have an inherent right to self-determination that exists before and after the state system of international law. 56 Unless these defining features were voluntarily, consciously and legally relinquished through the birth of the state, there are no reasonable grounds for this artificial modern construct to limit their ability of freely exercising their unique way of life. This inherent right should be considered in parallel with the already-explored legal right.

55 Coulter p13-14
56 ATSIC, Pritchard p82
5 THE CHANGING VISAGE OF THE STATE

It is not in the realm of declarations to concern themselves with implementation. Nevertheless, some preliminary speculations about what it might mean for governments to be effectively representative of indigenous peoples to the same degree as other peoples, in a way that reflects their inherent and legal right to exist independently, is both fun and not inappropriate in this instance. This is supported by Article 38, which dictates that

‘States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.’ The document’s reference to implementation inevitably summons the question of what kind it might be referring to.

When such reflection takes place, it is found that states may be required to make dramatic changes to their visage in order to keep indigenous peoples within their internal sphere. Article 19 is a useful launching pad for analyzing the extent of change that may be required:

Article 19:

‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures which may affect them.’

(Emphasis added)

Many states perceive this as radical. Robert Hill from Australia has stated that a standard cannot be applied to indigenous peoples which is not applied to others in the
population; Australia does not accept a right that allows a particular subgroup to be able to veto legitimate decisions of a democratic and representative govt.\textsuperscript{57} Similarly, John McNee of Canada has claimed that the establishment of complete veto power over legislative action for a particular group would be fundamentally incompatible with Canada’s parliamentary system.\textsuperscript{58} Rosemary Banks from New Zealand has argued that the article gives ‘indigenous peoples a right of veto over a democratic legislature and national resource management...that other...groups or individuals do not have;’\textsuperscript{59} and Jairo Montoya of Colombia said that Article 19 is in direct contradiction with Colombia’s internal legal system.\textsuperscript{60}

These reactions are not unjustified: Article 19 highlights a potentially serious incompatibility between the current practices of representative democracy, constitutional supremacy, and the relationship between international and domestic law on the one hand, and the requirements of states to accommodate the rights of different ‘peoples’ within its domain on the other. The obligation to obtain consent from indigenous peoples before making decisions which may affect their internal concerns such as land, culture, political organization, etc may be seen as undemocratic from the point of view that governmental decisions should be made on the basis of the opinions of the individuals who have elected them. However, if states are now comprised not only of a collection of individuals but also of a series of ‘peoples’ – indeed, a series of \textit{nations} – then the basic decision-making structures of the state such as the executive, legislature and judiciary, need to adapt to

\textsuperscript{57} GA/10612 p5
\textsuperscript{58} Ibid p6
\textsuperscript{59} Ibid p7
\textsuperscript{60} Ibid p9
reflect this. This is what Sarah Pritchard calls ‘*belated state-building*’\(^{61}\) and what I call ‘state make-over.’

It may further be time for the proliferation of the concept of pluri-nationalism, which impacts societal organization in Ecuador.\(^{62}\) Although they are often seen as coincidental, the nation and the state have always been separate entities. That we begin to recognize the existence of different nations within one state is not only helpful to the indigenous problem, but is also consistent with the transformative impact of globalization on the nation-state. Increased migration flows are changing the demographic make-up of states around the world, while the rise of terrorists, transnational corporations, and other non-state actors are eroding the conventional predominance of the state structure in global legal and political relations.

To make changes to the basic construction of the state requires both political bravery and creativity, but should not lead to fear of a radical expunging of power. Just like good marriages are created through the existence of the possibility of divorce, the clarification of the rights of indigenous peoples to self-determination outside the sphere of the state should strengthen, and not diminish, their existence within it.

6 CONCLUSION

The Declaration is not yet three months old, and so any attempt to discern its meaning and consequence at this stage will inevitably be leaky and invite controversy. Nevertheless, this work has attempted to establish that 1) the derivation of indigenous populations’ right to self-determination from their categorization as ‘peoples’ in the

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\(^{61}\) Pritchard, 86

\(^{62}\) International Center Seminar, Nina Pacari, ‘Self-Determination in the Context of a Pluri-national State: the Ecuadorian Experience, p12-14
Declaration is correct, according to international legal evolution and definitions; 2) although ambiguous, the Declaration gives indigenous peoples a right to external self-determination if their encompassing states are not representative of them to the same degree as other peoples within the state; 3) the aforementioned legal right is accompanied by a rational inherent right of these pre-existing groups to have control over their own political, economic, social and cultural affairs; 4) these arguments suggest a wide-reaching scope of indigenous peoples to internal self-determination, which – if exercised properly – may require a timely change to the make-up of states which is also incidentally suitable to global trends.

It can be hoped that greater consensus on these ideas will come with the passing of time and the trading of perspectives between states, indigenous peoples, lawyers, academics, and philosophers, and that they can be put into practice in a peaceful manner.
United Nations A/RES/61/295
Distr.: General
2 October 2007

Sixty-first session
Agenda item 68
06-51207
Resolution adopted by the General Assembly
[without reference to a Main Committee (A/61/L.67 and Add.1)]

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,
Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,1 by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,
Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,
Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

107th plenary meeting
13 September 2007

Annex
United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,
Guided by the purposes and principles of the Charter of the United Nations,
and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,
Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,
Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,


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Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

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, as well as the Vienna Declaration and Programme of

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2 See resolution 2200 A (XXI), annex.

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Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development, Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples, Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

Article 1
Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 2
Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

3 A/CONF.157/24 (Part I), chap. III.
4 Resolution 217 A (III).
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Article 3
Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4
Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5
Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6
Every indigenous individual has the right to a nationality.

Article 7
1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8
1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for 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;
   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   (d) Any form of forced assimilation or integration;
   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9
Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10
Indigenous peoples shall not be forcibly removed from their lands or
Article 11
1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12
1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13
1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.
2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14
1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

Article 15
1. Indigenous peoples have the right to the dignity and diversity of their
cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

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Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the
improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

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Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples
concerned.

Article 27
States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28
1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29
1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

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Article 30
1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31
1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and
traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32
1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 33
1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

Article 34
Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

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Article 35
Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

Article 36
1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37
1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38
States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39
Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40
Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41
The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

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Article 42
The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43
The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44
All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45
Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46
1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.
2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.


The General Assembly,

…

1. Solemnly proclaims the following principles:

…

The principle of equal rights and self-determination of peoples

By virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development, and every State has the duty to respect this right in accordance with the provisions of the Charter.

_Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter_, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle, in order:

(a) To promote friendly relations and co-operation among States; and

(b) To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned;
and bearing in mind that subjection of peoples to alien subjugation, domination and exploitation constitutes a violation of the principle, as well as a denial of fundamental human rights, and is contrary to the Charter.

Every State has the duty to promote through joint and separate action universal respect for and observance of human rights and fundamental freedoms in accordance with the Charter.

The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people.

Every State has the duty to refrain from any forcible action which deprives peoples referred to above in the elaboration of the present principle of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter.

The territory of a colony or other Non-Self-Governing Territory has, under the Charter, a status separate and distinct from the territory of the State administering it; and such separate and distinct status under the Charter shall exist until the people of the colony or Non-Self-Governing Territory have exercised their right of self-determination in accordance with the Charter, and particularly its purposes and principles.

Nothing in the foregoing paragraphs 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.
All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization 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 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 whole people belonging to the territory without distinction of any kind.

1995 Declaration on the Occasion of the Fiftieth Anniversary of the United Nations G.A. Res. 50/6, October 24, 1995:

1. To meet these challenges, and while recognizing that action to secure global peace, security and stability will be futile unless the economic and social needs of people are addressed, we will:

... - Continue to reaffirm the right of self-determination of all peoples, taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, and recognize the right of peoples to take legitimate action in accordance with the Charter of the United Nations to realize their inalienable right of self-determination. This shall not be construed as authorizing or encouraging any action that 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...
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(Indigenous Phillipines)
flores.morse@gmail.com 076 304 1052
1 meeting, several emails, several phone calls

Ghebali, Dr Victor-Yves
Expert on UN Reform, HEI
022 908 57 38
ghebali@hei.unige.ch
2 phone calls, 3 emails, 1 meeting

**Gonella-Frichner, Tonya**  
Permanent Forum Expert 2008-2010 - indigenous nominated  
American Indian Law Alliance  
aila@ailanyyc.org  
Phone +1 212 477 91 00  
Fax +1 212 477 00 04  
2 emails, 1 phone call, no reply

**Indigenous Peoples’ Centre for Documentation, Research and Information (DoCip)**  
14. av. De Trembley, 1209 Geneva  
0227403433  
danica@docip.org  
Pierrette Birraux, Scientific Director pierrette@docip.org  
Benigno Delgado, documentalist documentation@docip.org  
Several emails, several phone calls, 2 visits

**Joffe, Paul**  
Grand Council of the Crees  
p.joffeympatico.ca  
sent email, currently in Montreal but is willing to have a phone conversation about it

**Jones, Carwyn**  
Lawyer on Maori issues, Victoria University of New Zealand  
Carwyn.jones@vuw.ac.nz  
3 emails, referred me to Ministry of Foreign Affairs, NZ

**Littlechild, Wilton**  
International Organization of Indigenous Resource Development/Four Cree Nations  
winsport@incentre.net  
jwlittle@incentre.net  
Phone +1 780 585 30 38; cell +1 780 36 17 527  
Fax +1 780 585 20 25  
2 emails, no reply

**Malezer, Les**  
Foundation for Aboriginal and Islander Research Action (FAIRA)  
Les.malezeraira.org.au  
Sent email, no reply

**Pinero, Luis**  
International lawyer  
0229179134  
1 phone call, but out of the country until mid-December
Schweizer, Mme Natalie
coordinatrice de projects, Graduate Institute of International Studies
0229085742
schweiz9@hei.unige.ch
1 meeting, several contacts, several emails

Slimane, Samia
OHCHR
sslimane@ohchr.org
0229289379
Several phone calls, several emails, no leads

Venne, Sharone
Chief Negotiator, Deninu Kue First Nation, Yellow Knives Dene First Nation, NWT
Treaty and Tribal Corporation
oldwomanbear@hotmail.com
Phone +1 80 78 73 92 82
Fax +1 80 78 73 87 38
2 emails, no reply

Wissener, Siegfried
Expert on indigenous rights in international law
Wiessner@stu.edu
Sent email, no reply

Websites with further human resources

NativeWeb www.nativeweb.com
Cultural Survival www.culturalsurvival.org
Indian Law Resource Center www.indianlaw.org/default.htm
Assembly of First Nations (Canada) www.afn.ca
Inuit Circumpolar Conference www.inuit.org
Metis Nation of Ontario wwwmetisnation.org
Navajo/ Hopi and Black Mesa www.blackmesais.org
Navajo Nation www.navajo.org
Sami News (in Sami) www.saamiweb.org
Sami Parliament (in Sami) www.sametinget.se
San of South Africa www.sametinget.se
Haudenosaunee Homepage www.sixnations.org
Union of British Columbia Indian Chiefs www.ubcic.bc.ca

The Indigenous and Tribal Peoples Centre www.itpcentre.org

Survival International www.survival-international.org
Dr Victor-Yves Ghebali  
Expert on UN Reform  

When: 26/09, 2pm-3.30pm  
Where: 6th floor, 19 Chemin de Palettes, Geneva  

Take Tram 15 to Palettes (approx 20mins). 200m further up is Coop supermarket. Behind that is building. Front door code: *****  

Preparation:  
- What possibilities are there for a project on UN reform?  
- What is the scope for research on SC enlargement?  
- Is the presence of a hegemonic power that violates international norms acceptable and ‘normal’ in global affairs?  

Outcomes:  
- Yes it is normal. It is only acceptable when these norms are violated for the ‘good’

Professor Alfred de Zayas  
Expert on Human Rights Council, minority issues, international law, and more  

When: 17/10, 2pm-3.10pm  
Where: Restaurant de Cent Suisse  

Take Bus 8 to Red Cross, walk up (past UN entrance) approx 300m, near U.S Mission and tennis club  

Preparation:  
- What is the scope for research on politicization of Human Rights Council?  
- Is the HRC a positive development?  
- Was it necessary?  
- What exactly has changed?  
- Isn’t politicization of UN organs always a problem?  
- Who else can I talk to on this issue?  

Outcomes:  
- Indigenous peoples is a more interesting topic than the Human Rights Council  
- But if want to do HRC, could discuss process of change from commission  
- In his view, unnecessary, hasn’t changed much, if anything made worse  
- Yes, politicization is always a problem  
- If you do the Human Rights Council, get in touch with Ronald Barnes  
- Introduced me to the ambassadors of Ecuador and Cuba
Mme. Natalie Schweizer  
Coordinatrice de projects, Graduate Institute of International Studies  
**When:** 24/10, 2pm-3.30pm  
**Where:** 3rd floor of pink building, HEI, 132 Rue de Lausanne  
*Take Bus 1 from train station in direction of Jardin Botanique. Get off at Secheron, walk 10m in direction of bus, path to HEI on the right*  
**Preparation:**  
- Can you direct me to contacts and resources related to the process of crafting the Declaration?  
- What is the scope for research on a ‘cluster’ within the Dec., e.g self-determination or land?  
- Could you potentially be an advisor on this subject?  
**Outcomes:**  
- A list of resources and contacts

Benigno Delgado  
Documentalist, Indigenous Peoples' Center for Documentation, Research and Information  
**When:** 1/11, 3pm  
**Where:** DoCip, 14 av. de Trembley, 1209 Geneva  
**Preparation:**  
- Info and opinions on whether the articles in the U.N Dec. pertaining to self-determination (particularly 3, 4, 46 and 19) have the character of international customary law.  
- Any info on state practices and opinio juris of relevance to above articles  
- Countries of particular interest: US, Canada, NZ, Australia  
- Documentation on interpretations of SD in the Dec  
- Human contacts in Geneva?  
**Outcomes:**  
- Thesis of Bohre, University of Amsterdam  
- Document on Africa’s position  
- Reference to website

Pierrette Birraux  Scientific Director, Indigenous Peoples' Center for Documentation, Research and Information  
**When:** 1/11, 4pm  
**Where:** DoCip, 14 av. de Trembley, 1209 Geneva  
**Preparation:**  
- Human contacts in Geneva?  
**Outcomes:**  
- Try Julian Burger, OHCHR (already had him)

Ambassador Ronald Barnes
Author of shadow report to UN Human Rights Council, representative of Alaskan Tribes

When: 6/11, 9am-10.15am  
Where: 3rd floor, United Nations library

Preparation:
- Does Article 1 of the covenants refer specifically to external self-determination? Can indigenous people be considered peopleS under international law, with the same rights to S-D as those conferred in article 1? If yes, why is there a need to reproduce what has already been established in international law? Why is there a need for a special section of international law for indigenous people(s)? If not, why do you think that the same language was used in A3 of the DRIP as in the covenants, thereby implying the same meaning?
- The U.S view is that it is not in the mandate of Working Group to qualify, limit or expand the scope of existing legal obligations in common article 1, and never intent of states to do so. Is this true? What was the mandate of the WG?
- What is to be made of Article 19 of the DRIP? Is this intended to confer the right of veto over democratic legislation to IP? What kind of situations or circumstances do you think that A19 was intended for?
- For what reasons related to self-determination are you opposed to the treaty?

Outcomes:
- Received a copy of his shadow report
- Attention drawn to changes from draft declaration
- Attention drawn to concept of ‘constructive ambiguity’
- Referred to Sharone Venne, Moana Jackson, Tanya Fischner, Wilton Littlechild, Charmane Whiteface, whose contact details may be found through DoCip
- See Vienna Declaration Law of Treaties 31-35
- Peoples: It was never said that ‘peoples’ does NOT include indigenous
- Alaskan peoples have full scope and application of right to SD under charter and international law. Any limitation on this right within DRIP is not accepted
- What is the article in the DRIP which says that the DRIP does not reduce existing treaties?
- There is a need for IL on IP, because some IP not non-SG territories, some no treaties
- Westphalian model of states

Professor Alfred de Zayas  
Expert on minority issues, international lawyer, and more

When: 19/11, 9am  
Where: #23 Chemin Crete de Pregney  
Take #8 bus to OMS, walk in direction of bus, new building of OMS on the right, go around the building and behind it, follow path for 5mins to chemin

Preparation
- What factors determine the need for a declaration instead of mere domestic law or treaties?
- Is there a need for a definition on ‘indigenous’ and ‘peoples’? What does ‘peoples’ mean? Was the U.S correct in claiming that it is only reserved for national populations?
- “Consult.” Does this give them a higher position than the state?
- “Self-determination.” Is it only the essence that matters, or also the manifestation? Is the ambiguity ok and normal?
- What is the relationship between the laws of territorial integrity and the rights of indigenous to external self-determination?
- Who else can I contact on these issues?

Outcomes
The actual interview never took place. I fell sick with tummy-bug and couldn’t leave my bed. I asked him for a phone interview instead, but he was awaiting a call from Germany. He suggested that I call in the evening, but I was unable to reach him. The next day he left for the U.S to celebrate Thanksgiving.

Morse Flores
Technical Officer, PRO169/IPIED Programs, ILO

When: 21/11 2pm-3pm
Where: Room 19, 11th floor, International Labor Organization

Preparation:
- What are the main objections to indigenous peoples being considered ‘peoples’ under IL? US: only whole populations underneath a state. No definitions of IP nor P
- Is there any recent international practice or doctrine which supports the idea that ethnic sub-groups can be considered peoples?
- What kind of meaning does the declaration attach to SD? An ‘essence,’ internal only, internal predominantly, or both internal and external?
- Is it an evolving concept, or a pre-defined outcome?
- Is it even useful to view self-determination in terms of internal and external?
- Given that this is a declaration and not a treaty, is it acceptable that there is ambiguity? ‘Constructive ambiguity’
- Some argue that it isn’t even relevant to discuss any issue of external SD in the dec because it is minimum standard only, and IP generally don’t seek it.
Do these arguments hold any weight?
- Setting aside the Dec. for the moment, when the Covenants and other legal instruments say that peoples have a right to self-determination, is there any elaboration on what this means? E.g extent? Does the principle of territorial integrity of states take priority over the principle of SD, provided that governance is representative?
- Some say that external SD is a political principle, and not yet a rule of IL for rights of peoples. What is your response to this?
- Is the right of IP to SD solely derived from their (arguable) categorization as peoples, or is there some unique characteristic about IP which makes them distinct even from the common characteristics of other ‘peoples’?
Outcomes:
- Received contact of Luis Pinero 0229179134
- Economic autonomy equally important as political autonomy
- Question is not so much ‘what’ are the main objections to the classification as ‘peoples,’ but WHY. Answer: natural resource
- Lots of IP on cross-border territories
- Territorial integrity is not something set in stone
- Rights of indigenous was not an issue at the time of creation of A1 of covenants
- Saami, and Greenland Home-Rule examples of good autonomy systems

**Binota Moy Dhamai**
Expert on indigenous TRIPURA community, Bangladesh

**When:** 21/11 3pm-3.30pm  
**Where:** Room 21, 11th floor, International Labor Organization

**Preparation:** Unexpected interview, so asked many of the questions directed at Mr Flores, in addition to
- how do you see the declaration having an impact on domestic state-indigenous relations in Bangladesh?
- How important is economic autonomy to the TRIPURA peoples?
- What do the TRIPURA peoples want?

**Outcomes:**
- accent very thick: I could understand almost nothing
- Provision of a text: ‘Indigenous Peoples in International Law’ by Patrick Thornberry
- Invitation to attend Indigenous Caucus and Informal UN Meeting Dec 4-7

**Julian Burger** Head of Indigenous Peoples and Minorities Team  
Office of the High Commissioner of Human Rights

**When:** Initial interview scheduled for 16/11. Mr Burger requested a rescheduling after his trip to Spain. Upon his return, I was sick with the tummy bug. We thus communicated via email and telephone

**Where:** UNHCHR, 48 Giuseppe, Motta, road leading up to UN

**Preparation:**
- What is your general reaction to the Declaration?
- Does it clarify relations between indigenous peoples and States?
- What is your reaction to the criticisms launched by states against Article 19?
- What is your opinion on the meaning of Article 3?
- What is the future of the Working Group on Indigenous Peoples in the wake of the Declaration?

**Outcomes:**
- No substantial outcomes to record
Indigenous Caucus Meeting

When: 4-5 December
Where: Room XXIV, Palais des Nations, Geneva
Preparation: Registration with patricia@docip.org

Informal Meeting of the UN Human Rights Council

When: 6 December, 10am
Where: Room XVII, Palais des Nations, Geneva
Preparation: Registration with mpena@ohchr.org

Due to illness between 16-22 November, I was unable to conduct as much interactive research as I would have liked. I am compensating for this lack of networking opportunity by attending the meetings of the Indigenous Caucus and the Human Rights Council in the first week of December.
CHRONOLOGY OF SIGNIFICANT EVENTS IN RESEARCH

08/09 Lecture on UN Reform by Professor Ghebali
This inspired me to study the reform of the United Nations for my ISP

17/09 ISP advising session: Gyula Csurgai
Discussed scope for researching UN reform. Csurgai suggested enlargement of Security Council and referred me to Professor Ghebali as an advisor
Follow-up: Rang Professor Ghebali, organized meeting for Wednesday, 26 September
Total time: Approx 0.5hrs

18/09 – 25/09 Background reading on issues of UN Reform, including Security Council enlargement, Human Rights Council, Peacebuilding Commission
Total time: Approx. 3 hours

26/09 Meeting with Professor Ghebali
See ‘interactive research.’
Total time: Approx. 3 hours

Decision on final topic: Human Rights Council
Total time: Approx.8 hours

11/10 Background research at UN library on Human Rights Council
Sent email to Ghebali, informing of decision on topic
Received contact person from Ghebali, expert on HRC
Emailed her for meeting
Total time: Approx 3 hours

12/10 ISP Advising Session, Alexandre Lambert
Aims:
- to seek approval for my ISP topic
- To ask whether he knows of potential resources
- To clarify interactive research hours
Outcomes:
- Approval
- Interactive research clarified
- Contact Professor De Zayas (see ‘Human Resource List’
- Research UN reform, Human Rights Council, international human rights law
Follow-up: emailed Professor de Zayas
Total time: 0.5 hours

17/10 Meeting with Professor De Zayas
See ‘Interactive Research’
Total time: approx. 3 hours

18/10 Research day at UN library
Phone call and meeting set up with Natalie Schweizer
Total time: Approx 6 hours

20/10 Background reading, approx 3 hours

24/10
- **Reading** through Working Group reports on Declaration
- **Emailed** potential contacts in New Zealand: Matiu Dickson (law professor specializing on Maori issues at Waikato University, New Zealand); Grant Morris (law professor at Victoria University, New Zealand who also served on the Waitangi Disputes Tribunal), Simon Dench (high school history teacher who is knowledgeable on Maori legal issues)
- **2pm-3pm meeting with Natalie Schweizer** see ‘Interactive Research’
- **Exploration of UN documents** list, frustrated by fruitlessness of the find
Total time: Approx. 6 hours

25/10 Reading. Exploring different ‘clusters’ of the declaration; e.g definition, land, self-determination, process
Total time: Approx 3 hours

26/10
Research on customary law angle at UN library, approx 3 hours

27/10 ISP Advising with Gyula Csurgai
Highlighted importance of interactive research
Total time: Approx. 0.25hrs

28/10 Miscellaneous
Prepared interview questions for de Zayas
Looked through disk
Chose most intriguing articles of Dec
Settled on self-determination
Total time: approx. 2 hours

31/10 Making contacts
Rang Julian Burger, follow-up email: meeting for week of 12-16 Nov
Rang DoCip, follow up email, requesting documentation
Emailed Natalie, would she please be my advisor, does she think topic is appropriate
Emailed Professor Anaya, University of Arizona
Emailed Siegfried Wiessner, Professor of Law and Director of the Graduate Program in Intercultural Human Rights at St. Thomas University School of Law in Miami, Florida.
Emailed Carwyn Jones, Victoria University, New Zealand
Emailed Ministry of Foreign Affairs, NZ
Total time: 2 hours

1/11
Two interviews at DoCip
Approx 4 hours

6/11
Interview Ambassador Barnes
Approx 3 hours

7/11
Rang Samia Slimane, left voicemail, sent follow up email
Emailed Les Malezer, FAIRA
Emailed Paul Joffe, Grand Council of the Crees
Emailed Tonya Fischner, AILA
Read Bohre thesis
Read shadow report Ronald Barnes
Read and summarized existing documentation
Set up appointments for next week
Total: Approx 7 hours

8/11
Writing, reading
Approx. 5 hours

13/11
Reading of previous ISPs
Reading of Thornberry
Reading of Pritchard
Approx 3 hours

14/11
Reading of Pritchard continued
Reading of Working Group reports
Phone call to Julian Burger
Approx 7 hours

16/11 – 22/11
Sick with tummy bug. See illness report

19/11
Cancellation of interview with Alfred de Zayas

20/11
Editing of work journal, made phone calls, read articles from DoCip website,
writing
Approx. 2 hours

21/11
- Interview Morse Flores
- Interview Binota Moy Dhamai
  Approx 4 hours

23/11
- Write-up of interviews from 21/11
- Reading
- Writing
  Approx. 6 hours

24/11
Email and phone with Julian Burger
Construction of outline for draft
Approx 4 hours

25/11
Email and phone with Julian Burger
Writing
Approx 5 hours

26/11
Discussion with Julian Burger
Writing
Approx 5 hours

27/11
Writing
Approx 6 hours

28/11
Writing
Approx 9 hours

29/11
Final editing of work journal and ISP
Printing and binding
Approx 9 hours

30/11
Construction of powerpoint
Construction of outline
Approx 4 hours