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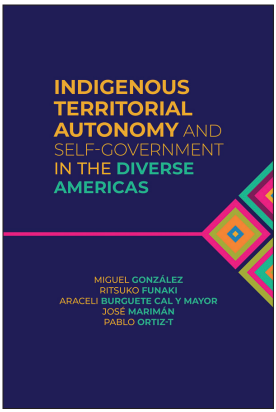

INDIGENOUS TERRITORIAL AUTONOMY AND SELF-GOVERNMENT IN THE DIVERSE AMERICAS

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The Right to Self-Determination and Indigenous Peoples: The Continuing Quest for Equality

Dalee Sambo Dorough

Recent Developments

Long before contact with colonizers, Indigenous peoples lived by their own traditional rules, protocols and laws (Borrows, 2017a; 2017b) to ensure social order and harmony within their communities. These guidelines found expression and are sourced in self-determination, representing pre-existing practices that foreshadow the development of international law and legal instruments by centuries.

Despite this backdrop of the erroneous and misguided views of organized religion and colonial forces, the highly sophisticated protocols of Indigenous peoples have survived and thrived. Our powerful economic, social, cultural, spiritual and political measures became subsumed by imposed notions of nomadic "savages" by those ignorant of good governance and lacking democratic skillfulness.

This short essay provides a glimpse of the right of self-determination and autonomy in favor of Indigenous peoples and argues that this prerequisite to the exercise of all other human rights attaches to Indigenous peoples, without qualification or limitation. Yet, for many Indigenous peoples, they are caught

in a continuing quest for equality. We are at a place and time for the quest to end, a time for Indigenous peoples to exercise and enjoy this right throughout their lands and territories, to pursue and practice their rules, protocols and laws as they did before contact. More importantly, the right to self-determination must be recognized and respected by those outside of our nations and communities and it must also be perfected or reconstituted within our communities.

The essay will not comprehensively trace the history of the Peace of Westphalia, the Papal Bulls or the acts of domination, subjugation, and exploitation of Indigenous peoples. Rather, the focus will be on the products of such actions and the existing legal order of the United Nations, including the human rights of Indigenous peoples, recent history and the current status and conditions of Indigenous peoples and their efforts to genuinely exercise the right of self-determination. The intent is to illustrate how these well-established international norms are useful tools to employ in a multi-pronged, multi-scalar effort driven by Indigenous peoples to gain recognition of and respect for their right to self-determination and its diverse elements.

With the adoption of the *United Nations Charter*, June 1945, Article 1 outlines the Purposes and Principles of the UN on behalf of the world community:

> To maintain international peace and security…
>
> To develop friendly relations among nations based on *respect for the principle of equal rights and self-determination of peoples*, and to take other appropriate measures to strengthen universal peace;
>
> To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in *promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*; and
>
> To be a centre for harmonizing …. [emphasis added]

To believe in the maintenance of international peace and security, to achieve international cooperation, there must be acceptance of equal rights and self-determination of all, without discrimination. These concepts are essential elements of harmonization among diverse peoples and cultures – these words provide an important context for interpretation of the whole of the instrument – and for arriving at a place that truly reflects a family of nations.

For a people, the prerequisite of self-determination, and to ensure the exercise and enjoyment of all other human rights, pivots on the "self." In the context of Indigenous peoples, the self is determined by the distinct status of the peoples concerned: those who are different. Our history of being different was strictly and barbarically used to perpetuate racial discrimination, to diminish rights and to destroy what is different about us. Today, it must be understood that we have the "right to be different and to be respected as such" and to be free of discrimination in every political and legal environment. It must be remembered that the scourge of racial superiority was formally denounced by the international community.

An important distinction of the rights of Indigenous peoples is that they are inherent or pre-existing rights. The pre-existence of Indigenous peoples as sovereign peoples must be recognized. Indigenous peoples had and continue to maintain highly developed and sophisticated concepts of governance and social control not only internally but also in their external relations with others, including other Indigenous nations and peoples.

In addition, recognition of inherent or pre-existing rights to lands, territories and resources is fundamental. Like self-determination, Indigenous peoples have consistently advanced regimes of land tenure and use of their lands and territories as well as extraordinary knowledge about their surrounding environment and ecosystems. This knowledge has been and continues to be accumulated on the basis of their profound relationship with the environment and is embedded in their respective languages, protocols, values, customs, practices, institutions and laws. The foundational right of self-determination and rights to lands, territories and resources are inherent in our legal status as distinct peoples.

For further clarity on the matter of inherent or pre-existing rights, it is important to underscore that our individual and collective human rights were not created or "given" by anyone and certainly not by governments, including those that remain holdovers to the notion of superiority.

The Nature of Human Rights

To understand the relevant human rights instruments, it is important to be clear about the nature of human rights. Human rights are

> interrelated – each component interrelates with all the others
>
> interdependent – dependent upon one another
>
> interconnected – mutually joined or connected between elements
>
> indivisible – cannot be divided

Therefore, the denial or violation of one human right will have an adverse impact upon all other human rights and a community's ability to exercise and enjoy all other human rights. As the International Law Association has affirmed "it would be inappropriate to deal with these areas separately, for the reason that – in light of the holistic vision of life of indigenous peoples" because the rights are all "strictly interrelated…." (ILA 2010, 43).[1]

The characteristics of human rights are important to keep in mind in the context of Indigenous peoples, many of whom hold the same all-inclusive perspective about their way of life and their relationship to all within their territories – everything is interrelated, interdependent, interconnected and indivisible. We hold a holistic worldview.

Human rights are universal, applying equally to all human beings. Fortunately, the current human rights regime of the United Nations, the Organization of American States, the International Labor Organization, and a growing number of other intergovernmental organizations, have begun to turn the corner, moving away from a Western European understanding of human rights of Indigenous peoples to ensure the distinct cultural context of Indigenous peoples.

In terms of the distinct cultural context of Indigenous peoples, it is imperative to recognize that the right of self-determination is a collective, pre-existing right that attaches to the distinct legal status of Indigenous peoples. Another crucial example is the collective nature of the rights of Indigenous peoples to their lands, territories and resources, which has many dimensions that are not reflected in the notion of individual property rights of others. Additional examples exist. However, the point here is to recognize

the significant contribution that Indigenous peoples have made to understanding the collective nature of their human rights in other areas, such as language and culture, education and a host of other communal dimensions of the day to day lives of Indigenous peoples.

Importantly, human rights cannot be destroyed – it is a different matter to deny or violate human rights, but such rights cannot be destroyed or alienated. In this regard, past "extinguishment" policies have been thoroughly denounced and challenges to the so-called plenary power of governments have been and continue to be made. And, human rights are the key rationale or compelling force to counter such challenges and outdated, racially discriminatory policies.

International Covenants

Some twenty years following the adoption of the UN Charter, the *International Convention on the Elimination of All Forms of Racial Discrimination* emerged. In contrast to many international human rights instruments, this Convention has one unique feature – it defines its subject matter, which is explicitly provided for in Part I, Article 1:

> In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

As stated, this language applies to every field of public life and it has extraordinary meaning when one considers the collective nature of those of a different race, color, descent, national or ethnic origin. The wording of "the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise" of human rights is extensive and captures policies that may not appear to but eventually may impair the exercise of a right.

Less than a year later, to further codify the rights enunciated in the 1948 Universal Declaration of Human Rights in the form of a legally binding human rights instrument, the international community and specifically, UN

member state representatives adopted the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. Unsuccessful in adopting a single treaty, civil and political rights favored by the West were purportedly segregated from economic, social and cultural rights favored in the East in response to then and to a large extent continuing entrenched views of Communist regimes and democratic states such as the U.S.

The two Covenants were adopted by the United Nations and contain exactly the same language in common Article 1 of the two treaties:

> 1. 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.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

Clearly, both Covenants are relevant to Indigenous peoples and in particular, the language affirming the *equal* application of the *right* of self-determination to all peoples.

Significantly, Article 27 of the ICCPR refers to "minorities" and in this regard it must be understood that for a majority of Indigenous peoples across the globe they may be numerical "minorities" but they are dramatically distinct from such categories of civil society.

> In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied

> the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Friendly Relations Declaration, 1970

Beginning in 1961, a few UN member states introduced a proposal in the context of "the codification and progressive development of international law" (A/C.6/L.492, 1961)[2] to focus on the elaboration of key principles to promote the "friendly relations and co-operation" of states (GA 1686 (XVI), 1961).[3] This exercise was a careful analysis of key principles related to self-determination and was adopted on the 25th anniversary of the United Nations, resulting in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations* in 1970 (GA 2625 (XXXV), 1970).[4]

Central to the Friendly Relations Declaration and Indigenous peoples are the provisions that address the fact that every state is committed to the progressive development of international law, including within the legal order of human rights. The Friendly Relations Declaration is significant in order to:

> … constitute a landmark in the *development of international law* and of relations among States, in promoting the rule of law among nations and particularly the *universal application of the principles embodied in the Charter*

The Declaration goes on to emphasize:

> … the importance of maintaining and strengthening international peace founded upon *freedom, equality, justice and respect for fundamental human rights* and of developing friendly relations among nations irrespective of their political, economic and social systems or the levels of their development,

UN member states affirm that they are:

> Convinced that the subjection of peoples to alien subjugation, domination and exploitation constitutes a major obstacle to the promotion of international peace and security,
>
> Convinced that the *principle of equal rights and self-determination of peoples* constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States, based on respect for the principle of sovereign equality,

They further affirm that:

> Every State has the duty to refrain from any forcible action which deprives peoples referred to in the elaboration of the principle of equal rights and self-determination of *their right to self-determination* and freedom and independence.

A crucial imperative in the elaboration of the right of self-determination in the Friendly Relations Declaration is the fact that:

> 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.*

Furthermore, "Every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples" and "To bring a speedy end to colonialism, having due regard to the freely expressed will of the peoples concerned."

A key provision of this Declaration, which must be read in the context of the full instrument, is the requirement or the obligation that states must conduct themselves in a manner consistent with these principles if they themselves want to maintain their own "territorial integrity," including the fact that "compliance" includes that they are "possessed of a government

representing the whole of the people belonging to the territory." The full language of this pivotal paragraph states:

> 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.

Indigenous peoples were not party to the dialogue, negotiation, and adoption of the Friendly Relations Declaration. However, in effect, it attaches to us as distinct peoples, the requirement of State compliance with its many provisions to ensure the exercise of Indigenous self-determination and to promote friendly relations.

International Labour Organization C169, 1989

Throughout the 1970s, Indigenous peoples began national and international political organizing around the persistent violations of rights, including treaty rights. Interestingly and separately, the International Labour Organization (ILO) has a long history of policies, conventions and recommendations aimed at safeguarding Indigenous peoples in the context of exploitation by corporations and companies' intent on free or cheap labor. Dating back to the 1930s, the ILO worked to protect Indigenous "employees" from forced labor and slavery as well as unsafe working conditions.

In 1953, the ILO adopted Convention No. 107 (ILO C107, 1957),[5] which became a legally binding international human rights treaty for those member states that ratified the instrument. In the face of UN developments, including increasing attention given to the gross violations of rights that resulted in the creation of the body that would begin the drafting of international human rights norms in favor of Indigenous peoples – the Working Group on Indigenous Populations [WGIP] – Indigenous peoples became vociferous about the "assimilationist" nature of ILO C107. This open criticism as well as the progressive development of Indigenous specific standards by the UN in

the context of the WGIP, the ILO undertook to revise C107. This two-year revision process resulted in ILO Convention on Indigenous and Tribal Peoples No. 169 (ILO C169, 1989)[6] adopted by the ILO plenary in 1989.

Though few states have ratified ILO C169, it is important to underscore that the norms affirmed in the Convention are Indigenous specific human rights norms and are legally binding obligations of states under international law. ILO C169 is the only legally binding treaty specifically concerning the individual and collective human rights of Indigenous peoples.

Article 3(1) of ILO C169 affirms that Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination. This necessarily includes Indigenous peoples' right to self-determination. Furthermore, Article 35 of ILO C169 affirms that:

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

Even more significant, the ILO has reviewed the relationship between their Convention and other progressive developments, including the *UN Declaration on the Rights of Indigenous Peoples*. Specifically, the ILO has highlighted the legal status of the *UN Declaration* by stating that:

> A Declaration adopted by the General Assembly reflects the collective views of the United Nations which must be taken into account by all members in good faith. Despite its non-binding status, the *Declaration has legal relevance*. UNDRIP is a Declaration adopted by the General Assembly of the United Nations. … For instance, it may reflect obligations of States under other sources of international law, such as customary law and general principles of law. Differences in legal status of UNDRIP and Convention No. 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples through advocacy, capacity building, research or other means.

In addition, the ILO has affirmed that C169 and the *UN Declaration* are "compatible and mutually reinforcing:"

> Crucial for the technical and promotional work of the UN system is the commitment of governments wishing to benefit from such assistance to promote and protect indigenous peoples' rights … The provisions of Convention No. 169 and the Declarationare *compatible and mutually reinforcing*. (emphasis added)

American Declaration on the Rights of Indigenous Peoples, 2016

Consistent with the trend of intergovernmental organizations undertaking efforts responsive to Indigenous peoples' human rights, the Organization of American States, as far back as 1989 began the process of drafting a regional instrument to complement its diverse human rights regime and to be taken up by its Inter-American Institute of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court on Human Rights. The *American Declaration on the Rights of Indigenous Peoples* was finalized on June 16, 2016. Here again, this regional instrument must be read in the context of other international human rights standards, including the *UN Declaration*. Making the linkage clear and also reinforcing the interrelated, interdependent, and indivisible nature of human rights, the *American Declaration* actually invokes the *UN Declaration* in its preamble by:

> BEARING IN MIND the progress achieved at the international level in recognizing the rights of indigenous peoples, especially the 169 ILO Convention and the United Nations Declaration on the Rights of Indigenous Peoples ….

UN Declaration on the Rights of Indigenous Peoples, 2007

These extraordinary developments have come as a result of the persistence and advocacy of Indigenous peoples from across the globe. It is clear that much progress has been made but more must be done for Indigenous peoples

to actually exercise and enjoy the norms that we have gained. Implementation is lacking and few "good practices" can be identified by Indigenous peoples worldwide. However, to keep on this path remains crucial for our survival and our overall cultural integrity. Because the right to self-determination is a prerequisite for the exercise and enjoyment of all other rights, it is useful to reiterate how key preambular paragraphs and operative provisions of the *UN Declaration* are interrelated.

The Preamble of the *UN Declaration* acknowledges that historical injustices have had damaging and devastating impacts upon Indigenous peoples and as such human rights standards should guide UN member state behavior toward Indigenous individuals and Indigenous peoples collectively. Essential, contextual paragraphs instruct the interpretation of the whole *UN Declaration* and in relation to self-determination. These provisions reflect the intentions of UN member states by:

> 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,
>
> 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 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 …

When understood as a whole, the operative paragraphs make it clear the *UN Declaration* is consistent with the understanding of the right of self-determination in international law as well as its equal application to Indigenous peoples.

> 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. [emphasis added]

The explicit recognition of the right of self-determination and its attachment to Indigenous peoples mirrors the language affirmed in common Article 1 of both the ICCPR and ICESCR discussed above:

> 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.

In consideration of the inherent right of self-determination of Indigenous peoples in the context of their traditional forms of governance and in relation to the rights and responsibilities of their distinct membership, collectively, the *UN Declaration* affirms self-government and all of its multiple, diverse forms of expressions, institutions, relationships, and protocols:

> 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.

There are some that have argued that because of the concluding provisions of the *UN Declaration* and the insistence of States to include a reference to territorial integrity within Article 46 that this somehow diminishes the right of self-determination of Indigenous peoples. It must be made clear that the language found in Article 46(2) must be read to understand that the principle of territorial integrity already exists and is clearly articulated in international

law. And, more importantly, there is no way that this understanding can be validly expanded upon by the *UN Declaration*. Furthermore, the other elements of this specific article provide some very well founded doctrines that must guide the application of the whole of the *UN Declaration*, including the right of self-determination. Specifically, Article 46(3) affirms that:

> 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.

Finally, all of the elements affirming the right of self-determination cannot mean that Indigenous self-determination can only be exercised within the parameters of Article 4. Such a conclusion is wholly illogical. It must be recognized that Article 3 is neither synonymous with, nor limited to autonomy or self-government.

Autonomy and Self-Government

Unfortunately, across the globe, UN member states have difficulty digesting the fact that the right of self-determination is one whole right, which has various forms, dimensions, and contexts, including autonomy and self-government. Though good examples of self-government arrangements exist in Bolivia, Colombia, Nicaragua, Mexico and Peru, this volume illustrates the fact that Indigenous peoples continue to face obstacles. Numerous hurdles have hampered efforts to exercise self-government as a central expression of the distinct characteristics of Indigenous peoples. The right to autonomy and self-government is at the core of the survival of Indigenous peoples. Most hurdles are set by the UN member state of mind bent on "ownership" of Indigenous peoples, treating them solely as objects that they have unilateral control over. Such actions only serve to diminish the content of this primordial right, ultimately leading to injustice, mistrust and antagonistic relations between Indigenous peoples and the State as well as the perpetuation of colonial attitudes.

Therefore, it is important to elaborate upon Article 4 of the *UN Declaration* and the constructive need for collective autonomy and self-government of Indigenous peoples as an element of the right to self-determination. Again,

the anchor is the pre-existing capacity to exercise authority over their internal and local affairs as a dimension of the right of self-determination. To be sure, in order to exercise the comprehensive array of rights affirmed in the *UN Declaration* that apply to the internal and local affairs of a collectivity, autonomy and self-government are essential. Here, Indigenous customs and traditional decision-making practices are important and must be honored, respected, and recognized. In this way, the unique characteristics of the Indigenous peoples are able to thrive in a way that cannot be reproduced elsewhere and especially in their relations with external actors, ranging from States to third parties to civil society.

Again, Article 4 specifies the content and contexts of a particular form of the right of self-determination. Therefore, Article 4 must be understood in relation to the internal affairs of Indigenous peoples and communities as well as their lands, territories and resources. However, another context for the exercise of self-government includes those affairs that have direct linkage to governance by the State that impacts the internal and local affairs of the Indigenous peoples concerned. For example, programs and funding to build infrastructure such as potable water and sewer systems, where State consultation and cooperation in good faith with Indigenous peoples must be the standard in both substance and procedure.

To be more specific, in terms of the implementation of Article 4 of the *UN Declaration*, full effect must be given to ensure Indigenous peoples' representation, according to their own terms, within the various bodies and branches of government, including the executive, legislative and the constitutional framework of the country concerned. For example, the Inuit-Crown Partnership Committee (Inuit-Crown Partnership Agreement, 2017)[7] in Canada provides a structure and procedures for Inuit to have ongoing dialogue with the executive branch of the federal government. Regarding recognition of rights within the constitutional framework, section 35 of the Constitution Act in Canada provides:

> (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.
>
> (2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

> (3) For greater certainty, in subsection (1) "treaty rights" includes rights that now exist by way of land claims agreements or may be so acquired.
>
> (4) Notwithstanding any other provision of this Act, the aboriginal and treaty rights referred to in subsection (1) are guaranteed equally to male and female persons (Constitution Act, 1983).[8]

In addition, specific norms must be developed to ensure that the status, identity, rights and interests of Indigenous peoples are reflected within the national legal system. Within the United States and elsewhere, the recognition of the inherent right to self-determination and the distinct collective rights of Indigenous peoples are a substantial feature of federal Indian law (US President Message on Indian Affairs, 1970).[9] It is also crucial for the federal or national government to recognize the validity of the laws, customs, traditions, practices and institutions of Indigenous peoples – the core or essence of the right to autonomy and self-government for Indigenous peoples.

There are numerous examples where autonomy and self-government institutions and structures are needed to effect Indigenous peoples' decision-making concerning their affairs, such as the ways and means to determine membership (*UN Declaration*, Art. 33)[10] of Indigenous peoples – their self-identification, often based on successive generations of understanding of language, life within a particular environment, spiritual practices, families and extended families, even the name that one is given. In addition, identifying the responsibilities (*UN Declaration*, Art. 35)[11] of the members of an Indigenous nation and peoples necessitates a form of social order and/or political institutions to do so.

Again, many of these "institutions" are pre-existing and reflect inherent values, customs, practices, protocols, and yes, institutions. The subject of traditional land tenure (*UN Declaration*, Art. 26)[12] within Indigenous territories also requires methods for ensuring that these systems are maintained as well as the collective nature of safeguarding these important understandings, methods, and usages. Essentially, autonomy and self-government touches upon all matters relevant to the day to day lives of Indigenous peoples within community. The realms of health and welfare, education, Indigenous knowledge, hunting and harvesting, traditional laws, and many other individual

and collective cultural practices must be taken into consideration through customarily appropriate autonomy and self-government.

A central feature of autonomy and self-government is the legitimacy of Indigenous laws, traditions, and customs in relation to those within a community and the ability of Indigenous peoples to organize their economic, social, cultural, spiritual and political life through such attributes. The right of self-determination speaks to this dimension of self-government when referring to Indigenous peoples determining their political status and freely pursuing their economic, social and cultural development.

Additional articles are crucial to highlight as evidence of the nature and understanding of autonomy and self-government. In particular, Article 5 (*UN Declaration*, Art. 5)[13] explicitly recognizes that "Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" and if they so choose to participate fully in the political life of the State. Article 18 can only be given full effect through forms and measures of autonomy and self-government in order for it to be fully manifested by Indigenous peoples:

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

Here, the State must both procedurally and substantively ensure that the effective participation of Indigenous peoples is secured in matters which would affect their rights. And, in order to do so, the Indigenous peoples concerned as well as their institutions must have access to materials and information for review and determination of their views, interests and concerns for their effective participation to be realized. Significantly, Article 19 invokes the important standard of free, prior, and informed consent, which is a key characteristic of autonomy and self-government sourced in the right of self-determination:

> 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.

Recalling that human rights are interrelated, interdependent and indivisible, articles 18 and 19, when read and understood in tandem, Article 18 affirms the right to participate in decision-making and further articulates by whom and how – matters wholly in the purview of the Indigenous peoples concerned. Article 19 affirms a responsibility of national government to consult and cooperate in good faith, recognizing the autonomy and self-government of Indigenous peoples and their decision-making processes before taking actions that may affect them. Such actions may have positive or negative impacts, but this is for the Indigenous peoples concerned to decide. These requirements alone beg the need for the exercise of the right to autonomy and self-government in the collective political life of the Indigenous peoples concerned in order to engage in consultation and cooperation with government over measures that may affect them as a people. It must be noted that the obligation of States to "consult and cooperate in good faith" with Indigenous peoples is affirmatively stated in no less than seven provisions of the *UN Declaration*.

As noted above, the need for States to accommodate Indigenous peoples' cultural context into the national legal system is imperative in relation to Article 27 of the *UN Declaration*.[14] In fact, the provision itself specifies that

> 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.

Another weighty example is Article 34 (*UN Declaration*, Art. 34)[15] overall but specifically in the context of its reference to Indigenous peoples' juridical systems or customs in relation to their members. This right is often infused with important traditions and practices, embedded in languages that are distinctive to the peoples concerned as well as their environment and life ways. Many are long-standing measures to maintain balance, harmony, and

sustainability. At the same time, one must also recognize that there may be progressive developments that alter traditions, especially where consistency with international standards may arise.

Finally, it is imperative that the language related to Article 4 explicitly recognizing that Indigenous peoples have the right to the "ways and means for financing their autonomous functions" is given full effect and support by UN member states at the domestic or national level. Too often, financial resources are insufficient, thereby stifling full exercise and enjoyment of autonomy and self-government of Indigenous peoples. In addition, in those regions where the Indigenous peoples themselves have pushed for or developed ways and means to financially support their own autonomy and self-government, States have challenged their capacity to do so in a discriminatory fashion, attempting to claim sole power to regulate this dimension of self-determination and self-government. Such actions must be curbed and eliminated.

International Law Association

From 2011 to 2014, the International Law Association Committee on the Rights of Indigenous Peoples undertook and prepared an Expert Commentary on the *UN Declaration* wherein they confirmed a number of important features about its legal status and the effects of its comprehensive provisions. The ILA Committee concluded that the *UN Declaration* has diverse legal effects and in particular, a number of its provisions fall into the category of customary international law, thereby creating significant legal effects and UN member state obligations.

Regarding the ILA 2010 Committee Report delivered at The Hague, the Committee affirmed that:

> The relevant areas of Indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, *autonomy or self-government*, cultural rights and identity, land rights as well as reparation, redress and remedies (ILA 2010, 43). (emphasis added)

The right of self-determination has important foundational elements. As stated above, the right to self-determination is a prerequisite to the exercise and enjoyment of all other individual and collective human rights of Indigenous

nations, peoples, and communities. It is also one whole right, including the important elements of self-government and autonomy but also the important features manifested in the expression of the right in relation to those outside of respective Indigenous peoples and nations, including UN member states. Again, the right of self-determination is inherent, pre-existing.

And, when one considers the essential doctrine of the equal application of the rule of law to protect against racial discrimination – a peremptory norm of international law – a fundamental principle of international law that is accepted by the international community of states as a norm from which no derogation is permitted,[16] it is clear that the right of self-determination of Indigenous peoples is the same right that applies to all other peoples and it is consistent with international law.

In the ILA Committee Report in Sofia, 2012, where members delivered their final conclusions and recommendations, the Committee restated their collective view that:

> States must comply with the obligation – consistent with customary and, where applicable, conventional international law – to recognize, respect, protect, fulfil and promote the right of indigenous peoples to self-determination, conceived as the right to decide their political status and to determine what their future will be, in compliance with relevant rules of international law and the principle of equality and non-discrimination (ILA 2012, 35).

Furthermore, specific to autonomy and self-government, the Committee stated that:

> States must also comply – according to customary and, where applicable, conventional international law – with the obligation to recognize and promote the right of indigenous peoples to autonomy or self-government, which translates into a number of prerogatives necessary in order to secure the preservation and transmission to future generations of their cultural identity and distinctiveness; these prerogatives include, *inter alia*, the right to participate in national decision-making with respect to decisions that may affect them, the right to be consulted with respect

> to any project that may affect them and the related right that projects suitable to significantly impact their rights and ways of life are not carried out without their prior, free and informed consent, as well as the right to regulate autonomously their internal affairs according to their customary law and to establish, maintain and develop their own legal and political institutions (ILA 2012, 35).

Additional foundational rights that are sourced in the right of self-determination is the right to free, prior and informed consent (FPIC). FPIC is the principle that a community has the right to give or withhold its consent to proposed projects that may affect the lands they customarily own, occupy or otherwise use. UN member states attempted to advance an intellectually dishonest argument about FPIC by erroneously suggesting that the right to free, prior and informed consent is a "veto." This term was solely being used by regressive governments to incite fear among other governments. However, these states did not succeed with this distortion of FPIC. FPIC is now a key right of Indigenous peoples in international law and jurisprudence. All Indigenous peoples have the right to say yes, no, or yes with conditions.

Informed, non-coercive negotiations between investors, companies or governments and Indigenous peoples prior to development or other enterprises on their lands, territories and involving their resources is an essential pathway consistent with the right of self-determination. Those who wish to advance their interests must enter into dialogue and negotiations with the Indigenous peoples concerned, recognizing their interrelated, inherent rights. Again, the Indigenous peoples concerned have the right to decide whether they will agree to the project or not once they have a full and accurate understanding of the implications of the project on them and their lands, territories and resources.

It is substantial that one of the operative paragraphs of the *UN Declaration*, Article 26, refers to a genuine measure of "control" and is directly related to the right of self-determination.

> 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. [emphasis added]

As noted above, there are few, but a growing number of positive examples where Indigenous peoples have achieved the exercise of self-determination that is closely aligned with what they held prior to contact. The comprehensive land claims agreement in favor of the Inuit in Labrador, Canada affirms the Nunatsiavut right of self-determination and management of their lands, territories and resources, including the offshore "territorial sea" consistent with the definition under the UN Convention on the Law of the Sea. In addition, the Inuit of Greenland presently have extensive autonomy over affairs within and outside of Greenland and they have carefully researched and adopted an agenda for the political enterprise for full independence from the colonial state of Denmark. All of their efforts have been consistent with international law and the international understanding of the right of self-determination of peoples, including Indigenous peoples.

Conclusion

In conclusion, we have numerous and harrowing examples of the urgent need for equality, respect, and recognition of the basic human rights of Indigenous peoples. However, the *UN Declaration* has diverse legal effects and reflects rights already found in human rights treaties and customary international law as well as conventional international law. Since the US government endorsement in 2010, we should celebrate the fact that the *UN Declaration* is a consensus international human rights instrument. It is noteworthy that the *UN Declaration* has been reaffirmed on numerous occasions by consensus of the General Assembly. It is increasingly being regarded as an authoritative source of guidance for diverse institutions, including parliaments,

governments, courts, national human rights institutions and regional as well as international human rights treaty bodies. Yet, the quest for equality continues.

Indigenous peoples, wherever they are in the world, have such extraordinary insights and a wealth of Indigenous knowledge about who they are and how they relate to everything that surrounds them – their homelands and all living things – there is so much that we have to offer. Our strength lies in our identity as distinct peoples. The world community has acknowledged this through adoption of the various Indigenous specific international human rights instruments. So, the intent of this essay is to encourage Indigenous peoples to consider, in pragmatic terms, how to use not only the strength of their profound knowledge, but to also the tools of international human rights law at the local, national, regional and international levels as well. Again, the intent is to illustrate how these well-established international norms are useful tools to employ in a multi-pronged, multi-scalar effort driven by Indigenous peoples to gain recognition of and respect for their right to self-determination and its diverse elements. And, this is only a glimpse into what is possible.

We, as Indigenous peoples and Indigenous advocates, must make greater use of the international fora to advance the relative effectiveness of all international instruments and standards in the protection of the rights of Indigenous peoples. Through our participation and advocacy at the international level, we can educate UN member states and others about the advances we have made and the implementation gaps that need to be closed.

We should be doing all that we can at the local, regional and international level, through increased use of the treaty bodies associated with the UN, including the Committee on the Elimination of Racial Discrimination (2007), the Special Rapporteur on the Rights of Indigenous Peoples, the Special Rapporteur on Contemporary Forms of Racism (2008), the Special Rapporteur on Violence Against Women (2011), the Human Rights Council, the Permanent Forum on Indigenous Issues, the International Labor Organization, the Organization of American States and the African Commission on Human and Peoples Rights. Finally, we can educate our future generations about the momentous strides that we have made against great odds, thereby adding to the force of reality to gain the equality aspired to by our people as a central feature of our right of self-determination.

NOTES

1 Interim Report, International Law Association, The Hague Conference (2010), Committee on Rights of Indigenous Peoples, p. 43. (s.f.) https://bit.ly/32YZklV

2 Sixth Committee of the General Assembly, Future work in the field of the codification and progressive development of international law (A/C.6/ L.492), December 2, 1961). Accessed 6 August 2021: https://documents-dds-ny.un.org/doc/UNDOC/LTD/N61/292/19/PDF/N6129219.pdf?OpenElement

3 General Assembly Resolution 1686 (XVI) of December 18, 1961 (Future work on the codification and progressive development of international law). Accessed 6 August 2021: https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/167/39/PDF/NR016739.pdf?OpenElement

4 General Assembly Resolution 2625 (XXXV) of October 24, 1970 (Declaration on the principles of international law regarding friendly relations and cooperation between States in accordance with the Charter of the United Nations).

5 Indigenous and Tribal Populations Convention, 1957 (No. 107), International Labor Organization, entered into force on June 2, 1959, 328 U.N.T.S. 247. Accessed 6 August 2021: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C107

6 Indigenous and Tribal Populations Convention, 1989 (No. 169), International Labour Organization, adopted in Geneva, ILO session No. 76, 27 June 1989 (entered into force 5 September 1991). Accessed 6 August 2021: https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169

7 "The Committee will advance shared priorities between Inuit and the Government of Canada, including the implementation of Inuit land claims agreements, social development, and reconciliation between Inuit and the Government of Canada. The Committee will monitor and report back on progress on advancing these priorities moving forward." The Committee includes the Prime Minister and select federal ministers, President Natan Obed on behalf of Inuit Tapiriit Kanatami, Chair/CEO Duane Smith on behalf of the Inuvialuit Regional Corporation, President Aluki Kotierk on behalf of Nunavut Tunngavik Inc., President Jobie Tukkiapik on behalf of Makivik Corporation, and President Johannes Lampe on behalf of the Nunatsiavut Government. Accessed 22 June 2021 https://pm.gc.ca/en/news/news-releases/2017/02/09/prime-minister-canada-and-president-inuit-tapiriit-kanatami-announce..

8 PART II, RIGHTS OF THE ABORIGINAL PEOPLES OF CANADA, section 35. Accessed 12 December 2022 https://laws-lois.justice.gc.ca/eng/const/FullText.html#h-53

9 "It is long past time that the Indian policies of the Federal government began to recognize and build upon the capacities and insights of the Indian people. Both as a matter of justice and as a matter of enlightened social policy, we must begin to act on the basis of what the Indians themselves have long been telling us. The time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions." PRESIDENT NIXON, SPECIAL MESSAGE ON INDIAN AFFAIRS [JULY 8, 1970). Accessed 22 June 2021 http://www.ncai.org/attachments/Consultation_IJaOfGZqlYSuxpPUqoSSWIaNT

kEJEPXxKLzLcaOikifwWhGOLSA_12%20Nixon%20Self%20Determination%20Policy.pdf

10 *UN Declaration*, Art. 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.

11 *UN Declaration*, Art. 35. Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

12 *UN Declaration*, Art. 26 (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.

13 *UN Declaration*, Art. 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.

14 *UN Declaration* Art. 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.

15 *UN Declaration* Art. 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.

16 The peremptory norms of international law include crimes against humanity; war crimes; piracy; racial discrimination; genocide; apartheid; slavery and torture.

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