

INDIAN LAW RESOURCE CENTER

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Implementing the UN Declaration on the Rights of Indigenous Peoples at the Global Level: Creating a UN Mechanism for Monitoring and Promotion

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With the endorsement by the United States of the UN Declaration on the Rights of Indigenous Peoples (UN Declaration) in December, 2010, the nations of the world at last reached a worldwide consensus about indigenous peoples' rights. The Indian Law Resource Center believes that it is urgent to begin creating a mechanism or body at the UN level to implement the UN Declaration. The 2014 World Conference on Indigenous Peoples presents a fine opportunity to win a formal decision to create such an implementing body.

It is widely understood that human rights instruments are just pieces of paper with practically no effect unless steps are taken to implement the rights in question, that is, to make it possible to exercise or enjoy the rights. Countries must be urged and encouraged to carry out their human rights obligations, and this is particularly true with respect to the UN Declaration. Many countries have shown little understanding of indigenous peoples' rights and even less inclination to respect valuable rights to lands and resources and important political and social rights such as the right of self-determination and the right to maintain indigenous cultures, languages, and traditions. Some countries deny that indigenous peoples exist in the country, when in fact they do. International monitoring and oversight are especially needed to guard against fraud, misdealing, and legal manipulation to deprive indigenous peoples of their lands and natural resources. Without strong and effective measures at the international level, the promise of the UN Declaration will be lost.

The need for international mechanisms to implement the UN Declaration and monitor state compliance are discussed in a short paper by the Center's Executive Director that was submitted to a UN Expert Seminar on indigenous rights to lands and resources in January 2006. This paper is attached because it summarizes the wide variety of implementation and monitoring mechanisms and bodies that are used in the UN human rights system, and it discusses some of the possible options for implementing and monitoring the UN Declaration.

Several kinds of mechanisms are typically used to promote human rights instruments and to monitor compliance by states. Committees of experts, such as the Human Rights Committee (Covenant on Civil and Political Rights) and the Committee on

the Elimination of Racial Discrimination (Convention on the Elimination of All Forms of Racial Discrimination), monitor and promote compliance with a number of human rights treaties. Such committees, among other activities, review periodic reports submitted by countries and make observations, recommendations, and sometimes general comments, and in some instances consider complaints of violations. Other mechanisms commonly used are special rapporteurs, independent experts, and working groups. In the past, a commission made up of states, such as the Commission on Permanent Sovereignty over Natural Resources, has been used successfully.

A mechanism or implementing body for the UN Declaration should have a broad and far-reaching mandate, perhaps with innovative elements to promote respect for indigenous rights and to discourage violations. It might include the power to review voluntary reports submitted by states as well as reports and other information submitted by indigenous peoples, non-governmental organizations (NGOs), and others. The mandate could also include the powers to seek information about compliance, make visits to countries, carry out research, prepare reports and recommendations, disseminate information about successful implementation and best practices, write and disseminate information about the UN Declaration and how it is to be interpreted and applied, and to consider other measures that may be required to monitor compliance and promote respect for the UN Declaration.

At this stage, it is unwise and actually pointless to expect or insist that any specific proposal be adopted. Many proposals and counter proposals will be made and considered. A successful strategy depends on being flexible about the details of the desired body or mechanism. Negotiation and compromise are inevitable and even desirable for reaching consensus. We can, however, be clear about the goal: a strong and effective body or mechanism for monitoring and implementing the UN Declaration.

We are now gathering information and exploring options for an implementing body. We are discussing ideas with “old hands” at the UN, and we will be meeting with many people from the UN Office of the High Commissioner for Human Rights and many others. We are taking into account the existing role of the UN Permanent Forum on Indigenous Issues in terms of implementation, but we believe that additional implementation work is required beyond what the Permanent Forum can do. The Expert Mechanism on the Rights of Indigenous Peoples also has a role, but only a very limited one because of its narrow mandate. We believe at this early stage that a new body, such as a commission made up of states and indigenous experts, with a broad new mandate, will be the best but not the only approach.

Creating an implementing body will take several years of work. It will be necessary to build broad support among indigenous peoples and NGOs and to win the support of countries. In October 2012, indigenous peoples in the Arctic called for the creation of an implementing mechanism at the UN, and other indigenous communities and organizations will probably express a similar interest. It will take a worldwide effort by indigenous peoples to achieve this end. The task of winning support from countries will require educating them about the need for an implementing body and making the

case for its value. After states have made the decision to create such a body, it will be necessary to work out the details and get formal action by the United Nations putting the body into operation.

The World Conference on Indigenous Peoples, to be held in New York in September of 2014, presents a wonderful opportunity to demand action by the United Nations member countries. Such World Conferences are always in search of practicable and concrete measures or decisions they can adopt that will contribute to the enjoyment of human rights and other goals of the United Nations. A proposal to create an implementing and monitoring body to give effect to the UN Declaration is just such a proposal – well within the range of decisions the Conference could consider and adopt. Most of the work of educating and lobbying states will have to be done well before the World Conference. By the time of the Conference there must be a consensus or near consensus of states around a decision on the general outlines of such a body. The details of the body or mechanism would probably be left for negotiations after the Conference in the United Nations Human Rights Council and the Economic and Social Council.

The World Conference is an opportunity to win action by the UN, but it is not the only means for creating an implementing mechanism. If success is not achieved through the Conference, it will be possible to initiate action in the UN Human Rights Council as well. The UN Permanent Forum on Indigenous Issues is another body which could be very useful in building support for vigorous implementation and monitoring.

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**EXPERT SEMINAR ON INDIGENOUS PEOPLES' PERMANENT
SOVEREIGNTY
OVER NATURAL RESOURCES AND ON THEIR RELATIONSHIP TO LAND**

**25, 26 and 27 January 2006
Palais des Nations**

Indigenous Land and Resource Rights: Implementation and Monitoring

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* The views expressed in this paper do not necessarily reflect those of the OHCHR.

Attachment

Indigenous land and resource rights, which are now being declared in the draft Declaration on the Rights of Indigenous Peoples, will remain very vulnerable to abuse and loss even after adoption of the Declaration. Even after indigenous peoples are recognized as having ownership and control of their lands and resources, strong measures will be needed to implement, promote and protect these land and resource rights. The purpose of this paper is to set out some of the reasons why implementation and protection mechanisms and procedures are needed and to outline some of the procedures and mechanisms that may be most useful after the Declaration is adopted.

Indigenous rights to lands and resources are different from most other rights, because they involve property with very great market value, that is, value in money terms. Of course, indigenous land is sought after by settlers, developers, agricultural interests, or others depending on the characteristics of the land. Practically everywhere, the land would have great value in the open market. Likewise, the natural resources of indigenous peoples will in many cases be enormously valuable, whether it is timber, water, oil or gold. This is an obvious point, in itself.

What makes the lands and resources peculiarly vulnerable to unjust taking or loss is the enormous disparity in wealth and power between most indigenous peoples and the economic interests that want to have indigenous lands and resources. Almost everywhere, indigenous peoples are exceedingly poor in relative economic terms. Many indigenous peoples live in conditions of desperate hunger and want, lacking adequate food, shelter, and health care. In many if not most situations, indigenous peoples are also lacking in political power because of social and political exclusion and marginalization. In many situations, indigenous peoples will not be able to adequately protect their lands and resources in domestic legal systems – at least in the immediate future. These conditions may be improving, but they are likely to persist for many years despite adoption of the Declaration. At the same time, indigenous lands and resources are sought after by enormously wealthy and powerful interests, including state governments and transnational corporations, some of the most powerful entities on Earth.

It is a sad truth, all but universal, that unless strong protective or regulatory measures are enforced, the relatively poor and less powerful party will be forced by economic necessity to give up its lands and resources – usually on very unjust terms. It is sometimes said that in an unregulated market economy a poor person “cannot afford” to own a valuable asset. He will by necessity sell it to pay for food, shelter and other basic needs. The terms of trade will be poor because of the vast difference in bargaining power. Without effective restraints, indigenous peoples could find themselves deprived of their lands and resources, receiving only paltry money compensation. Without lands, indigenous cultures and communities cannot be sustained.

There is, as well, the need to promote implementation of and respect for indigenous land and resource rights on the part of all states where indigenous peoples are located. The possibility that some states may deny that indigenous peoples exist in the state or that some states may simply ignore indigenous peoples’ land and resource rights is very substantial. We believe it is still the case that in many parts of the world

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governments have little knowledge of indigenous peoples and their human and collective rights. These are the well-understood reasons why measures are called for to promote and protect all human rights after they are recognized and declared by the international community.

Mechanisms for Implementing and Protecting Indigenous Land and Resource Rights.

There are many possible mechanisms that might be useful for promoting implementation of the indigenous land and resource rights and for helping to assure that these rights are respected and protected by states. Once the draft Declaration is adopted, some such mechanisms should be put in place as soon as possible in order that indigenous peoples may realize the rights that we have developed over the past 30 years. It is not too soon to begin considering what measures might be most useful and effective especially for land and resource rights, which involve complex issues that are not yet thoroughly understood. We do not believe it is necessary or wise to try to include any additional measures of this sort in the draft Declaration itself.

We would like to initiate a discussion of the various possible mechanisms with a view to reaching a consensus on one or more mechanisms that could be adopted not long after the adoption of the Declaration itself.

What we are interested in discussing are mechanisms — bodies, institutions, organs, and their procedures — that are capable of exercising oversight over the status of indigenous peoples' rights to land and resources, including indigenous peoples' permanent sovereignty over natural resources, and are also capable of implementing or promoting relevant principles and law at an international level to ensure that these rights are respected and upheld. The functions of implementation mechanisms might, for example, include:

- Periodic state reports that are reviewed by a monitoring body with authority to render observations and comments;
- Investigations and fact-finding;
- Preparation of recommendations to higher bodies;
- Reviewing or carrying out research on the status of indigenous peoples' land and resource rights: gathering information on how these rights are or are not being enforced; how these rights are perceived; a survey of controversial issues surrounding these rights, particularly rights to natural resources;
- Further development of the concept of indigenous sovereignty over natural resources;
- Developing a comprehensive set of guidelines for states and non-state entities for protecting and respecting indigenous land and resource rights;
- Development of recommendations for improving enforcement or international consensus and cooperation concerning indigenous land and resource rights;
- Consideration of complaints of violations of land and resource rights.

There are many existing bodies and mechanisms at the international level for the promotion and monitoring of human rights, and these provide useful models to be considered. One mechanism of particular interest is no longer in existence, and that is the specialized commission such as the Commission on Permanent Sovereignty Over Natural Resources. Such a commission could be particularly useful for dealing with indigenous peoples' land and resource rights. We will first summarize the most pertinent international mechanisms and then comment briefly on the possible usefulness of a commission on indigenous land and resource rights.

1. Treaty-based monitoring bodies. There are seven monitoring bodies established by human rights treaties:

- The Human Rights Committee (HRC);
- The Committee on Economic, Social and Cultural Rights (CESCR);
- The Committee on the Elimination of Racial Discrimination (CERD);
- The Committee on the Elimination of Discrimination Against Women (CEDAW);
- The Committee Against Torture (CAT);
- The Committee on the Rights of the Child (CRC); and
- The Committee on Migrant Workers (CMW).

These expert bodies are principally mandated to consider the periodic reports that states are obliged to submit under their respective treaties, reporting on the steps taken to implement the treaty. Five of the treaty bodies are empowered to consider individual communications or complaints where the state concerned has so agreed (HRC, CERD, CAT, CEDAW, and CMW). Two (CAT and CEDAW) are empowered to conduct inquiries into reported violations where the state concerned has agreed. The treaty bodies consist of 10 – 23 independent experts elected by the states parties.

Without doubt, the mechanism of periodic state reports monitored and reviewed by a committee of experts is very widely accepted and it has contributed greatly to the implementation and enforcement of human rights. However, it may be doubted whether such a mechanism is appropriate where there is not yet a treaty, but rather a non-binding declaration. Nevertheless, elements of this model may be very much needed in some form even before a treaty or convention is in force.

2. Thematic mechanisms of the Human Rights Commission. The Human Rights Commission has over the past 60 years developed several mechanisms that have proven useful. The future of the Commission itself is, no doubt, very short, but the Human Rights Council or whatever body takes the Commission's place may nevertheless choose to implement some of the same mechanisms. *Special rapporteurs* may be empowered to gather information and make reports on specified topics or areas of concern. The Commission now has a Special Rapporteur on the Human Rights of Indigenous Peoples. *Working groups* can be very useful for examining particular situations or fields of human rights concern, and indeed the Sub-Commission's Working Group on Indigenous Populations has been in existence for some 20 years. The present working group may or may not continue after the Commission comes to an end, but in

any case a working group would have to have a far more specific mandate in order to be effective in implementing, developing and promoting respect for the rights in the draft Declaration. An *independent expert* is another mechanism, similar to a special rapporteur, appointed by a body to study or report on a specified topic or area of concern.

3. Other Commission mechanisms: Statements and complaints. Of course, the Commission and the Sub-Commission have long had their own procedures that have permitted oral and written statements about human rights violations and issues, and that have permitted confidential complaints against particular states (the 1503 procedure). Whether or not such procedures will continue in any new Council, it appears clear that such measures would not by themselves be adequate to effectively monitor the implementation of the rights in the draft Declaration or to assure respect for these rights.

4. The Permanent Forum on Indigenous Issues. This relatively new body was not conceived as a body for monitoring state compliance with human rights norms, although it has some important authority in this regard. The Permanent Forum is not devoted exclusively to human rights, but has many other areas of concern as well. The Permanent Forum may certainly be a very valuable body for discussing and developing ideas for mechanisms that will promote and protect rights recognized in the draft Declaration. However, it may be doubted whether it should itself be the body to carry out the needed work of implementation and monitoring.

5. Other mechanisms: arbitral tribunals, ombudsman, etc. Other mechanisms may someday be useful for implementing and enforcing indigenous rights, and such mechanisms might include judicial or quasi-judicial mechanisms such as a tribunal empowered to decide specific cases. Generally, states are not likely to consent to the jurisdiction of a judicial or arbitral tribunal at this stage in the development of the rights of indigenous peoples. Such mechanisms may be appropriate, if ever, after a relevant convention has come into force. On the other hand, the idea of an ombudsman with authority to consider complaints and problems submitted by indigenous peoples has been discussed from time to time for many years. While this may be a useful idea, it does not seem adequate to the task of developing, implementing and monitoring the rights in the Declaration.

6. A Commission on indigenous lands and resources. A commission created specifically to develop, implement and monitor the land and resource rights of indigenous peoples might be very useful. Such a commission, made up of states and indigenous representatives, could carry out a variety of important tasks aimed at clarifying indigenous rights, promoting implementation of those rights, and securing the enforcement of those rights by states. This idea is based on the success of the Commission on Permanent Sovereignty over Natural Resources, which played a very important role in the decolonization period by elaborating the right, particularly of newly emerging states, of permanent sovereignty over their natural resources. The Commission, made up of just nine states, was created by the General Assembly in December 1958 to conduct a survey on the status of permanent sovereignty over natural resources and to make recommendations to the General Assembly on this matter. The Commission

completed its work successfully in 1961. The Commission's principal accomplishment was the drafting of the Declaration on Permanent Sovereignty Over Natural Resources, which was eventually adopted by the General Assembly (GA Resolution 1803 (XXVII)). The Declaration achieved a delicate balance between the rights of former colonies emerging as states with the interests of developed countries in international obligations and security of contracts and investments. The history of the Commission is described in N. Schrijver, *Sovereignty Over Natural Resources* (1997).

Reconciling state interests with the interests of indigenous peoples calls for a delicate process similar in some ways to the process of balancing the rights of former colonies with the interests of the developed countries. Just as permanent sovereignty over natural resources was a concept that demanded further study and elaboration in the decolonization period, so also the rights of indigenous peoples to their lands and resources call for further study and clarification to assure that they are reconciled with the legitimate interests of states. The Final Report of Special Rapporteur Erica-Irene A. Daes on Indigenous Peoples' Permanent Sovereignty Over Natural Resources, and her working paper on Indigenous Peoples' Relationship to Land are very important contributions on these topics. They are not, however, exhaustive, and they must be regarded as the beginning or foundation for further work that is needed to resolve and clarify the many complex issues that remain concerning indigenous lands and resources. The draft Declaration has now substantially achieved a balance in the statement of indigenous rights that can probably be adopted without major change. But further work will be needed in the future to assure that these rights are constructively implemented in a manner that promotes the interests of both indigenous peoples and states.

A commission made up of both states and indigenous representatives might well undertake the needed further study of indigenous peoples' resources rights especially, as well as indigenous peoples' land rights. Such a commission might also be charged with developing and proposing appropriate mechanisms for implementing, monitoring, and promoting indigenous land and resource rights. It is possible that such a commission might, itself, become a monitoring body with a mandate to promote and protect the rights in the Declaration. Such a commission might be established and appointed by the new Human Rights Council or by the General Assembly. At this time, it is impossible to be very specific on such details. For the present time it is important that dialogue about these topic begin and that we start to exchange ideas about how to realize the rights that are soon to be declared in the Declaration on the Rights of Indigenous Peoples.