

## ***UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation\****

*Paul Joffe\*\**

*The UN Declaration on the Rights of Indigenous Peoples constitutes a major step towards addressing the persistent human rights violations against Indigenous peoples worldwide. It is the most comprehensive universal international human rights instrument explicitly addressing the rights of Indigenous peoples.*

*The Declaration provides a principled and normative legal framework for achieving reconciliation between Indigenous and non-Indigenous peoples around the world. In 2006, the newly-elected Conservative government of Canada opposed the Declaration at home and abroad, motivated by ideology rather than justice and international law. As a minority government, it has undemocratically ignored a Motion adopted by Parliament — calling for the Parliament and government of Canada to fully implement the standards in the Declaration.*

*This article underlines the importance of adopting a human rights-based approach. It highlights the significance of the Declaration in achieving reconciliation with Indigenous peoples in Canada. A central conclusion of this article is that the positions of the Canadian government are untenable and incompatible with constitutional and international obligations. Its adherence to unprincipled positions is undermining the international human rights system.*

---

\* An earlier version of this article was originally prepared for the publication Aboriginal Law Conference — 2008 published by the Continuing Legal Education Society of British Columbia, June 2008. The CLEBC article is entitled “UN Declaration: Achieving Reconciliation and Effective Application in the Canadian Context”.

As this article was ready to be published, the Canadian government announced: “A growing number of states have given qualified recognition to the United Nations Declaration on the Rights of Indigenous Peoples. Our Government will take steps to endorse this aspirational document in a manner fully consistent with Canada’s Constitution and laws.” See Canada (Governor General), *A Stronger Canada. A Stronger Economy. Now and for the Future*. Speech from the Throne, 3 March 2010 at 19. This possible qualification to Canada’s endorsement could have the effect of restricting interpretation of the *Declaration’s* provisions to what exists in domestic law. Depending on the wording of the endorsement, it could serve to perpetuate the status quo. It could also undermine the universality of Indigenous peoples’ human rights.

\*\* Member of the Bars of Québec and Ontario. I disclose that I have worked in Canada and internationally with Indigenous peoples and human rights organizations for over 20 years on the UN Declaration on the Rights of Indigenous Peoples. Similarly, I am involved in the ongoing standard-setting process at the Organization of American States (OAS), in formulating a draft American Declaration on the Rights of Indigenous Peoples. The views expressed in this paper are my own. I am grateful to Jennifer Preston and Suzanne Jasper for their valuable comments on earlier drafts.

*Presently, as an integral part of the reconciliation process, it is imperative to demonstrate unequivocal respect for the human rights of Indigenous peoples. This would require the Canadian government to endorse the Declaration and, in collaboration with Indigenous peoples, actively implement it in Canada.*

*Regardless of Canadian government positions on the Declaration, there are significant initiatives that can be considered by Indigenous peoples and others so as to enhance its relevance in Canada. By invoking the Declaration in a wide range of domestic and international issues, its future as a “living” human rights instrument may be ensured.*

---

*La Déclaration des Nations Unies sur les droits des peuples autochtones constitue une étape majeure pour aborder les violations persistantes des droits humains à l'échelle mondiale. Il s'agit d'un instrument universel de droits humains décrivant les droits des peuples autochtones le plus élaboré qui soit.*

*La Déclaration fournit un cadre législatif et normatif pour arriver à la réconciliation entre les peuples autochtones et non-autochtones partout dans le monde. En 2006, le nouveau gouvernement conservateur du Canada a rejeté la Déclaration en invoquant des motifs idéologiques, tant sur le plan national et international, plutôt que la justice et le droit international. Bien que minoritaire, il a fait fi d'une motion adoptée par le Parlement — qui proposait au Parlement et au gouvernement du Canada de procéder à la mise en oeuvre complète des normes contenues dans la Déclaration.*

*Le présent article traite de l'importance d'adopter une approche fondée sur les droits humains. Il vise à souligner le rôle de la Déclaration pour arriver à la réconciliation avec les peuples autochtones au Canada. Il conclut principalement que la position du gouvernement du Canada est intenable et incompatible avec ses obligations internationales et constitutionnelles. Son raisonnement, qui ne repose pas sur des principes, mine le système international des droits humains.*

*Il est aujourd'hui primordial, dans un effort d'harmonisation des relations, de témoigner un respect non équivoque à l'égard des droits des peuples autochtones. Le gouvernement du Canada doit à cette fin approuver la Déclaration et, en concertation avec les peuples autochtones, s'attacher à la mettre en oeuvre au Canada.*

*Malgré la prise de position du gouvernement canadien concernant la Déclaration, les peuples autochtones et les autres peuvent entreprendre des initiatives significatives visant à accroître la pertinence de la Déclaration au Canada. En invoquant la Déclaration dans un vaste éventail des questions au pays et sur le*

*plan international, son avenir comme un instrument vivant de droits humains pourrait être assurée.*

## 1. INTRODUCTION

On 13 September 2007, the United Nations General Assembly held a historic vote to adopt the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>1</sup> (hereinafter, the “UN Declaration” or “Declaration”). As Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous Issues, declared:

The 13th of September 2007 will be remembered as a day when the United Nations and its Member States, together with Indigenous Peoples, reconciled with past painful histories and decided to march into the future on the path of human rights.<sup>2</sup>

The *Declaration* constitutes a major step towards addressing the widespread and persistent human rights violations against Indigenous peoples worldwide. It is the most comprehensive and universal international human rights instrument explicitly addressing the rights of Indigenous peoples.<sup>3</sup>

<sup>1</sup> GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15 [*UN Declaration or Declaration*].

<sup>2</sup> Victoria Tauli-Corpuz, “Statement of Victoria Tauli-Corpuz, Chair of the UN Permanent Forum on Indigenous issues on the occasion of the adoption of the UN Declaration on the Rights of Indigenous Peoples” (Delivered to the United Nations General Assembly, New York, 13 September 2007) [Victoria Tauli-Corpuz, “Statement of Victoria Tauli-Corpuz”].

<sup>3</sup> See also *Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, ILO Official Bulletin Vol. 72, Ser. A, No. 2 (entered into force 5 September 1991), reprinted in (1989) 28 I.L.M. 1382 [*Indigenous and Tribal Peoples Convention*, 1989]. As stated in International Labour Organization, “ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners”, n.d., distributed at the Permanent Forum on Indigenous Issues, 7th Sess., April 2008 at 2: “The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing. The Declaration’s provisions deal with all the areas covered by the Convention. In addition, the Declaration addresses a number of subjects that are not covered by the Convention.”

The *Declaration* does not create any new rights.<sup>4</sup> It responds to the “urgent need to respect and promote the inherent rights of indigenous peoples”.<sup>5</sup> It affirms a wide range of political, economic, social, cultural, spiritual and environmental rights. While individual rights are positively affirmed and protected in various ways,<sup>6</sup> the rights in this new instrument are predominantly collective in nature.

These rights of Indigenous peoples include, *inter alia*: enjoyment of all human rights under international law;<sup>7</sup> equality with all other peoples;<sup>8</sup> self-determination, including self-government;<sup>9</sup> recognition and enforcement of treaties;<sup>10</sup> identity and membership;<sup>11</sup> maintenance and strengthening of their distinct institutions;<sup>12</sup> live in freedom, peace and security;<sup>13</sup> traditions, customs, cultural heritage and intellectual property;<sup>14</sup> traditional medicines and health practices;<sup>15</sup> subsistence and development;<sup>16</sup> lands, territories and resources;<sup>17</sup> education;<sup>18</sup> conservation and protection of environment;<sup>19</sup> labour<sup>20</sup> and cross-border contacts and co-operation.<sup>21</sup>

<sup>4</sup> Office of the High Commissioner for Human Rights (Craig Mokhiber), “Declaration on the Rights of Indigenous Peoples: Panel Presentation”, United Nations, New York (26 October 2006): “It is clear that the Declaration is not a treaty. . . . It is, in many ways, a ‘harvest’ that has reaped existing ‘fruits’ from a number of treaties, and declarations, and guidelines, and bodies of principle, but, importantly, also from the jurisprudence of the Human Rights bodies that have been set up by the UN and charged with monitoring the implementation of the various treaties. . . . There are no new rights in the Declaration”. Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, A/HRC/9/9* (11 August 2008), at para. 86 (Conclusions) [Human Rights Council, *Report of the Special Rapporteur, S. James Anaya*]. Les Malezer, Chair, Global Indigenous Peoples’ Caucus, Statement to the UN General Assembly, New York (Delivered to the United Nations General Assembly, New York, 13 September 2007): “These rights in the Declaration are already recognised in international law, but they are rights which have been denied to Indigenous Peoples everywhere.”

<sup>5</sup> *UN Declaration*, *supra* note 1, preambular para. 7.

<sup>6</sup> See *infra* note 292 and accompanying text.

<sup>7</sup> *UN Declaration*, *supra* note 1, art. 1.

<sup>8</sup> *Ibid.*, art. 2.

<sup>9</sup> *Ibid.*, arts. 3 and 4.

<sup>10</sup> *Ibid.*, art. 37.

<sup>11</sup> *Ibid.*, arts. 33 and 35.

<sup>12</sup> *Ibid.*, arts. 5, 18, 20(1), 33(2) and 34.

<sup>13</sup> *Ibid.*, art. 7(2).

<sup>14</sup> *Ibid.*, arts. 11(1), 12, 13, 15 and 31.

<sup>15</sup> *Ibid.*, art. 24(1).

<sup>16</sup> *Ibid.*, arts. 20(2), 23 and 32.

<sup>17</sup> *Ibid.*, arts. 10 and 25–30.

<sup>18</sup> *Ibid.*, art. 14.

<sup>19</sup> *Ibid.*, arts. 29 and 32(3).

<sup>20</sup> *Ibid.*, art. 17.

<sup>21</sup> *Ibid.*, art. 36.

Throughout the *Declaration*, harmonious and co-operative relations between Indigenous peoples and States are promoted in diverse ways.<sup>22</sup> In promoting justice for Indigenous peoples, their right to an effective legal remedy is affirmed.<sup>23</sup> States are required to establish effective mechanisms, in conjunction with Indigenous peoples, to resolve issues relating to lands, territories and resources<sup>24</sup> or other property<sup>25</sup> of which Indigenous peoples have been dispossessed.

In regard to implementation of the *Declaration*, the requirement to take affirmative measures engages both States<sup>26</sup> and international organizations. The United Nations, its bodies and specialized agencies “shall promote respect for and full application of the provisions of this Declaration and follow up [its] effectiveness”.<sup>27</sup>

The *Declaration* elaborates international human rights standards for the “survival, dignity and well-being of the world’s Indigenous peoples”.<sup>28</sup> As distinct peoples, they now have a principled and normative international legal framework that affirms their human rights.

The path to adoption of the *Declaration* was challenging and mired with uncertainty. In 1985, the Working Group on Indigenous Populations (WGIP)<sup>29</sup> began to formulate articles for inclusion in a Declaration. For nine years, the WGIP discussed these evolving draft texts with States, Indigenous peoples and UN specialized agencies at its annual meeting in Geneva.

In 1993, a text of the *Declaration* was adopted by the WGIP members. In 1994, this text was unanimously approved<sup>30</sup> by the independent experts in the former UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.

<sup>22</sup> For further discussion of this aspect, see *infra* notes 141 and 142 and accompanying texts.

<sup>23</sup> *UN Declaration*, *supra* note 1, art. 40, where Indigenous peoples’ right of access to just and fair processes for resolution of conflicts or disputes is also affirmed.

<sup>24</sup> *Ibid.*, art. 27 (independent and impartial process for recognition and adjudication of land and resource rights). See also art. 28, in regard to right to redress, including restitution and compensation, for Indigenous peoples’ lands, territories and resources that have been subject to various forms of dispossession.

<sup>25</sup> *Ibid.*, art. 11(2) (redress relating to cultural, intellectual, religious and spiritual property taken without Indigenous peoples’ consent).

<sup>26</sup> *Ibid.*, arts. 38 and 42.

<sup>27</sup> *Ibid.*, art. 42. See also art. 41.

<sup>28</sup> *Ibid.*, art. 43.

<sup>29</sup> The creation of the Working Group on Indigenous Populations was proposed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in its resolution 2 (XXXIV) of 8 September 1981. The establishment of WGIP was endorsed by the Commission on Human Rights in its resolution 1982/19 of 10 March 1982 and authorized by the Economic and Social Council in its resolution 1982/34 of 7 May 1982.

<sup>30</sup> UN Sub-Commission on Prevention of Discrimination and Protection of Minorities resolution 1994/45 of 26 August 1994.

In March 1995, the Commission on Human Rights decided<sup>31</sup> to establish an open-ended inter-sessional working group, which considered the draft text for further amendments. After an additional 11 years of discussion with Indigenous peoples, States and others, a revised text was issued by the Chair of this Working Group in February 2006. A month later, the text was submitted to the Commission as part of the Chair's final report.<sup>32</sup>

The UN Commission on Human Rights was replaced by the Human Rights Council in June 2006.<sup>33</sup> At its inaugural session, the 47-member Council adopted the "UN Declaration on the Rights of Indigenous Peoples" on June 29, 2006.<sup>34</sup> The only opposing votes on the Council were the Russian Federation and Canada, who called the vote. With a view to delaying or preventing adoption of the *Declaration* by the General Assembly, the newly-elected Conservative government in Canada increasingly worked with New Zealand, Australia and the United States. These were three of the most actively obstructionist States in the standard-setting process relating to Indigenous peoples.<sup>35</sup>

On December 20, 2006, led by the African Group of States, a resolution was adopted by the General Assembly to "defer consideration and action" on the *Declaration* so as "to allow time for further consultations".<sup>36</sup> The General Assembly also decided "to conclude its consideration of the Declaration . . . before the end of its sixty-first session" in September 2007.

---

<sup>31</sup> UN Commission on Human Rights resolution 1995/32 of 3 March 1995, which was endorsed by the Economic and Social Council in its resolution 1995/32 of 25 July 1995.

<sup>32</sup> UN Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, E/CN.4/2006/79, 22 March 2006 (Chairperson-Rapporteur: Luis-Enrique Chávez (Peru)).

<sup>33</sup> The Council was established in 2006. See UN General Assembly, *Human Rights Council*, A/RES/60/251, 15 March 2006.

<sup>34</sup> Human Rights Council, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, Res. 2006/2. The text of the *UN Declaration* was included as an Annex.

<sup>35</sup> Each of these three States has been the subject of "early warning and urgent action" procedures by the UN Committee on the Elimination of Racial Discrimination, in respect to their treatment of Indigenous peoples. Recently, Canada has also been criticized under the same procedures: see Committee on the Elimination of Racial Discrimination, Letter from Committee Chairperson to Ambassador, Permanent Mission of Canada to the United Nations at Geneva, Early-Warning Measures and Urgent Procedures, 15 August 2008, online: <[http://www2.ohchr.org/english/bodies/cerd/docs/Canada\\_letter150808.pdf](http://www2.ohchr.org/english/bodies/cerd/docs/Canada_letter150808.pdf)>.

<sup>36</sup> UN General Assembly, *Working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214 of 23 December 1994*, A/RES/61/178, adopted 20 December 2006. Canada and New Zealand had actively lobbied African States, with a view to obtaining a delay in the adoption of the *Declaration*.

During the next eight months, informal consultations sporadically took place mainly among States. Finally, in late August 2007, an agreement was reached between the African Group of States and the supportive States (led by Mexico and Peru).<sup>37</sup> As a result, nine amendments were made which, through further consultations, were accepted by States in other regions. These amendments were shared with the Indigenous Peoples' Caucus in New York, with the understanding that without Caucus approval the supportive States would not go forward with the revised text.

The vote was 144 States in favour and 4 opposed. Those four States were Canada, United States, New Zealand and Australia. However, on 3 April 2009, the Labour government in Australia endorsed the *Declaration*.<sup>38</sup> With positive announcements from Colombia and Samoa, the supportive States outnumber the opposing ones by 147-3. Canada was the only country on the 47-member Human Rights Council to vote against the *Declaration* at the General Assembly.

In 1948 when the international community adopted the *Universal Declaration on Human Rights*,<sup>39</sup> the collective rights of Indigenous peoples were not included. This serious omission is described by Professor Richard Falk as follows:

... even the idealistic drafters of the main human rights instruments in international law (the Universal Declaration and the two covenants) failed altogether to comprehend the significance of the circumstances threatening the survival of indigenous peoples around the world, and hence, left their specific needs completely out of account while purporting to set forth a universal framework for the realization of human rights.<sup>40</sup>

Since international human rights instruments largely focus on individual rights, the *Declaration* fills an important gap in the international system. The urgent need for this new universal human rights instrument is beyond question. The historical and contemporary experiences of Indigenous peoples in every region of the world are most often depicted in terms of dispossession of lands and resources,

<sup>37</sup> Guatemala also played a significant positive role and has continued to do so in the early stages of implementing the *Declaration*. In addition, the support of the European Union States was an essential factor.

<sup>38</sup> Australia (Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs), "Statement on the United Nations Declaration on the Rights of Indigenous Peoples", Parliament House, Canberra (3 April 2009), online: <[http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un\\_declaration\\_03apr09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm)>. In the spring of 2009, New Zealand and the United States indicated that they are in the process of reconsidering their opposing positions.

<sup>39</sup> *Universal Declaration of Human Rights*, UNGA Res. 217 A (III), UN Doc. A/810, at 71 (1948), adopted by the UN General Assembly on 10 December 1948.

<sup>40</sup> R. Falk (Forward) in W.F. Felice, *Taking Suffering Seriously: The Importance of Collective Human Rights* (Albany, N.Y.: State Univ. of N.Y. Press, 1996) xi at xii.

colonization and colonialism,<sup>41</sup> racism and discrimination,<sup>42</sup> exclusion, marginalization, forced assimilation<sup>43</sup> and other human rights violations. Indigenous peoples are described as “[u]ndoubtedly . . . the most vulnerable of all categories of vulnerable peoples”.<sup>44</sup> Yet they have been largely excluded from the decolonization process that was initiated by the United Nations following its inception.<sup>45</sup>

---

<sup>41</sup> See R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations Univ. Press, 1990) at 118: “The subordination of indigenous peoples to the nation-state, their discrimination and marginalization, has historically, in most cases, been the result of colonization and colonialism. Within the framework of politically independent countries, the situation of indigenous and tribal peoples may be described in terms of internal colonialism.” In M. Pomerance, *Self-Determination in Law and Practice* (The Hague/Boston: Martinus Nijhoff Publishers, 1982) at 106, n. 260, it said that colonialism was first declared to be a “crime” by the General Assembly in Resolution 2621 (XXV), 12 October 1970 (adopted by a vote of 86-5-15).

<sup>42</sup> Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, *Declaration*, adopted in Durban, South Africa, 8 September 2001, para. 14: “We recognize that colonialism has led to racism, racial discrimination, xenophobia and related intolerance, and that . . . indigenous peoples were victims of colonialism and continue to be victims of its consequences. We acknowledge the suffering caused by colonialism and affirm that, wherever and whenever it occurred, it must be condemned and its reoccurrence prevented.”

<sup>43</sup> See generally A. Armitage, *Comparing the Policy of Assimilation: Australia, Canada, and New Zealand* (Vancouver: University of British Columbia Press, 1995). See also Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996), vol. 2(1), at 89: “. . . the *Indian Act* was intended to hasten the assimilation, civilization and eventual annihilation of Indian nations as distinct political, social and economic entities. It was not intended as a mechanism for embracing the Indian nations as partners in Confederation or fulfilling the responsibilities of the treaty relationship. Rather, it focused on containment and disempowerment — not by accident or ignorance, but as a matter of conscious policy.”

<sup>44</sup> R. Falk, “Forward” in M.C. L  m, *At the Edge of the State: Indigenous Peoples and Self-Determination* (Ardsley, N.Y.: Transnational Publishers, 2000) at xiii.

<sup>45</sup> *Ibid.*: “Ravaged by colonial and settler oppression often verging on tactics of eradication, these peoples have also been denied the benefits of ‘decolonisation’.” See also S.J. Anaya, *Indigenous Peoples in International Law*, 2d ed. (Oxford/New York: Oxford University Press, 2004) at 53-54: “The regime of decolonization prescriptions that were developed and promoted through the international system, however, largely bypassed indigenous patterns of association and political ordering that originated prior to European colonization.” See also *Xeni Gwet’in First Nations v. British Columbia* (2007), (sub nom. *Tsilhqot’in Nation v. British Columbia*) [2008] 1 C.N.L.R. 112, 2007 CarswellBC 2741 (B.C. S.C.), at para. 20: “. . . this judgment features Tsilhqot’in people as they strive to assert their place as First Peoples within the fabric of Canada’s multi-cultural society. . . . Tsilhqot’in people have survived despite centuries of colonization. The central question is whether Canadians can meet the challenges of decolonization.”



Increasing international concern was generated as a result of widespread human rights violations against Indigenous peoples.<sup>46</sup> As a result, over 370 million Indigenous people in over 70 countries now have a universal instrument and framework for addressing ongoing human rights transgressions. Indigenous peoples are affirmed as “members of the human family”,<sup>47</sup> reinforcing the international human rights system and its universality.<sup>48</sup>

As explained in the *State of the World Population 2008* report, the notion of “universality of human rights” includes rights of both groups and individuals:

There has been considerable discussion over the universality of human rights, but the discussion has often overlooked the critical interrelationships between human rights and cultures. The human rights framework includes protections for the collective rights of groups as well as those of individuals  
...<sup>49</sup>

The adoption of the *Declaration* has been hailed in every region of the world. UN Secretary-General Ban Ki-moon welcomed this new human rights instrument as a “triumph for indigenous peoples around the world”.<sup>50</sup> The European Union

<sup>46</sup> For a history of the gradual inclusion of Indigenous peoples’ issues internationally, see S. J. Anaya, *Indigenous Peoples in International Law*, 2d ed., *supra* note 45 at 53–94.

<sup>47</sup> *Universal Declaration of Human Rights*, GA Res. 217(III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71 [UDHR], first preambular paragraph: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.” Similar wording is found in the preamble of the *International Covenant on Civil and Political Rights*, 16 December 1966, 999 U.N.T.S. 171 (entered into force 23 March 1976) [ICCPR] and the *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 U.N.T.S. 3 (entered into force 3 January 1976) [ICESCR]. UN Secretary-General, “Indigenous Peoples Rich and Integral Part of Human Tapestry, Have Much to be Proud of, Much to Teach, Secretary-General Says”, *Press Release*, SG/SM/8799, HR/4683, OBV/363, 29 July 2003: “The human family is a tapestry of enormous beauty and diversity. The indigenous peoples of the world are a rich and integral part of that tapestry.”

<sup>48</sup> United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, February 2008, online: PFII <[http://www.un.org/esa/socdev/unpfii/documents/UNDG\\_Guidelines\\_indigenous\\_FINAL.pdf](http://www.un.org/esa/socdev/unpfii/documents/UNDG_Guidelines_indigenous_FINAL.pdf)> at 9: “Most international human rights instruments (with the exception of the UN [Declaration]) protect the rights of the individual. Indigenous peoples need the recognition of specific collective rights for their survival as human groups.” The Guidelines were drafted by a group of UN organizations and specialized agencies under the aegis of the Inter-Agency Support Group on Indigenous Peoples’ Issues.

<sup>49</sup> United Nations Population Fund (UNFPA), *State of the World Population 2008 — Reaching Common Ground: Culture, Gender and Human Rights* (New York: UNFPA, 2008), online: <<http://www.unfpa.org/swp/2008/presskit/docs/en-swop08-report.pdf>>, at 2. On the same page, it is added: “Universal rights are realized by specific people and groups in their own cultural contexts, and must be understood in that way. This realization is what culturally sensitive approaches aim to achieve.”

<sup>50</sup> United Nations, “Statement attributable to the Spokesperson for the Secretary-General on the adoption of the Declaration on the Rights of Indigenous Peoples”, New York, 13 September 2007, online: <<http://www.un.org/apps/sg/sgstats.asp?nid=2733>>.

embraced the *Declaration* as “one of the most significant achievements in this field of human rights”.<sup>51</sup> The African Group of States described the adoption of the *Declaration* as providing “a new and comprehensive framework” and emphasized its “implementation”.<sup>52</sup>

Regional human rights bodies also have expressed positive support. The Rapporteurship on the Rights of Indigenous Peoples of the Inter-American Commission on Human Rights “applauded” the approval of the *Declaration*.<sup>53</sup> The African Commission on Human and Peoples’ Rights expressed confidence that “the Declaration will become a very valuable tool and a point of reference for the African Commission’s efforts to ensure the promotion and protection of indigenous peoples’ rights on the African continent”.<sup>54</sup>

When Australia and New Zealand voted in September 2007 to oppose the *Declaration*, human rights commissions in those countries indicated that they will use the *UN Declaration* in carrying out their respective mandates.<sup>55</sup> Also, the Canadian Human Rights Commission has publicly stated that it “will look to the Declaration for inspiration in [its] own work.”<sup>56</sup>

Against this wave of support and worldwide opinion in favour of the *UN Declaration*, the Conservative government of Canada insists that its decision to oppose the adoption of this instrument by the General Assembly “was the right one”.<sup>57</sup> The

<sup>51</sup> Portugal (on behalf of the European Union), “Mr. Roldopho Stavenhagen: Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people” (Statement delivered to the Human Rights Council, 6th Sess., 18th mtg., Geneva, 26 September 2007).

<sup>52</sup> Egypt (on behalf of the African Group), “African Statement on the Mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous People” (Delivered to the Human Rights Council, 6th Sess., 18th mtg., Geneva, 26 September 2007).

<sup>53</sup> Inter-American Commission on Human Rights, “IACHR Rapporteurship Applauds Approval of UN Declaration on Rights of Indigenous Peoples” (18 September 2007).

<sup>54</sup> African Commission on Human and Peoples’ Rights, “Communique on the United Nations Declaration on the Rights of Indigenous Peoples”, Done in Brazzaville, the Republic of Congo (28 November 2007).

<sup>55</sup> New Zealand Human Rights Commission, “Indigenous Rights Declaration to guide Commission work” (14 September 2007), online: <<http://www.hrc.co.nz/home/hrc/newsandissues/indigenousrightsdeclarationtoguidecommissionwork.php>>. See also Dr. Helen Szoke (chief executive of the Victorian Equal Opportunity and Human Rights Commission), “Indigenous rights need to be included in Victorian charter” (26 September 2007), online: <<http://www.theage.com.au/news/opinion/indigenous-rights-need-to-be-included-in-victorian-charter/2007/09/25/1190486307024.html>>.

<sup>56</sup> Canadian Human Rights Commission, “Public Statement on the Declaration on the Rights of Indigenous Peoples (15 February 2008) online: <[http://www.chrc-ccdp.ca/media\\_room/speeches-en.asp?id=455&content\\_type=2](http://www.chrc-ccdp.ca/media_room/speeches-en.asp?id=455&content_type=2)>.

<sup>57</sup> Letter from the Minister of Indian Affairs and Northern Development Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (10 December 2007) at 1 (copy on file with the author).

government claims it has “principled and well-publicized concerns”<sup>58</sup> and that it has tackled Indigenous issues “openly, honestly, and with respect”.<sup>59</sup> The Tory government has also emphasized the importance of seeking “reconciliation between groups as we move forward together in the 21st century”.<sup>60</sup>

As this article will illustrate, the Canadian government’s opposition to the *Declaration* is based on ideological bias rather than on a legitimate, legal rationale. The government has consistently engaged in exaggerated, absolutist interpretations so as to generate confusion and opposition at home and abroad. It has also repeatedly violated the rule of law in Canada and internationally; misled Parliament and the Canadian public; and undermined the human rights of Indigenous peoples.<sup>61</sup> Such conduct fails to uphold the honour of the Crown and is inconsistent with the constitutional objective of reconciliation with Indigenous peoples. As a consequence of its actions, Canada’s international reputation on human rights has been and continues to be severely tarnished.<sup>62</sup>

In examining the *UN Declaration on the Rights of Indigenous Peoples*, this article will address the following:

- i) use of international human rights norms in the Canadian context;
- ii) importance of adopting a human rights-based approach;
- iii) significance of the *Declaration* in achieving reconciliation with Indigenous peoples in Canada;
- iv) actions taken by Canadian government to oppose adoption of the *Declaration*;
- v) specific government arguments against the *Declaration*; and,
- vi) legal status of UN General Assembly resolutions and declarations and their application by Canadian courts.

<sup>58</sup> Letter from the Minister of Indian Affairs and Northern Development Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (28 March 2008) at 2 (copy on file with the author).

<sup>59</sup> Indian and Northern Affairs Canada, “Luncheon Hosted by Canada’s Permanent Mission to the United Nations”, 1 May 2008 (speech to Ambassadors by Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians Chuck Strahl) (copy on file with the author).

<sup>60</sup> Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians Chuck Strahl Holds a News Conference Prior to a Meeting with Ambassadors from Various Countries to Discuss Progress on the Domestic and International Front Regarding Indigenous Issues, Transcription, United Nations Secretariat Building, 1 May 2008.

<sup>61</sup> For an elaboration of such Canadian government actions, see discussion under headings 4–6 of this article.

<sup>62</sup> See, e.g., R. Bajer, “Canada loses face internationally in voting against indigenous rights” *Lawyers Weekly* (19 September 2008) at 12.

## 2. USE OF INTERNATIONAL HUMAN RIGHTS NORMS IN THE CANADIAN CONTEXT<sup>63</sup>

In the present era of increasing globalization, virtually every major issue relating to Indigenous peoples in Canada and elsewhere is being addressed in at least some important respect at the international level. This growing trend serves to enhance the significance of international human rights norms for the domestic Canadian context.

In relation to international human rights law, the use of the term “norms” in this article refers to those rights, obligations, principles and rules found in such international instruments as conventions and declarations, as well as in the jurisprudence of human rights bodies. The term also refers to relevant customary international law,<sup>64</sup> including jus cogens or peremptory norms.<sup>65</sup> For example, the international peremptory norm prohibiting racial discrimination<sup>66</sup> can serve to reinforce the importance of the same prohibition under the equality provisions of the *Canadian Charter of Rights and Freedoms*.<sup>67</sup>

<sup>63</sup> The analysis under this heading is partly reproduced from Paul Joffe & Willie Littlechild, “Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms” in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004) Section 12.

<sup>64</sup> A. Aust, *Modern Treaty Law and Practice* (New York: Cambridge University Press, 2000) at 10: “Treaties and customs are the main sources of international law. Customary law is made up of two elements: (1) a general convergence in the practice of states from which one can extract a norm (standard of conduct), and (2) *opinio juris* — the belief by states that the norm is legally binding on them.” See also G. Slyz, “International Law in National Courts” in T.M. Franck & G.H. Fox, eds., *International Law Decisions in National Courts* (N.Y.: Transnational Publishers, 1996) 71 at 71-72; and Bruno Simma & Philip Alston, “The Sources of Human Rights Law: Custom, Jus Cogens and General Principles” (1992) 12 *Aust. Y.B.I.L.* 82.

<sup>65</sup> *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, reprinted in 8 *I.L.M.* 679 (1969), art. 53: “A peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole . . . from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” James Crawford, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) at 188: “Those peremptory norms that are clearly accepted and recognised include the prohibitions against aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination.”

<sup>66</sup> I. Brownlie, *Principles of Public International Law*, 5th ed. (Oxford: Clarendon Press, 1998) at 515: “The least controversial examples of [peremptory norms] are the prohibition of the use of force, the law of genocide, the principle of racial non-discrimination, crimes against humanity, and the rules prohibiting trade in slaves and piracy.”

<sup>67</sup> *Canadian Charter of Rights and Freedoms*, in *Constitution Act, 1982*, Schedule B to the *Canada Act, 1982*, (U.K.), 1982, c. 11, Part I, s. 15. See also *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, 1989 CarswellNat 193, 1989 CarswellNat 695 (S.C.C.), at 1056-1057 [S.C.R.], per Dickson C.J. for the majority: “Canada’s international human rights obligations should inform not only the interpreta-

Similarly, the right of all peoples to self-determination<sup>68</sup> is generally accepted to be customary international law<sup>69</sup> (if not also a peremptory norm).<sup>70</sup> According to the “doctrine of adoption”,<sup>71</sup> this human right would likely be considered a part of Canadian law without legislative enactment. This doctrine has been affirmed by the Supreme Court of Canada in *R. v. Hape*<sup>72</sup> to be operative in the Canadian context in the absence of conflicting legislation.

A similar position was taken by the Attorney General of Canada in the *Québec Secession Reference*:

[T]he principles of customary law relating to the right of self-determination are applicable in the present case, because they do not conflict with the applicable Canadian domestic law. *Since these principles of customary law can be “incorporated” into domestic law by Canadian courts, it is respectfully submitted that Canadian courts unquestionably have jurisdiction to apply them.*<sup>73</sup>

---

tion of rights guaranteed by the *Charter* but also the interpretation of what can constitute pressing and substantial [section 1] objectives which may justify restrictions upon those rights.”

<sup>68</sup> The right of self-determination is affirmed in identical art. 1 of the two international human rights Covenants. In relation to Indigenous peoples, this right is also reflected in art. 3 of the *UN Declaration*.

<sup>69</sup> W.A. Schabas & S. Beaulac, *International Human Rights and Canadian Law: Legal Commitment, Implementation and the Charter*, 3d ed. (Toronto: Carswell, 2007) at 80, where it is stated that the right of peoples to self-determination is “part of the law of Canada and justiciable before our courts despite the fact that [it is] not incorporated . . . in specific legislation”.

<sup>70</sup> Robert McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 I.C.L.Q. 857 at 858: “This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.” See also S. James Anaya, “Indigenous Rights Norms in Contemporary International Law” (1991) 8 *Ariz. J. Int’l & Comp. Law* 1 at 29-30: “. . . self-determination is widely held to be a norm of general or customary international law, and arguably *jus cogens* (a peremptory norm)”. K. Doehring, “Self-Determination” in B. Simma, ed., *The Charter of the United Nations: A Commentary* (New York: Oxford University Press, 1994) 56 at 70: “The right of self-determination is overwhelmingly characterized as forming part of the peremptory norms of international law.”

<sup>71</sup> The doctrine of adoption has long been recognized in English common law. See also *Trendtex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529 (Eng. C.A.) *per* Lord Denning.

<sup>72</sup> *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 CarswellOnt 3563, 2007 CarswellOnt 3564, ¶39 (S.C.C.). In *Hape*, the Supreme Court made reference to “prohibitive rules of customary international law”. However, one would expect that customary rules relating to human rights would also be considered a part of Canadian law under the doctrine of adoption.

<sup>73</sup> Reply By the Attorney General of Canada to Questions Posed By the Supreme Court of Canada at para. 8, online: QL (SCQR), in the matter of *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, 1998 CarswellNat 1300, 1998 CarswellNat 1299 (S.C.C.). [emphasis added] For a similar approach in the context of the Canadian Charter, see

Constitutional rules of interpretation in Canada would further reinforce the application of the right of self-determination to Aboriginal and treaty rights under s. 35 of the *Constitution Act, 1982*.<sup>74</sup> For example, in the *Québec Secession Reference*, the Supreme Court of Canada applied the “living tree” doctrine<sup>75</sup> to the underlying principles in Canada’s *Constitution*, which include the protection of Aboriginal and treaty rights.<sup>76</sup> This flexible doctrine<sup>77</sup> would enable Aboriginal peoples’ rights under the *Constitution* to be interpreted in a manner consistent with their right of self-determination under international law.

At the international level, the right of peoples to self-determination is said to be a “prerequisite” for the enjoyment of *all* other human rights.<sup>78</sup> In regard to the *International Covenant on Civil and Political Rights*, the UN Human Rights Com-

Gerard V. LaForest, “The Expanding Role of the Supreme Court of Canada in International Issues” (1996) 34 *Can. Y. I.L.* 89 at 97.

<sup>74</sup> Kent Roach, *Constitutional Remedies in Canada* (Aurora, Ontario: The Cartwright Group Ltd., 2008) at 15-1: “In devising remedies, courts should be sensitive to the purposes of aboriginal rights, including the role of treaty-making and self-determination, while recognizing that they have a duty to enforce aboriginal rights.” At 15-3, Roach adds: “A purposive approach to remedies for aboriginal rights will recognize that both the history and future of aboriginal rights involve elements of self-determination.”

<sup>75</sup> *Edwards v. Canada (Attorney General)* (1929), [1930] A.C. 124, 1929 CarswellNat 2 (Canada P.C.), at 136: “The [*Constitution Act, 1867*] planted in Canada a living tree capable of growth and expansion within its natural limits.”

<sup>76</sup> *Reference re Secession of Québec*, *supra* note 73 at para. 52: “. . . observance of and respect for these [underlying constitutional] principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a ‘living tree’, to invoke the famous description in *Edwards v. Attorney-General for Canada* . . .”

<sup>77</sup> *Reference re Provincial Electoral Boundaries*, [1991] 2 S.C.R. 158, 1991 CarswellSask 403, 1991 CarswellSask 188 (S.C.C.), at 180 [S.C.R.]: “The doctrine of the constitution as a living tree mandates that narrow technical approaches are to be eschewed . . . The tree is rooted in past and present institutions, but must be capable of growth to meet the future.” See also *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, (sub nom. *Hunter v. Southam Inc.*) [1984] 2 S.C.R. 145, 1984 CarswellAlta 121, 1984 CarswellAlta 415 (S.C.C.), at 155 [S.C.R.]: “A constitution . . . is drafted with an eye to the future . . . Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.”

<sup>78</sup> Sub-Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980) (H. Gros Espiell, Special Rapporteur) at para. 59: “[H]uman rights can only exist truly and fully when self-determination also exists. Such is the fundamental importance of self-determination as a human right and as a prerequisite for the enjoyment of all the other rights and freedoms.” Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, UN Doc. A/HRC/12/34 (15 July 2009), para. 41: “The right of self-determination is a foundational right, without which

mittee has concluded that “the provisions of article 1 [self-determination] may be relevant in the interpretation of other rights protected by the Covenant”.<sup>79</sup>

With respect to the Aboriginal and treaty rights of Indigenous peoples in Canada, reliance upon international concepts is highly appropriate. As underlined by the Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, emerging international norms guide both governments and the courts and cannot be ignored:

Aboriginal rights from the beginning have been shaped by international concepts. . . . More recently, emerging international norms have guided governments and courts grappling with aboriginal issues. Canada, as a respected member of the international community, cannot ignore these new international norms any more than it could sidestep the colonial norms of the past. Whether we like it or not, aboriginal rights are an international matter.<sup>80</sup>

In relation to a wide range of Indigenous issues in Canada, it can prove very useful to invoke international human rights norms and law in negotiations with governments, corporations or other third parties. The same is true for Indigenous cases in domestic courts. The use of the *UN Declaration*, as a universal instrument with a broad range of standards relating to Indigenous peoples, is especially relevant.

Victoria Tauli-Corpuz emphasizes that “the price for our assertion to be recognized as distinct peoples, and to have our rights, as contained in the UN Declaration on the Rights of Indigenous Peoples, protected, respected and fulfilled is eternal vigilance.”<sup>81</sup> In devising careful and effective strategies in this regard, a human rights-based approach can be highly significant.

### 3. IMPORTANCE OF ADOPTING A HUMAN RIGHTS-BASED APPROACH<sup>82</sup>

Under a “human rights-based approach”, Indigenous issues are addressed within a framework of international human rights law and standards. Indigenous rights are included as an integral part of both policy and law. In practice, State

---

indigenous peoples’ human rights, both collective and individual, cannot be fully enjoyed.”

<sup>79</sup> *Apirana Mahuika et al. v. New Zealand*, Communication No 547/1993, Human Rights Committee, 70th Sess., UN Doc. CCPR/C/70/D/547/1993 (15 November 2000), para. 9.2.

<sup>80</sup> Beverley McLachlin, Chief Justice of Supreme Court of Canada, “Aboriginal Rights: International Perspectives”, Order of Canada Luncheon, Speech, Canadian Club of Vancouver, Vancouver, British Columbia (8 February 2002).

<sup>81</sup> Victoria Tauli-Corpuz, “The Concept of Indigenous Peoples at the International Level: Origins, Development and Challenges” in C. Erni, ed., *The Concept of Indigenous Peoples in Asia: A Resource Book* (Copenhagen/Chang Mai: International Work Group for Indigenous Affairs (IWGIA)/Asian Indigenous Peoples Pact Foundation, 2008) 77 at 97.

<sup>82</sup> The analysis under this heading is adapted from Paul Joffe & Willie Littlechild, “Administration of Justice and How to Improve it: Applicability and Use of International Human Rights Norms”, *supra* note 63.

governments often fail to affirm that Indigenous peoples have inherent collective rights that are human rights, including the right of self-determination.

In the absence of a principled human rights framework, violations or denials of Indigenous peoples' rights are likely to continue to be treated casually by governments and the courts. Even when domestic judicial remedies are provided, they have often fallen short. Redress of past dispossessions of Indigenous peoples' lands, territories and resources or prevention of future injustices has been dependent on discretionary governmental policies or programming. This has led to uneven treatment and results. These situations perpetuate a lack of dignity, security and well-being among Indigenous peoples.

A human rights approach to the understanding and realization of Aboriginal and treaty rights of Indigenous peoples is widely endorsed and applied internationally. This approach draws upon international human rights concepts and standards, which can serve to uplift domestic practices.

In the November 2007 *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, it is concluded that the "rights and principles enshrined in the Declaration mesh with the general principles of the [human] rights-based approach".<sup>83</sup> UN Secretary-General Ban Ki-moon has highlighted that the *UN Declaration* is "a visionary step towards addressing the human rights of indigenous peoples".<sup>84</sup> Similarly, in relation to Indigenous peoples, the United Nations Development Group has accentuated that the *Declaration* is an integral part of a human rights-based approach:

The human rights standards contained in, and principles derived from, the Universal Declaration of Human Rights, the United Nations Declaration on the Rights of Indigenous Peoples and other international human rights instruments, as well as the recognition of indigenous peoples' collective rights, provide the framework for adopting a human rights-based and culturally sensitive approach when addressing the specific situation of indigenous peoples.<sup>85</sup>

Based on the past 30 years, there is a well-established practice to address Indigenous peoples' collective rights within international and regional human rights systems.<sup>86</sup> Indigenous peoples' rights are increasingly integrated with such human rights systems and this practice is growing. For more than 10 years, a draft "Ameri-

---

<sup>83</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, A/HRC/6/15 (15 November 2007) at para. 64. At para. 17, the Report makes clear that it is advocating a "human rights-based approach".

<sup>84</sup> UN Secretary-General (Ban Ki-moon), "Protect, Promote, Endangered Languages, Secretary-General Urges in Message for International Day of World's Indigenous People", SG/SM/11715, HR/4957, OBV/711, 23 July 2008.

<sup>85</sup> United Nations Development Group, "United Nations Development Group Guidelines on Indigenous Peoples' Issues", *supra* note 48 at 24.

<sup>86</sup> This includes the African Commission on Human and Peoples' Rights and the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights.



can Declaration on the Rights of Indigenous Peoples<sup>87</sup> is being developed within the Organization of American States (OAS) with Indigenous and State participation.

There are other compelling reasons for adopting and maintaining a human rights-based approach — especially one that embraces relevant and uplifting international norms.

First, it is widely recognized that Indigenous peoples' collective rights are human rights.<sup>88</sup> This reality has been affirmed by the Canadian Human Rights Commission.<sup>89</sup> Also, as Irwin Cotler states: "A . . . category [of human rights], one distinguishably set forth in the Canadian *Charter* — and increasingly recognized in international human rights law — is the category of *aboriginal rights*."<sup>90</sup>

In its Agenda and Framework for the programme of work, the UN Human Rights Council has permanently included the "rights of peoples" under Item 3 "Promotion and protection of all human rights . . .".<sup>91</sup> The resolution that includes this Agenda and Framework was approved without a vote by the Council in June 2007 and subsequently approved by the General Assembly.<sup>92</sup> Therefore, the position that the Canadian government has taken against recognizing Indigenous peoples' collective rights as human rights is without merit.<sup>93</sup> At the OAS negotiations on a draft *American Declaration on the Rights of Indigenous Peoples*, the Tory

<sup>87</sup> If and when adopted, this American Declaration will apply throughout the Americas — North, Central and South America and the Caribbean.

<sup>88</sup> See, e.g., J.Y. Henderson, M.L. Benson & I.M. Findlay, *Aboriginal Tenure in the Constitution of Canada* (Toronto: Carswell, 2000) at 447; P. Joffe, "Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec" (2000) 45 McGill L.J. 155 at 182; C.P. Cohen, ed., *Human Rights of Indigenous Peoples* (Ardsey, N.Y.: Transnational Publishers, 1998); M.E. Turpel, *Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition*, 25 Cornell Int'l L. J. 579; R. Torres, *The Rights of Indigenous Populations: The Emerging International Norm*, (1991) 16 Yale J. Int'l L. 127.

<sup>89</sup> Canadian Human Rights Commission, "Still A Matter of Rights", A Special Report of the Canadian Human Rights Commission on the Repeal of Section 67 of the *Canadian Human Rights Act*, January 2008, at 8: ". . . human rights have a dual nature. Both collective and individual human rights must be protected; both types of rights are important to human freedom and dignity. They are not opposites, nor is there an unresolvable conflict between them. The challenge is to find an appropriate way to ensure respect for both types of rights without diminishing either."

<sup>90</sup> Irwin Cotler, "Human Rights Advocacy and the NGO Agenda" in I. Cotler & F.P. Eliadis, eds., *International Human Rights Law: Theory and Practice* (Montreal: Canadian Human Rights Foundation, 1992) 63 at 66.

<sup>91</sup> Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex.

<sup>92</sup> UN General Assembly, Res. 62/219, 22 December 2007.

<sup>93</sup> Cf. Office of the High Commissioner for Human Rights, "OHCHR Fact Sheet: The UN Declaration on the Rights of Indigenous Peoples", United Nations, online: <<http://www2.ohchr.org/english/issues/indigenous/docs/IntDay/IndigenousDeclarationeng.pdf>>: "The Declaration . . . provides the foundation — along

government has strongly objected to recognizing Indigenous peoples' collective rights as human rights.<sup>94</sup>

Second, as former UN Secretary-General Boutros-Ghali highlighted in 1993, human rights constitute the "common language of humanity".<sup>95</sup> In every region of the globe, governments, peoples and individuals are committed to the promotion and respect of human rights. All Member States of the United Nations are legally bound to uphold at all times the purposes and principles of the *UN Charter*,<sup>96</sup> which include "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".<sup>97</sup>

Third, a human rights approach should serve to ensure a more coherent and consistent interpretation and treatment of Indigenous peoples' fundamental rights. To date, Canadian courts have not engaged in comprehensive human rights analyses in interpreting Aboriginal and treaty rights. Two UN committees concerned with human rights have linked Canada's extinguishment policies to "economic marginalization" and "dispossession".<sup>98</sup> Yet the Supreme Court of Canada contin-

---

with other human rights standards — for the development of policies and laws to protect the collective human rights of indigenous peoples."

<sup>94</sup> Letter from Assembly of First Nations National Chief Phil Fontaine to the Minister of Indian Affairs and Northern Development Chuck Strahl (30 January 2007), Annex, at 8 (copy on file with the author). At 9, the National Chief adds: "Representatives of Indigenous organizations have repeatedly requested the government to clarify and substantiate its position in writing, with no response."

<sup>95</sup> B. Boutros-Ghali, Opening Statement by the United Nations Secretary-General, "Human Rights: The Common Language of Humanity", in World Conference on Human Rights, *The Vienna Declaration and Programme of Action June 1993* UN DPI/1394-39399-August 1993-20 M.

<sup>96</sup> *Charter of the United Nations*, art. 2, para. 2.

<sup>97</sup> *Ibid.*, art. 1, para. 3.

<sup>98</sup> See Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc. E/C.12/1/Add.31 (10 December 1998), para. 18: "The Committee views with concern the direct connection between Aboriginal economic marginalization and the ongoing dispossession of Aboriginal people from their lands . . . and endorses the recommendations of RCAP that policies which violate Aboriginal treaty obligations and the *extinguishment, conversion or giving up of Aboriginal rights and title should on no account be pursued by the State Party*." [emphasis added] See also Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/61/CO/3 (23 August 2002), para. 17.

ues to apply the discriminatory<sup>99</sup> and anachronistic doctrine of extinguishment to Aboriginal rights,<sup>100</sup> despite far-reaching adverse human rights considerations.<sup>101</sup>

Fourth, in Canada and internationally, it is well recognized that the principles of democracy, rule of law and respect for human rights are profoundly interrelated.<sup>102</sup> Therefore, a human rights approach is required to ensure balanced and comprehensive legal analyses. It is said: “Canadian legal values concerning human rights are rooted directly in international standards”.<sup>103</sup>

In the *Québec Secession Reference*, the Supreme Court of Canada stated that underlying constitutional principles include democracy, constitutionalism and the rule of law, and respect for minority rights.<sup>104</sup> These underlying principles function together and cannot be defined in isolation from one another.<sup>105</sup> The Court also highlighted that the protection of Aboriginal and treaty rights “whether looked at in

<sup>99</sup> D. Sambo, “Indigenous Peoples and International Standard-Setting Processes: Are State Governments Listening?”, (1993) 3 *Transnat’l L. & Contemp. Probs.* 13 at 31.

<sup>100</sup> *R. v. Powley*, [2003] 2 S.C.R. 207, 2003 CarswellOnt 3503, 2003 CarswellOnt 3502 (S.C.C.), at para. 46: “The doctrine of extinguishment applies equally to Métis and to First Nations claims.”

<sup>101</sup> Paul Joffe & Mary Ellen Turpel, *Extinguishment of the Rights of Aboriginal Peoples: Problems and Alternatives*, A study prepared for the Royal Commission on Aboriginal Peoples, vol. 2, c. 8 (extinguishment incompatible with human rights and other norms), at 322 *et seq.*

<sup>102</sup> Paul Joffe, “Assessing the Delgamuukw Principles: National Implications and Potential Effects in Québec”, *supra* note 88 at 188. 2005 *World Summit Outcome*, GA Res. 60/1, UN GAOR, 60th Sess., Supp. No. 49, Vol. I, UN Doc. A/60/49 (2006) 3, at para. 119: “. . . all human rights, the rule of law and democracy . . . are interlinked and mutually reinforcing and . . . they belong to the universal and indivisible core values and principles of the United Nations”. See also *Vienna Declaration and Programme of Action* (adopted 25 June 1993) in United Nations World Conference on Human Rights, *Report of the World Conference on Human Rights: Report of the Secretary-General*, UN Doc. A/CONF.157/24 (Part I), (13 October 1993) at c. III, para. 5, *reprinted* in (1993) 32 I.L.M. 1661 at para. 8: “Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”

<sup>103</sup> S.J. Toope, “Legal and Judicial Reform through Development Assistance: Some Lessons” (2003) 48 *McGill L.J.* 357 at 387-388.

<sup>104</sup> *Reference re Secession of Québec*, *supra* note 73 at para. 32.

<sup>105</sup> *Ibid.* at para. 49: “These defining principles function in symbiosis. No single principle can be defined in isolation from the others, nor does any one principle trump or exclude the operation of any other.” At para. 50, the Court adds: “The individual elements of the Constitution are linked to the others, and must be interpreted by reference to the structure of the Constitution as a whole. . . . [C]ertain underlying principles infuse our Constitution and breathe life into it.”

their own right<sup>106</sup> or as part of the larger concern with minorities, reflects an important underlying constitutional value.”<sup>107</sup>

Armand de Mestral and Evan Fox-Decent underline the relevance of international human rights standards to Canada’s underlying constitutional principles and the *UN Declaration*:

Canadian proponents of the *Declaration on the Rights of Indigenous Peoples* might well worry that Canada is not meeting international standards . . . In our view, the constitutional principle [that requires protection of minorities] weighs in favour of Canada signing the *Indigenous Rights Declaration*, and so the failure of the government to do so thus far places the government’s inaction, not international law, in tension with the principle.”<sup>108</sup>

In *R. v. Demers*, Supreme Court Justice LeBel stated that “a further principle underlying our constitutional arrangement is respect for human rights and freedoms”.<sup>109</sup> This further reinforces a human rights-based approach in Canada.

Fifth, rather than adopt an “impoverished view”,<sup>110</sup> a human rights-based approach may convince governments in Canada to embrace a supportive approach — one that sensitively<sup>111</sup> addresses the Aboriginal and treaty rights of Indigenous peoples in litigation or negotiations. Throughout Canada’s history, in virtually every case relating to these rights, the government of Canada chooses to act as an

<sup>106</sup> Indigenous peoples are distinct peoples and not simply minorities. Therefore, it is more appropriate to treat the protection of Aboriginal and treaty rights as a separate constitutional principle. Similarly, see C.-A. Sheppard, “The Cree Intervention in the Canadian Supreme Court Reference on Québec Secession: A Subjective Assessment” (1999) 23 Vermont L. Rev. 845 at 856.

<sup>107</sup> *Reference re Secession of Québec*, *supra* note 73 at para. 82. In addition, it is worth noting that in *Marshall v. Canada*, [1999] 3 S.C.R. 533, 1999 CarswellNS 350, 1999 CarswellNS 349 (S.C.C.), at para. 45, the constitutional obligation to protect Aboriginal and treaty rights is referred to as a “national commitment”. See also *R. v. Powley*, *supra* note 100 at para. 45: “Section 35 reflects a new promise: a constitutional commitment . . .”

<sup>108</sup> A. de Mestral & E. Fox-Decent, “Rethinking the Relationship Between International and Domestic Law” (2008) 53 McGill L.J. 573 at 627, n. 254.

<sup>109</sup> *R. c. Demers*, [2004] 2 S.C.R. 489, 2004 CarswellQue 1547, 2004 CarswellQue 1548, ¶79 (S.C.C.). In regard to underlying constitutional principles, Mr. Justice LeBel added: “This matrix of values infuses the totality of our constitutional documents. . . . These unwritten elements are aids in the interpretation of the text of our constitutional documents and can fill gaps in the text . . . They may also, in certain circumstances, give rise to substantive legal obligations, which themselves are limitations on government and courts”.

<sup>110</sup> For a recent example, see *Tsilhqot’in Nation v. British Columbia*, *supra* note 45 at para. 1376, where Vickers J. concludes: “What is clear to me is that the impoverished view of Aboriginal title advanced by Canada and British Columbia, characterized by the plaintiff as a “postage stamp” approach to title, cannot be allowed to pervade and inhibit genuine negotiations.”

<sup>111</sup> See *R. v. Sparrow*, [1990] 1 S.C.R. 1075, 1990 CarswellBC 756, 1990 CarswellBC 105 (S.C.C.), at 1112 *per* Dickson C.J.C.: “. . . it is possible, and, indeed, crucial, to be sensitive to the aboriginal perspective itself on the meaning of the rights at stake”.

adversary.<sup>112</sup> No other people in Canada are automatically subjected to such consistently adverse<sup>113</sup> and discriminatory treatment.<sup>114</sup> Such rigidity and adversity in federal and provincial government positions has been criticized by the UN Committee on the Elimination of Racial Discrimination:

The Committee is . . . concerned that claims of Aboriginal land rights are being settled primarily through litigation, at a disproportionate cost for the Aboriginal communities concerned due to the strongly adversarial positions taken by the federal and provincial governments . . .<sup>115</sup>

A further reason for adopting a human rights approach relates to the acute poverty facing Indigenous peoples in the different regions of Canada. This poverty is interrelated with the denial of their basic human rights. Such poverty is not happenstance, but is a result of colonialism, dispossession of lands and resources, discrimination and other unacceptable actions.<sup>116</sup>

<sup>112</sup> Especially in lawsuits or negotiations that mainly involve Indigenous peoples and a provincial or territorial government, the Canadian government should be taking positions that support the full enjoyment of Aboriginal and treaty rights under Canada's *Constitution*. Instead, the government generally crafts arguments that would minimize such rights and give greater control to the province or territory concerned. In the context of British Columbia, see generally Louise Mandel, "The Ghost" in Maria Morelato, ed.-in-chief, *Aboriginal Law Since Delgamuukw* (Aurora, Ontario: Cartwright Group Ltd., 2009) 55.

<sup>113</sup> *R. v. Sparrow*, *supra* note 111 at 1108: "The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship."

<sup>114</sup> In contrast, in litigation within the United States, it is very common for the federal government to act as *amicus curiae* in support of an Indigenous tribe or individual. See, e.g., *Nevada v. Hicks*, 533 U.S. 353 (2001); *Atkinson Trading Company, Inc. v. Shirley*, 532 U.S. 645 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Strate v. A-1 Contractors*, 520 U.S. 438 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996); *Duro v. Reina*, 495 U.S. 676 (1990); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1984); *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983); and *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191 (1978). I am grateful to K. Jerome Gottschalk, Attorney, Native American Rights Fund, for these references.

<sup>115</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, UN Doc. CERD/C/CAN/CO/18 (25 May 2007), para. 22. The Committee added: "Wherever possible, the Committee urges the State party to engage, in good faith, in negotiations based on recognition and reconciliation, and reiterates its previous recommendation that the State party examine ways and means to facilitate the establishment of proof of Aboriginal title over land in procedures before the courts."

<sup>116</sup> See, e.g., "Statement of Reconciliation" in Indian Affairs and Northern Development, *Gathering Strength — Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997) at 4: "Attitudes of racial and cultural superiority led to a suppression of Aboriginal culture and values. As a country, we are burdened by past actions that resulted in weakening the identity of Aboriginal peoples, suppressing their languages and cultures, and outlawing spiritual practices . . . We must

Severe poverty inhibits significantly the enjoyment of human rights.<sup>117</sup> It is well-established that Indigenous peoples and individuals who live in debilitating poverty — even those living in developed countries such as Canada<sup>118</sup> — are precluded from the effective exercise or enjoyment of fundamental human rights.

In Indigenous communities and nations, denials of Indigenous peoples' collective human rights, including self-determination,<sup>119</sup> are root causes and major contributors to deep-seated health<sup>120</sup> and other socio-economic problems.<sup>121</sup> Land and resource dispossessions entail highly serious and far-reaching human rights abuses.<sup>122</sup> They endanger the survival<sup>123</sup> and well-being of distinct Indigenous

---

acknowledge that *the result of these actions was the erosion of the political, economic and social systems of Aboriginal people and nations.*" [emphasis added]

117 UN World Conference on Human Rights, *Vienna Declaration and Programme of Action*, *supra* note 102, Part I, para. 14: ". . . the existence of widespread extreme poverty inhibits the full and effective enjoyment of human rights; its immediate alleviation and eventual elimination must remain a high priority for the international community."

118 R. Müllerson, "Reflections on the Future of Civil and Political Rights" in B.H. Weston & S.P. Marks, eds., *The Future of International Human Rights* (Ardsley, New York: Transnational Publishers, 1999) 225 at 235: "Existing poverty in some highly developed countries . . . are among the conditions that make the enjoyment of some civil and political rights for many people impossible".

119 Canadian Medical Association, *Bridging the Gap: Promoting Health and Healing for Aboriginal Peoples in Canada* (Ottawa: Canadian Medical Association, 1994) at 14: "It is recognized that self-determination in social, political and economic life improves the health of Aboriginal peoples and their communities. Therefore, the CMA encourages and supports the Aboriginal peoples in their quest for resolution of self-determination and land use."

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

121 Royal Commission on Aboriginal Peoples, *supra* note 43, vol. 3 at 5: "Current social problems are in large part a legacy of historical policies of displacement and assimilation, and their resolution lies in recognizing the authority of Aboriginal people to chart their own future within the Canadian federation."

122 R.J. Epstein, "The Role of Extinguishment in the Cosmology of Dispossession" in G. Alfredsson & M. Stavropoulou, eds., *Justice Pending: Indigenous Peoples and Other Good Causes* (The Hague: Kluwer Law International, 2002) 45 at 55: ". . . confiscation of indigenous peoples' land necessarily entails human rights abuses of the most serious and fundamental kind."

123 See *Case of the Saramaka People v. Suriname*, (*Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*), I/A Court H.R., Judgment of August 12, 2008, Series C No. 184, para. 37, where it is said that, in the context of proposed development, investment, exploration or extraction plans, "'survival' . . . signifies much more than physical survival". The Court explained that "the phrase 'survival as a tribal people' must be understood as the ability of the Saramaka to 'preserve, protect and guarantee the special relationship that [they] have with their territory', so that 'they may continue living their traditional way of life, and that their distinct cul-

peoples and cultures.<sup>124</sup> Both peoples and individuals are impacted. Therefore, eradicating this poverty is in essential ways “a human rights challenge”<sup>125</sup> that would be aided by the *UN Declaration*.<sup>126</sup>

In conclusion, the adoption of a human rights-based approach should prove highly beneficial for interpreting and implementing Indigenous peoples’ rights and the *UN Declaration*. However, the effective use of such an approach will require ongoing human rights learning and education. The UN General Assembly proclaimed 2009 as the *International Year of Human Rights Learning*, in order to “promote a human rights culture worldwide”.<sup>127</sup> Human rights education is essential for everyone and “can constitute an empowering tool for those that are marginalized . . . in particular for indigenous peoples”.<sup>128</sup>

The significance of human rights education in relation to Indigenous peoples has been described as follows:

Human rights education, if effective, should serve to promote tolerance, respect and understanding. . . . [I]t is important for people of all ages to appreciate that Aboriginal and treaty rights are human rights that must be respected. . . . the sacred nature and historical and contemporary significance of treaties should be an integral part of human rights education.<sup>129</sup>

In the *Programme of Action for the Second International Decade of the World’s Indigenous People*, it is recommended that “programmes of education on the human rights of indigenous peoples should be developed and strengthened . . .

---

tural identity, social structure, economic system, customs, beliefs and traditions are respected, guaranteed and protected . . .”.

<sup>124</sup> R. Stavenhagen, *The Ethnic Question: Conflicts, Development, and Human Rights*, (Tokyo: United Nations Univ. Press, 1990) at 105: “Indigenous peoples are aware of the fact that unless they are able to retain control over their land and territories, *their survival as identifiable, distinct societies and cultures is seriously endangered*.” [emphasis added]

<sup>125</sup> United Nations Development Program, *Human Development Report 2000* (Oxford: Oxford University Press, 2000) at 73: “eradicating poverty is more than a major development challenge — it is a human rights challenge”.

<sup>126</sup> Message of Louise Arbour, United Nations High Commissioner for Human Rights and Rodolfo Stavenhagen, Special Rapporteur, on the occasion of the International Day of the World’s Indigenous Peoples, 7 August 2007: “The adoption of the Declaration . . . should be seen as providing impetus for renewed efforts by the international community to address the pressing concerns of the world’s 370 million indigenous people, including perhaps the most urgent issue of all: poverty and marginalization.”

<sup>127</sup> *International Year of Human Rights Learning*, GA Res. 62/171 (18 December 2007), preamble. This International Year officially commenced on 10 December 2008, which was the 60th anniversary of the adoption of the *Universal Declaration of Human Rights*.

<sup>128</sup> Commission on Human Rights, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Addendum: Conclusions and Recommendations of the Expert Seminar on Indigenous Peoples and Education*, 61st Sess., E/CN.4/2005/88/Add.4 (15 December 2004), para. 37.

<sup>129</sup> P. Joffe & W. Littlechild, *supra* note 63 at 12-25–12-26.

and should advocate against stereotypes and ethnic stigmatization”.<sup>130</sup> In order to increase understanding, diversity, equality and non-discrimination, the *Declaration* and Indigenous peoples’ human rights should be integrated into the school curriculum at different grade levels.<sup>131</sup>

In regard to Indigenous nations and communities, it would be useful to develop versions of the *Declaration* in various Indigenous languages. As recommended in the 2008 *Report of the international expert group meeting on indigenous languages*: “States, indigenous peoples and international organizations should collaborate in translating the United Nations Declaration on the Rights of Indigenous Peoples into indigenous languages and disseminate these widely”.<sup>132</sup> This is already taking place in different regions of the world.<sup>133</sup>

National and regional conferences and workshops are also useful to foster increased understanding and insight in relation to the *UN Declaration* and international human rights law. It should prove highly beneficial for Indigenous leaders, among others, to gradually integrate a human rights-based approach in addressing their diverse issues. In particular, such an approach is likely to be relevant in formulating and implementing Indigenous constitutions and in a wide range of governance issues.

Many scholars, lawyers, law students, judges, legislators and government officials — both Indigenous and non-Indigenous — are also in need of human rights

<sup>130</sup> UN General Assembly, *Draft Programme of Action for the Second International Decade of the World’s Indigenous People: Report of the Secretary-General*, UN Doc. A/60/270 (18 August 2005) (adopted by the General Assembly on 16 December 2005) at para. 47.

<sup>131</sup> UN General Assembly, *Revised draft plan of action for the first phase (2005–2007) of the World Programme for Human Rights Education: Note by the Secretary-General*, A/59/525/Rev.1 (2 March 2005) (adopted by the General Assembly, GA Res. 59/113. *World Programme for Human Rights Education B* (14 July 2005)) at para. 19 (b): “promoting a rights-based approach to education, human rights education . . . provides . . . the following benefits: . . . (b) Increased access to and participation in schooling by creating a rights-based learning environment that is inclusive and welcoming and fosters universal values, equal opportunities, diversity and non-discrimination”. See also *Convention on the Rights of the Child*, UN GAOR, 44th Sess., Supp. No. 49, at 166, UN Doc. A/RES/44/49 (1990), adopted by the General Assembly in resolution 44/25 of 20 November 1989, art. 29, para. 1(b): “States Parties agree that the education of the child shall be directed to: . . . (b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations”.

<sup>132</sup> Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on indigenous languages*, 7th Sess., New York, E/C.19/2008/3 (21 January 2008) at para. 44 (a).

<sup>133</sup> See, e.g., Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: United Nations Children’s Fund*, 7th Sess., New York, E/C.19/2008/4/Add.1 (23 January 2008) at para. 3: “The UNICEF Regional Office for Latin America and the Caribbean is supporting the translation of the Declaration into 15 indigenous languages . . . [and] child-friendly translated versions in Ecuador and Costa Rica (to be used as a basis for versions in other countries)”.



education. Increased comprehension of the relationship of international human rights law to Canadian domestic law is often essential.

This education and learning is crucial, if Indigenous peoples' human rights are to be respected, protected, and fulfilled. The human rights of Indigenous peoples in the *Declaration* are core considerations in the international and Canadian context. As illustrated in the following sections, the unfair actions and arguments of the government of Canada against the *UN Declaration* can best be analyzed and countered by embracing a human rights-based approach.

#### 4. SIGNIFICANCE OF THE UN DECLARATION IN ACHIEVING RECONCILIATION

In the Introduction of this article, the importance of the *UN Declaration on the Rights of Indigenous Peoples* has been described in diverse ways. Its comprehensive legal framework elaborates upon the human rights of Indigenous peoples globally.

The *Declaration* is both a beacon and catalyst for achievement, well-being and renewed hope. The value of hope in the Indigenous context should not be underestimated:

People talk about surviving, even thriving, because they didn't give up, because they had hope — not because everything turned out the way they wanted. Hope is . . . interpret[ed] . . . very personally, not as some depersonalized reference to goals or expectations. Hope is *not* about naive or excessive optimism. It is *not* solely about achievement. It *is* about not losing sight of the goodness of life even when it is not visible.<sup>134</sup>

It is well-established that countries around the world have sought to exploit, dominate and dispossess Indigenous peoples on the basis of presumed racial and cultural inferiority. Under English and Canadian law, theories of dispossession evolved based on doctrines of European superiority. Indigenous peoples were considered either too primitive or else heathens and infidels,<sup>135</sup> and therefore disqualified from owning or controlling their lands, territories and resources.<sup>136</sup> Such racist

<sup>134</sup> R. Jevne, "Magnifying Hope: Shrinking Hopelessness", in Commission on First Nations and Métis Peoples and Justice Reform, *Submissions to the Commission*, Final Report, vol. 2 (Saskatchewan: 2004), Section 6 at 6-1 [emphasis in original].

<sup>135</sup> V. Deloria, Jr., "Laws Founded in Justice and Humanity: Reflections on the Content and Character of Federal Indian Law" (1989) 31 *Ariz. L. Rev.* 203 at 223.

<sup>136</sup> Economic and Social Council, *Report on the United Nations Seminar on the effects of racism and racial discrimination on the social and economic relations between indigenous peoples and States, Geneva, Switzerland, 16–20 January 1989*, UN Doc. E/CN.4/1989/22, 8 February 1989, para. 40(b) at 10: "The concepts of 'terra nullius', 'conquest' and 'discovery' as modes of territorial acquisition are *repugnant, have no legal standing, and are entirely without merit or justification* to substantiate any claim to *jurisdiction or ownership* of indigenous lands and ancestral domains, and the legacies of these concepts should be eradicated from modern legal systems." [emphasis added]

rationales as the “doctrine of discovery”<sup>137</sup> — which is still a part of the case law in Canada and numerous other countries — purportedly provided European powers with a rationale to claim jurisdiction and sovereignty over Indigenous peoples’ traditional territories.

In light of this grievous history and legacy, it is especially important to adopt a human rights-based approach consistent with international law and its progressive development. If we are to achieve genuine reconciliation<sup>138</sup> in Canada, as promised under the *Constitution Act, 1982*, then the Harper government cannot continue to oppose the implementation of the *UN Declaration*. The *Declaration* represents a compromise<sup>139</sup> and is strongly supported globally by not only Indigenous peoples, but also States, international and regional bodies, UN specialized agencies and human rights organizations.

In regard to the *Declaration*, Prime Minister Stephen Harper has characterized Canada’s objective in terms of “promoting harmony and reconciliation” but claims that the text falls short.<sup>140</sup> In the *Declaration*, there are seven preambular paragraphs<sup>141</sup> and 17 articles that promote harmonious and co-operative relations.<sup>142</sup> Many of these provisions relate to processes that foster consultation, co-operation, partnership, treaties, agreements and other constructive arrangements. The *Declaration*, as a whole, is described “as a standard of achievement to be pur-

<sup>137</sup> It is a legal fiction that inhabited land can be subject to “discovery”. See, e.g., J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979) at 182: “. . . a necessary condition for valid acquisition of nearly all inhabited territory was the consent of the native chiefs or peoples involved”. The doctrine of “discovery” is described in *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), at 573-574, by Chief Justice Marshall of the United States Supreme Court: “[D]iscovery gave title to the government . . . by whose authority, it was made, against all other European governments . . . The exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. . . . [T]he rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but . . . their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.”

<sup>138</sup> *Black’s Law Dictionary*, 9th ed., defines reconciliation as: “Restoration of harmony between persons or things that had been in conflict”.

<sup>139</sup> During more than 20 years of discussions and negotiations at the United Nations, the text that was adopted by the UN Human Rights Council on June 29, 2006 was the result of numerous compromises between States and Indigenous peoples. Additional compromises were agreed to in inter-State negotiations in late August 2007, primarily to accommodate the concerns of the African Group of States.

<sup>140</sup> Letter from Prime Minister Stephen Harper to Assembly of First Nations National Chief Phil Fontaine (26 June 2006) (copy on file with the author).

<sup>141</sup> *UN Declaration*, *supra* note 1, preambular paras. 8, 12, 14, 15, 18, 19 and 24.

<sup>142</sup> *Ibid.*, arts. 5, 10, 11(2), 12(2), 14(3), 15(2), 19, 22(2), 23, 27, 30, 31(2), 32(2), 36(2), 38, 46(2) and 46(3).

sued in a spirit of partnership and mutual respect”.<sup>143</sup> It is explicitly required that, in the exercise of all of the rights in the *Declaration*, the “human rights and fundamental freedoms of all shall be respected”.<sup>144</sup>

Both the former UN High Commissioner for Human Rights and the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people have urged support for the *Declaration* as “a universal framework for indigenous peoples’ rights, social justice and reconciliation”.<sup>145</sup> The High Commissioner, who is a former judge of the Supreme Court of Canada, expressed “profound disappointment” that Canada chose to vote against the *Declaration* — which action is described as a “surprising stand for a country that likes to see itself as a model of tolerance and respect for the rights of all”.<sup>146</sup>

The *UN Declaration* should prove especially useful in interpreting existing international human rights instruments. The Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people highlights that UN human rights mechanisms and bodies have “played a crucial role in promoting and protecting the rights of indigenous peoples, while contributing to the development of a common normative understanding concerning the minimum content of these rights.”<sup>147</sup> He adds:

Currently the most authoritative expression of this common understanding, the Declaration on the Rights of Indigenous Peoples constitutes an important tool in the regular promotional and protective activities of these bodies within their respective mandates and normative frames of reference.<sup>148</sup>

Also, in regard to the *Indigenous and Tribal Convention, 1989* (No. 169), the International Labour Organization emphasizes:

Differences in legal status of [UN Declaration] 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. . . . The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing.<sup>149</sup>

The ILO adds that “the UN’s human rights bodies and mechanisms can rely on the Declaration and address implementation issues within their respective man-

<sup>143</sup> *Ibid.*, last preambular para.

<sup>144</sup> *Ibid.*, art. 46, para. 2.

<sup>145</sup> “Message of Louise Arbour, United Nations High Commissioner for Human Rights and Rodolfo Stavenhagen, Special Rapporteur,” *supra* note 126.

<sup>146</sup> “Arbour lashes Canada for voting against aboriginal rights” *The Canadian Press* (22 October 2007) (copy on file with the author).

<sup>147</sup> Human Rights Council, *Report of the Special Rapporteur S. James Anaya*, *supra* note 4 at para. 62.

<sup>148</sup> *Ibid.*

<sup>149</sup> International Labour Organization, “ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners”, *supra* note 3 at 2.

dates”.<sup>150</sup> This includes the UN Permanent Forum on Indigenous Issues, the Human Rights Council and the human rights treaty bodies.<sup>151</sup>

Clearly, by providing an Indigenous context for interpreting existing human rights, the *Declaration* can well play a vital role in promoting and achieving reconciliation. James (Sákéj) Henderson describes the *Declaration* as “an interpretative document that explains how the existing human rights are applied to Indigenous peoples and their contexts. It is a restatement of principles for postcolonial self-determination and human rights”.<sup>152</sup> Special Rapporteur James Anaya explains:

. . . the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples.<sup>153</sup>

Another dimension of reconciliation found in the *UN Declaration* relates to the right to security. Within the Canadian constitutional context, the right to “security of the person” is included in the *Canadian Charter of Rights and Freedoms*.<sup>154</sup> While rights to collective and individual security have not been sufficiently elaborated within Canada in the Indigenous context, they are interrelated with<sup>155</sup> and are an integral aspect<sup>156</sup> of the underlying constitutional principle of “protection of Aboriginal and treaty rights”.<sup>157</sup> If the guarantees in section 35 of the *Constitution*

<sup>150</sup> *Ibid.* at 3.

<sup>151</sup> *Ibid.*

<sup>152</sup> J.Y. Henderson, “A snapshot in the journey of the adoption of the UN Declaration on the Rights of Indigenous Peoples”, *Justice as Healing*, Newsletter, Native Law Centre, University of Saskatchewan, vol. 13, No. 1, 2008, at 2-3.

<sup>153</sup> Human Rights Council, *Report of the Special Rapporteur S. James Anaya*, *supra* note 4 at 86 (Conclusions). Similarly, see Norway, “Statement (Agenda Item 4)” (Delivered to the Expert Mechanism on the Rights of Indigenous Peoples, 2nd Sess., Geneva, 12 August 2009) (copy on file with the author): “The Declaration contextualizes all existing human rights for Indigenous Peoples and provides therefore the natural frame of reference for work and debate relating to the promotion of indigenous peoples rights”.

<sup>154</sup> *Canadian Charter*, *supra* note 67, s. 7.

<sup>155</sup> Generally, in relation to the profound relationship between security and human rights, see text accompanying *infra* notes 276 and 277. With regard to Indigenous peoples globally, see Grand Council of the Crees (Eeyou Istchee) *et al.*, “Towards a *U.N. Declaration on the Rights of Indigenous Peoples*: Injustices and Contradictions in the Positions of the United Kingdom”, Joint Submission to Prime Minister Tony Blair, United Kingdom of Great Britain and Northern Ireland (10 September 2004), Annex, para. 47: “Failure to recognize and respect our collective human rights threatens our collective security, perpetuates our impoverishment and undermines a vast range of our other rights as self-determining peoples.”

<sup>156</sup> For Canadian court cases that link security to Aboriginal and treaty rights, see, *e.g.*, *infra* notes 157, 158 and 160.

<sup>157</sup> The constitutional principle of “protection of Aboriginal and treaty rights” is described in the text accompanying *supra* notes 106 and 107. In regard to Indigenous peoples’ treaties with States, it is clear from their content that a key objective was and continues to be to ensure the collective and individual security of the Indigenous peoples and

*Act, 1982* are to be effective, the security of Aboriginal peoples and individuals must be a key result.<sup>158</sup>

Article 7 of the *Declaration* includes rights to both collective and individual security:

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 . . .<sup>159</sup>

Also, article 20(1) provides that Indigenous peoples have the “right . . . to be secure in the enjoyment of their own means of subsistence and development”. These provisions relating to security are to be read in the context of the whole *Declaration*, as well as international law as a whole.

---

individuals concerned. See, e.g., *Samson Indian Nation & Band v. Canada* (2005), [2006] 1 C.N.L.R. 100, 2005 CarswellNat 6710, 2005 CarswellNat 3959 (F.C.); affirmed (2006), 2006 CarswellNat 4511, 2006 CarswellNat 4833 (F.C.A.); leave to appeal allowed (2007), 2007 CarswellNat 2740, 2007 CarswellNat 2741 (S.C.C.); leave to appeal allowed (2007), 2007 CarswellNat 2742, 2007 CarswellNat 2743 (S.C.C.); affirmed (2009), 2009 CarswellNat 203, 2009 CarswellNat 204 (S.C.C.), at para. 511: “For their part, the Cree leadership was concerned with their people’s economic security. . . . They were keen to protect their people from famine and disease, hence the focus of the treaty talks on what the Cree would receive.”

<sup>158</sup> In regard to Indigenous peoples, security has always been a central objective. See Thomas R. Berger, *A Long and Terrible Shadow: White Values, Native Rights in the Americas 1492–1992* (Toronto/Vancouver: Douglas & McIntyre, 1992) at 141: “The defence of Native land rights is the issue upon which Native peoples base claims to their *identity, culture and political autonomy, and ultimately to their survival*. Throughout the New World Native people understand that *without a secure land base they will cease to exist as distinct peoples; their fate will be assimilation*.”[emphasis added] See, e.g., *R. v. George*, [1964] 2 O.R. 429 (Ont. C.A.); reversed 1966 CarswellOnt 4, [1966] S.C.R. 267 (S.C.C.), at 432 [O.R.] *per* Roach J.A “[The Indians] lived by hunting and foraging. The wild life inhabiting the forests, the lakes and rivers to a large extent was the source of their food . . . These were the essentials that were secured to them, not alone for their security but also as being essential to the “Interest” of the Crown.”

<sup>159</sup> See also *African Charter of Human and Peoples’ Rights*, adopted 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* 21 October 1986, art. 23 (right of all peoples to peace and security).

Concepts of security would include such interlinked and mutually reinforcing elements as cultural security,<sup>160</sup> food security,<sup>161</sup> environmental security,<sup>162</sup>

---

<sup>160</sup> See especially *UN Declaration*, *supra* note 1, preambular paras. 2–4, 7, 9, 11 and arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. In relation to Aboriginal rights in Canada, see, e.g., *R. v. Sappier*, [2006] 2 S.C.R. 686, 2006 CarswellNB 677, 2006 CarswellNB 676 (S.C.C.), at para. 33: “. . . the object is to provide cultural security and continuity for the particular aboriginal society”. See also *Tsilhqot’in Nation v. British Columbia*, *supra* note 45 at para. 612: “From the perspective of a Tsilhqot’in person, this land provided their cultural security and continuity.”

<sup>161</sup> See especially *UN Declaration*, *supra* note 1, arts. 3, 4, 20, 24, 26, 29, 31, 32, 37, 38 and 41. UN General Assembly, *Right to Food: Note by the Secretary-General*, A/60/350, September 2005 (Interim report of the Special Rapporteur of the Commission on Human Rights on the right to food, Jean Ziegler) at 20–21, para. 55 (f) (Recommendations): “All Governments should respect, protect and fulfil the right to food of their indigenous populations, including by recognizing their right to land, resources and traditional subsistence activities, their intellectual property rights over their genetic and knowledge resources and their right to appropriate development that does not result in further marginalization, exploitation, poverty or hunger.” UN General Assembly, *The right to food*, UN Doc. A/RES/63/187 (18 December 2008), para. 13: “Also stresses its commitments to promote and protect, without discrimination, the economic, social and cultural rights of indigenous peoples, in accordance with international human rights obligations and taking into account, as appropriate, the United Nations Declaration on the Rights of Indigenous Peoples . . .”

<sup>162</sup> See especially *UN Declaration*, *supra* note 1, preambular para. 11 and arts. 3, 4, 7, 29, 32, 37, 38 and 41. International Commission on Intervention and State Sovereignty, *The Responsibility to Protect* (Ottawa: Int’l Development Research Centre, 2001) at para. 2.22: “The emphasis in the security debate shifts . . . from territorial security, and security through armaments, to security through human development with access to food and employment, and to environmental security.”

human security,<sup>163</sup> social security<sup>164</sup> and territorial security.<sup>165</sup> Such dimensions are consistent with changing perspectives of security, at international, regional and national levels.<sup>166</sup> Indigenous security issues can be further particularized, so as to address the “rights and special needs of elders, women, youth, children and persons with disabilities” in the implementation of the *UN Declaration*.<sup>167</sup>

<sup>163</sup> See generally *UN Declaration*, *supra* note 1. John B. Henriksen, “Implementation of the Right of Self-Determination of Indigenous Peoples Within the Framework of Human Security”, in M.C. van Walt van Praag & O. Seroo, eds., *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention* (Barcelona: Centre UNESCO de Catalunya, 1999) 226, at 226: “‘indigenous peoples human security’ . . . encompasses many elements, inter alia physical, spiritual, health, religious, cultural, economic, environmental, social and political aspects. In my opinion, the desirable human security situation exists when the people concerned and its individual members have adequate legal and political guarantees for their fundamental rights and freedoms, including the right of self-determination.”

<sup>164</sup> See especially *UN Declaration*, *supra* note 1, arts. 7, 17, 21–23, 38 and 41. See also Committee on Economic, Social and Cultural Rights, General Comment No. 19, *The right to social security* (art. 9), UN Doc. E/C.12/GC/19 (4 February 2008), para. 1: “The right to social security is of central importance in guaranteeing human dignity for all persons when they are faced with circumstances that deprive them of their capacity to fully realize their Covenant rights.” And at para. 3: “Social security, through its redistributive character, plays an important role in poverty reduction and alleviation, preventing social exclusion and promoting social inclusion.”

<sup>165</sup> See especially *UN Declaration*, *supra* note 1, preambular paras. 6, 7, 10 and 12 and arts. 3, 4, 8(2)(b), 10, 24, 25–32, 37, 38 and 41. E.-I. Daes, *Equality of Indigenous Peoples Under the Auspices of the United Nations — Draft Declaration on the Rights of Indigenous Peoples* (1995) 7 St. Thomas L. Rev. 493 at 497: “. . . the principle of territorial security . . . means that indigenous peoples have defined historical territories physically intact, environmentally sound and economically sustainable in their own ways.” UNICEF Innocenti Research Centre, *Ensuring the Rights of Indigenous Children*, Innocenti Digest No. 11 (February 2004) at 17: “An indigenous community that lives in security (including land security), free from discrimination and persecution, and with a sustainable economic base has a solid foundation for ensuring the protection and harmonious development of its children.” See also Extractive Industries Review, *Striking a Better Balance: The Final Report of the Extractive Industries Review*, Vol. I (*The World Bank Group and Extractive Industries*), December 2003, online: <<http://www.commddev.org/content/document/detail/1955/>>, at 40: “For indigenous peoples, secure, effective, collective ownership rights over the lands, territories, and resources they have traditionally owned or otherwise occupied and used are fundamental to economic and social development, to physical and cultural integrity, to livelihoods and sustenance.”

<sup>166</sup> See, e.g., *Declaration on Security in the Americas*, adopted at the third plenary session of October 28, 2003, Special Conference on Security, Mexico City, OEA/Ser.K/XXXVIII, CES/DEC. 1/03 rev.1 (28 October 2003), para. 4i: “. . . the traditional concept and approach must be expanded to encompass new and nontraditional threats, which include political, economic, social, health, and environmental aspects.”

<sup>167</sup> *UN Declaration*, *supra* note 1, art. 22(1).

Ensuring the security of Indigenous peoples is critical to achieving reconciliation. In the historical and contemporary context, their security has been repeatedly undermined by governments and third parties. In the 2005 *Mikisew Cree First Nation* case, Binnie J. on behalf of the Supreme Court of Canada highlighted the “fundamental objective” of reconciliation:

The fundamental objective of the modern law of aboriginal and treaty rights is the reconciliation of aboriginal peoples and non-aboriginal peoples and their respective claims, interests and ambitions. The management of these relationships takes place in the shadow of a long history of grievances and misunderstanding.<sup>168</sup>

If past and ongoing grievances and human rights violations are to be resolved, then there must be a genuine process of reconciliation. Such a process is measured by the positive actions of the government.<sup>169</sup>

A case in point is the tragic issue of residential schools<sup>170</sup> and the apology that was expressed by Prime Minister Stephen Harper on June 11, 2008.<sup>171</sup> Experts on this matter underline that apologies must “acknowledge the fact of harms, accept some degree of responsibility, avow sincere regret, and promise not to repeat the offense.”<sup>172</sup> However, forgiveness is not required as a response: “Survivors acquire and retain the power to grant or withhold forgiveness. They, and others, know that some acts are unforgivable.”<sup>173</sup>

<sup>168</sup> *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 2005 CarswellNat 3757, 2005 CarswellNat 3756, ¶1 (S.C.C.).

<sup>169</sup> C. Blackstock, “Reconciliation Means Not Saying Sorry Twice: Lessons from Child Welfare in Canada” in M.B. Castellano, L. Archibald & M. DeGagné, eds., *From Truth to Reconciliation: Transforming the Legacy of Residential Schools* (Ottawa: Aboriginal Healing Foundation, 2008) 165 at 174: “Reconciliation requires not just *saying* the right thing but *doing* the right thing.”

<sup>170</sup> See, generally, R. Chrisjohn, S. Youngward & M. Maraun, eds. *Circle Game: Shadows and Substance in the Indian Residential School Experience in Canada* (Penticton, British Columbia: Theytus Books, 2002); J.S. Milloy, *A National Crime: The Canadian Government and the Residential School System — 1879 to 1986* (Winnipeg, Manitoba: University of Winnipeg Press, 1999); and J.R. Miller, *Shingwauk’s Vision: A History of Native Residential Schools* (Toronto/Buffalo/London: University of Toronto Press, 1996).

<sup>171</sup> For the text of the Prime Minister’s apology, see *House of Commons Debates*, No. 110 (11 June 2008).

<sup>172</sup> M. Minow, *Between Vengeance and Forgiveness: Facing History after Genocide and Mass Violence* (Boston: Beacon Press, 1998) at 112.

<sup>173</sup> *Ibid.* at 116. See also Grand Chief Edward John, “From Apology to Action: A Response to the Residential Schools Apology”, Chief Joe Mathias Centre, Squamish Nation, North Vancouver, 11 June 2008: “For individual survivors and their families the ‘acceptance’ of an apology is a highly personal matter and should be respected. Because the giving of forgiveness is an essential element of an apology, this too is highly personal. We cannot dictate how survivors should respond. . . . Apology, acceptance and forgiveness are essential parts of a process of grieving and of letting go. It cannot be rushed.”



The human rights violations that were inflicted with devastating effect against Indigenous peoples and individuals began in 1831 and continued for over 140 years.<sup>174</sup> As described in the *Report of the Royal Commission on Aboriginal Peoples*:

No segment of our research aroused more outrage and shame than the story of the residential schools. . . . the incredible damage — loss of life, denigration of culture, destruction of self-respect and self-esteem, rupture of families, impact of these traumas on succeeding generations, and the enormity of the cultural triumphalism that lay behind the enterprise — will deeply disturb anyone who allows this story to seep into their consciousness . . .<sup>175</sup>

Professor Martha Minow cautions against apologies that are insincere: “As any parent who has tried to teach a child to apologize knows . . . the problems with apology include insincerity, an absence of clear commitment to change, and incomplete acknowledgement of wrongdoing.”<sup>176</sup>

For many observers, the apology by the Canadian government was sensitively crafted and an essential step. However, it would be difficult to conclude that the government is in the process of making a “clear commitment to change”.

In his apology, the Prime Minister recognized that the policies of assimilation in residential schools — such as “to kill the Indian in the child” — were wrong and “had a lasting and damaging impact on aboriginal culture, heritage and language”.<sup>177</sup> Yet, in regard to the *UN Declaration*, the Harper government has proposed to delete the right to “control” and “protect” Indigenous peoples’ cultural heritage, traditional knowledge, and traditional cultural expressions.<sup>178</sup> Contrary to the recommendations of the UN Committee on Economic, Social and Cultural Rights,<sup>179</sup> the government has cut funding for support of vulnerable Aboriginal languages.<sup>180</sup>

<sup>174</sup> M.B. Castellano, L. Archibald & M. DeGagné, “Introduction” in M.B. Castellano, L. Archibald & M. DeGagné, eds., *supra* note 169, 1 at 1-2.

<sup>175</sup> Royal Commission on Aboriginal Peoples, *supra* note 43, vol. 1 at 601-602.

<sup>176</sup> M. Minow, *supra* note 172 at 112.

<sup>177</sup> See *supra* note 171.

<sup>178</sup> See text accompanying *infra* note 352.

<sup>179</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc. E/C.12/CAN/CO/4, E/C.12/CAN/CO/5 (22 May 2006) at paras. 33 and 67, which called for implementation of the recommendations of the Task Force on Aboriginal Languages and Cultures. See Task Force on Aboriginal Languages and Cultures, “Towards a New Beginning: A Foundational Report for a Strategy to Revitalize First Nation, Inuit and Métis Languages and Cultures”, Report to the Minister of Canadian Heritage by The Task Force on Aboriginal Languages and Cultures (June 2005) (copy on file with the author).

<sup>180</sup> It is reported that the federal government cut \$160M in funding for Aboriginal languages: see M.-A. Chouinard, “Et après?” *Le Devoir*, editorial (12 June 2008) A6; and M. Cornellier, “Savoir s’excuser” *Le Devoir* (11 June 2008) A3.

Inconsistent with the apology,<sup>181</sup> the Tory government had also refused to implement the \$5 billion *Kelowna Accord* which was “to address the serious conditions that contribute to poverty among Aboriginal peoples”.<sup>182</sup> This *Accord* had been agreed to in November 2005 by national Indigenous leaders and all heads of government — federal, provincial and territorial.<sup>183</sup> By reducing some of the harsh socio-economic disparities<sup>184</sup> affecting Indigenous peoples in all regions, this agreement would have facilitated increased enjoyment of their human rights.<sup>185</sup> As a follow-up to the apology, the provincial premiers publicly indicated that the Prime Minister should convene a First Ministers meeting to address the poverty and education aspects in the *Kelowna Accord*.<sup>186</sup>

The federal government has remained dismissive of the *Accord*.<sup>187</sup> However, as a result of continued pressure from the leaders of provincial and territorial governments and national Aboriginal organizations, significant funding for long-neglected Aboriginal housing, education and training was included as part of a large

<sup>181</sup> See, e.g., J. Travers, “Apology alone cannot close a gaping wound” *Toronto Star* (12 June 2008): “A measure of the disconnect between words and action is that the Prime Minister who rose to yesterday’s occasion is also the one who stooped to let the Kelowna Accord lapse.”

<sup>182</sup> The *Kelowna Accord* is in the form of a final document emanating from a First Ministers Meeting in 2005. The document is entitled “First Ministers and National Aboriginal Leaders: Strengthening Relationships and Closing the Gap”, Kelowna, British Columbia, 24-25 November 2005.

<sup>183</sup> See also the *Kelowna Accord Implementation Act* (Bill C-292), S.C. 2008, c. 23 (assented to on 18 June 2008). Bill C-292 was initially tabled as a private members Bill by former Prime Minister Paul Martin.

<sup>184</sup> In regard to Canada, see UN General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), A/60/358 (16 September 2005) at 6, para. 15: “Poverty, infant mortality, unemployment, morbidity, suicide, criminal detention, abuse of women and child prostitution are issues of particular concern to the communities. . . . [D]espite efforts to remedy the situation, educational attainment, health standards, housing conditions, family income and access to economic opportunity and to social services are much worse among aboriginal people than among other Canadians.”

<sup>185</sup> Office of the High Commissioner for Human Rights, *The OHCHR Plan of Action: Protection and Empowerment*, Geneva, May 2005, at para. 10: “Poverty is the gravest human rights challenge in the world. . . . In human rights terms, poverty is both a symptom and a cause: continuing severe deprivation is a sign that those affected are living in a state of *indignity*, and thus denial of rights; and the poor and marginalized are deprived, above all, of the capacity to claim their rights.”

<sup>186</sup> K. Howlett, R. Seguin & B. Currie, “Premiers revive the spirit of Kelowna” *Globe and Mail* (17 July 2008) A1 at A4: “[Québec Premier Jean] Charest said . . . Ottawa cannot ignore the accord any longer. He also suggested that it was not the place of the Harper government to cancel it.” See also M. White, “Premiers eye meeting with PM to solve aboriginal poverty” *The [Montreal] Gazette* (17 July 2008) at A9.

<sup>187</sup> See, e.g., “High time to keep promises” *Globe and Mail*, editorial (21 July 2008) A10: “. . . the Tories’ recent contempt for Kelowna . . . [is] typified by the parliamentary secretary to the Indian Affairs minister dismissing it as ‘a press release.’”

economic “stimulus” budget for Canada.<sup>188</sup> This budget was announced in Parliament by the federal government on 27 January 2009.

This positive news came at the same time as the disclosure of about 12,000 new compensation cases concerning former students in residential schools.<sup>189</sup> Most of these tragic offences involve sexual abuse.

A further concern is the Conservative government’s continuing opposition to the application of the *UN Declaration* in Canada. This ongoing strategy is not consistent with a reconciliatory approach.

The *Declaration* positively affirms the very human rights that were unconscionably violated in the context of residential schools. These rights would also be highly relevant in preventing any recurrences in the future.<sup>190</sup> The *Declaration* enriches the framework for reconciliation with regard to this tragedy.

Colonial notions of superiority were a persistent theme in the “program of social engineering”<sup>191</sup> that took place in residential schools. The *UN Declaration* rejects doctrines, policies and practices based on or advocating superiority of peoples or individuals. When based on national origin or racial, religious, ethnic or cultural differences, these doctrines, etc. are denounced in the *Declaration* as “racist, scientifically false, legally invalid, morally condemnable and socially unjust”.<sup>192</sup>

In terms of the commitment of the Harper government, there are additional questions. Prior to the June 2008 government apology, there had been a lack of will

<sup>188</sup> “Aboriginal spending priorities set” *Calgary Herald* (28 January 2009), online: <<http://www2.canada.com/calgaryherald/news/story.html?id=e366c680-e47e-4b37-afa7-db344a1d94eb>>.

<sup>189</sup> “Rampant sexual abuse of native children in residential schools” *The Canadian Press* (17 January 2009), online: <<http://grannyrantson.blogspot.com/2009/01/rampant-sexual-abuse-of-native-children.html>> (copy on file with the author).

<sup>190</sup> In regard to the *UN Declaration*, *supra* note 1, see, *inter alia*: equality and non-discrimination (arts. 1 and 2); self-determination and self-government (arts. 3 and 4); security of Indigenous peoples and individuals (art. 7); right not to be subjected to forced assimilation or destruction of culture (art. 8); practice cultural traditions and customs (arts. 11 and 34); manifest and teach spiritual and religious traditions, customs and ceremonies (art. 12); establish and control educational systems and institutions (art. 14); dignity and diversity of cultures, traditions, histories to be reflected in education (art. 15); participate in decision-making in matters affecting rights (art. 18); improvement, without discrimination, of economic and social conditions (art. 21); determine and develop priorities and strategies for exercising right to development (art. 23); maintain and develop cultural heritage, traditional knowledge and traditional cultural expressions (art. 31); and determine identity (art. 33).

<sup>191</sup> M.B. Castellano, L. Archibald & M. DeGagné, “Introduction” in M.B. Castellano, L. Archibald & M. DeGagné, eds., *supra* note 169 at 2.

<sup>192</sup> *UN Declaration*, *supra* note 1, preambular para. 4.

to apologize. First, the Indian Affairs Minister opposed any apology.<sup>193</sup> Then the government sought to delay its own apology for at least five years.<sup>194</sup>

The issue of residential schools is primarily a human rights tragedy. Yet, in the Prime Minister's apology, no mention is made of "human rights" or the *UN Declaration on the Rights of Indigenous Peoples*. The day after the Harper apology, Indian Affairs Minister Chuck Strahl repeated the government's position that it prefers to work on practical matters in Canada rather than endorse "flowery words" of a declaration of principles.<sup>195</sup>

As Grand Chief Edward John has highlighted, reconciliation commands a different government attitude in relation to the *UN Declaration* and Indigenous peoples' human rights:

Our history is most often described in terms of widespread and persistent violations of fundamental human rights. As an integral part of the reconciliation process it is critical for Canada to demonstrate unequivocal respect for the human rights of our peoples as Indigenous peoples. The United Nations has adopted a set of minimum standards for relations between a State and Indigenous Peoples. These minimum standards are reflected in the UN Declaration on the Rights of Indigenous Peoples . . .<sup>196</sup>

As part of the settlement<sup>197</sup> of the thousands of court cases relating to residential schools, a Truth and Reconciliation Commission began its mandate in June 2008. "[T]ruth and reconciliation are not one and the same. . . . There is a road toward reconciliation, and truth is a fundamental part of the journey, but there are other steps to be taken along the way."<sup>198</sup>

<sup>193</sup> "The lost children of our schools" *Globe and Mail*, editorial (28 April 2007) A20: "This winter, Indian Affairs Minister Jim Prentice said he will not apologize to aboriginals for the government's role in overseeing the largely church-run residential schools because 'fundamentally, the underlying objective had been to try and provide an education to aboriginal children.'"

<sup>194</sup> B. Curry, "House apologizes to residential school students" *Globe and Mail* (2 May 2007) A6: "The House of Commons apologized unanimously yesterday to former students of Canada's Indian Residential Schools, but the federal government wants at least five more years before issuing its own apology."

<sup>195</sup> J. O'Neill, "Leaders hope apology will curb prejudice" *The [Montreal] Gazette* (14 June 2008) A14.

<sup>196</sup> Grand Chief Edward John, *supra* note 173. See also Office of the High Commissioner for Human Rights, "OHCHR Fact Sheet: The UN Declaration on the Rights of Indigenous Peoples", *supra* note 93: "It is a Declaration of affirmation since States are now committed, through its adoption, to reconciliation and the building of just and equitable societies in which indigenous peoples are full partners."

<sup>197</sup> "Indian Residential Schools Settlement Agreement", online: <<http://www.residentialschoolsettlement.ca/Settlement.pdf>>.

<sup>198</sup> J. Llewellyn, "Bridging the Gap between Truth and Reconciliation: Restorative Justice and the Indian Residential Schools Truth and Reconciliation Commission" in M.B. Castellano, L. Archibald & M. DeGagné, eds., *supra* note 169, 185 at 187.

In Canada, the process<sup>199</sup> of reconciliation is likely to be a long one. In this crucial and challenging context, the significance of the *UN Declaration* must be fully recognized by the Canadian government.<sup>200</sup> On May 1, 2008, over 100 scholars and experts highlighted the centrality of this human rights instrument in the quest for justice and reconciliation:

The Declaration provides a principled framework that promotes a vision of justice and reconciliation. In our considered opinion, it is consistent with the Canadian Constitution and Charter and is profoundly important for fulfilling their promise. Government claims to the contrary do a grave disservice to the cause of human rights and to the promotion of harmonious and cooperative relations.<sup>201</sup>

The Supreme Court of Canada has underlined in *Haida Nation*: “This process of reconciliation flows from the Crown’s duty of honourable dealing toward Aboriginal peoples”.<sup>202</sup> Clearly, “honourable dealing” cannot include the continued undermining or denial of Indigenous peoples’ human rights. A Canadian government strategy against the *UN Declaration*, both internationally and domestically, is incompatible with genuine reconciliation and upholding the honour of the Crown.

## 5. CANADIAN GOVERNMENT ACTIONS TO OPPOSE ADOPTION OF THE DECLARATION

### (a) Applicable International and Constitutional Standards

It is important to highlight some key duties and other norms that should be used in assessing the government’s conduct. This is especially crucial, since Aboriginal rights are too often analyzed within a highly constrained framework.<sup>203</sup>

<sup>199</sup> *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 CarswellBC 2657, 2004 CarswellBC 2656 (S.C.C.), at para. 32: “Reconciliation is not a final legal remedy in the usual sense. Rather, it is a process flowing from rights guaranteed by s. 35(1) of the *Constitution Act, 1982*.”

<sup>200</sup> See, for example, the “open letter” on residential schools to the Prime Minister from Assembly of First Nations National Chief Phil Fontaine, reproduced in *The Eastern Door* (9 May 2008) 4 at 5: “We will look for assurances that Canada respects our rights as peoples, now and in the future, while recognizing and appreciating our differences.”

<sup>201</sup> “*UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument*” (1 May 2008), online: CFSC <<http://www.cfsc.quaker.ca/pages/documents/UNDecl-Expertsign-onstatementMay1.pdf>> (signed by more than 100 legal scholars and experts).

<sup>202</sup> *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199, at para. 32.

<sup>203</sup> Douglas Lambert, “Where To From Here: Reconciling Aboriginal Title with Crown Sovereignty” in Maria Morellato, ed.-in-chief, *Aboriginal Law Since Delgamuukw*, *supra* note 112, 31 at 35: “. . . Aboriginal rights, as narrowly construed, leave little scope for the concept of reconciliation. Protection of the historical community customs of the Aboriginal way of life in the 18th century is scarcely a reconciliation in the 21st century between the Indigenous people of Canada and the asserted sovereignty of the Crown and its colonizers.” For a ruling with more flexibility, see *Ahousaht Indian Band v. Canada (Attorney General)*, 2009 BCSC 1494, 2009 CarswellBC 2939 (B.C. S.C.) (Nuu-chah-nulth Nations have the Aboriginal right to fish any species of fish

Too often, the full range of relevant international and Canadian constitutional standards has not been fully considered. Former Justice of the British Columbia Court of Appeal, Douglas Lambert, concludes that Aboriginal rights — as currently interpreted by the Supreme Court of Canada — is unlikely to provide a useful path towards reconciliation:

The recognition of Aboriginal rights, as opposed to Aboriginal title, is not likely to achieve . . . reconciliation in modern times. Aboriginal rights simply preserve the opportunity to keep on doing the characteristic activities that were being done at the time of first meaningful contact. In short, with rare exceptions, Aboriginal rights simply preserve the past. Only the recognition of Aboriginal title gives any assurance of economic and cultural self-sufficiency and independence for Indigenous peoples in the future.<sup>204</sup>

Canada's Constitution has underlying constitutional principles that "assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions."<sup>205</sup> These interrelated principles have not been sufficiently utilized in the context of Indigenous peoples' rights.

In addition, Canadian courts have not analyzed Aboriginal and treaty rights from a human rights-based perspective. Within international and regional human rights systems, Indigenous peoples' collective and individual rights are affirmed as human rights.<sup>206</sup> Thus, there is a compelling need for courts and governments in Canada to readjust their perspectives and approaches. For genuine reconciliation, it is crucial to integrate the full range of international and constitutional norms — and their interrelationships — that are relevant to Indigenous peoples' rights.

As a member State of the United Nations, Canada has a duty to respect the purposes and principles of the *Charter of the United Nations*.<sup>207</sup> This requires actions "promoting and encouraging respect" for human rights and not undermining them.<sup>208</sup> The duty to promote respect for human rights is to be based on "respect for the principle of equal rights and self-determination of peoples".<sup>209</sup> In Canada, this duty is reinforced by the underlying constitutional principle of "respect for human rights and freedoms".<sup>210</sup>

In seeking election to the Human Rights Council, Canada accepted the commitment required to "uphold the highest standards in the promotion and protection

---

within their respective traditional territories (to a seaward boundary extending nine miles) and to sell fish commercially — but it does not extend to a modern industrial fishery or to unrestricted rights of commercial scale).

<sup>204</sup> *Ibid.* at 53. Perpetuating poverty has far-reaching human rights consequences: see *supra* note 185.

<sup>205</sup> *Reference re Secession of Québec*, *supra* note 73 at para. 52.

<sup>206</sup> See, especially, the discussion *supra* under headings 2 and 3.

<sup>207</sup> *UN Charter*, arts. 1 and 2. The purposes and principles of the *Charter* are also highlighted in the *UN Declaration*, *supra* note 1, preambular para. 1.

<sup>208</sup> *Ibid.*, art. 1(3).

<sup>209</sup> *Ibid.*, art. 55 c.

<sup>210</sup> *R. c. Demers*, [2004] 2 S.C.R. 489, 2004 CarswellQue 1547, 2004 CarswellQue 1548, ¶79 (S.C.C.).

of human rights . . . [and] fully cooperate with the Council”.<sup>211</sup> It is on this basis that Canada’s actions must be assessed, during the three-year period that Canada was a member. The duty to “fully cooperate” required Canada to support the Council in carrying out its responsibility “for promoting universal respect for the protection of all human rights . . . for all, without distinction of any kind and in a fair and equal manner”.<sup>212</sup> A central purpose of the *UN Charter* is to “achieve international cooperation . . . in promoting and encouraging respect for human rights . . . for all”.<sup>213</sup> This obligation applies to all member States.

Canada and other States must not politicize human rights. A key reason for creating the new Human Rights Council includes: “ensuring . . . objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization”.<sup>214</sup>

The *UN Declaration* affirms a wide range of Indigenous peoples’ inherent rights. Such rights have a distinct place within the architecture of Canada’s *Constitution*. Aboriginal rights that are guaranteed by section 35 of the *Constitution Act, 1982* are not limited to those relating to lands and resources.<sup>215</sup> Nor are such rights limited to those recognized at common law.<sup>216</sup> It would compound the discrimina-

<sup>211</sup> UN General Assembly, *Human Rights Council*, *supra* note 33 at para. 9. See also Canada, “Statement to the Human Rights Council Wednesday, June 28, 2006 By Ambassador Paul Meyer, Permanent Mission of Canada, On behalf of Canada, Australia and New Zealand: Universal Periodic Review”, Geneva: “The members of the Council have committed themselves to uphold the highest standards of human rights . . . [and] cooperate with the Council”.

<sup>212</sup> UN General Assembly, *Human Rights Council*, *supra* note 33 at para. 2.

<sup>213</sup> *UN Charter*, art. 1(3). See also UN General Assembly, *Respect for the purposes and principles contained in the Charter of the United Nations to achieve international cooperation in promoting and encouraging respect for human rights and for fundamental freedoms and in solving international problems of a humanitarian character*, A/RES/62/166 (18 December 2007), para. 1: “Reiterates the solemn commitment of all States to enhance international cooperation in the field of human rights . . . in full compliance with the Charter of the United Nations.”

<sup>214</sup> UN General Assembly, *Human Rights Council*, *supra* note 33, preamble. See also UN General Assembly, *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, A/62/165, 18 December 2007, para. 5: “Reaffirms that the promotion, protection and full realization of all human rights and fundamental freedoms, as a legitimate concern of the world community, should be guided by the principles of non-selectivity, impartiality and objectivity and should not be used for political ends”.

<sup>215</sup> See, e.g., Brian Slattery, “Making Sense of Aboriginal and Treaty Rights” (2000) 79 *Can. Bar Rev.* 196 at 212: “. . . an aboriginal right to speak an indigenous language would likely also be generic, because the basic structure of the right would presumably be identical in all groups where it arises, even though the specific languages protected would vary from group to group. . . . [T]he aboriginal right of self-government is probably also a generic right . . .”

<sup>216</sup> *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010, 1997 CarswellBC 2359, 1997 CarswellBC 2358, ¶136 (S.C.C.). See also *R. c. Côté*, [1996] 4 C.N.L.R. 26, 1996 CarswellQue 1039, 1996 CarswellQue 1040 (S.C.C.), at para. 52: “Section 35(1) would

tion<sup>217</sup> suffered by Indigenous peoples to interpret Canada's *Constitution* as affirming only some inherent or pre-existing rights — especially when these rights are now affirmed in a universal human rights instrument.<sup>218</sup> Such an approach would not be consistent with the constitutional duty to uphold the honour of the Crown<sup>219</sup> or with Canada's international human rights obligations.

Aboriginal rights affirmed in section 35 are subject to progressive interpretation.<sup>220</sup> This is consistent with the “living tree” doctrine<sup>221</sup> that applies to Canada's

---

fail to achieve its noble purpose of preserving the integral and defining features of distinctive aboriginal societies if it only protected those defining features which were fortunate enough to have received the legal recognition and approval of European colonizers.”

<sup>217</sup> See, e.g., Brad Morse, “Comparative Assessments of Indigenous Peoples in Québec, Canada and Abroad” in Commission d'étude des questions afférentes à l'accession du Québec à la souveraineté, *Les Attributs d'un Québec souverain* (Québec: Bibliothèque nationale du Québec, 1992), Exposés et études, vol. 1, 307 at 344: “. . . the effects of colonization and dispossession of the Indian, Inuit and Metis peoples have been tragic beyond belief. Our history has been one in which our European ancestors at an early stage pursued positive and respectful policies toward the Nations they encountered . . . This attitude, however, was quickly jettisoned . . . and our self-interest switched to favour oppression and assimilation so as to facilitate the purchase — or theft — of their lands and its resources as well as the denial of their inherent rights to maintain their ways of life, traditions, cultures, religious beliefs, laws and governments.” [emphasis added]

<sup>218</sup> *Mabo v. Queensland (No. 2)* (1992), 107 A.L.R. 1 (Australia H.C.), at 29, per Brennan J.: “The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration.” [emphasis added] See also *Reference re Secession of Québec*, supra note 73 at para. 22: “In a number of previous cases, it has been necessary for this Court to look to international law to determine the rights or obligations of some actor within the Canadian legal system.”

<sup>219</sup> At the time of the patriation of Canada's *Constitution* in the early 1980s, Canadian government representatives offered to include the recognition and affirmation of Aboriginal and treaty rights in the *Canadian Charter of Rights and Freedoms*. Indigenous leaders opted for a separate Part II in the *Constitution Act, 1982* — in part, because of the vague and uncertain scope of the limitations in section 1 of the *Charter*. The choice of Indigenous peoples to have their own distinctive Part in the *Constitution* does not in any way diminish the human rights quality of their inherent rights.

<sup>220</sup> Peter Hogg, *Constitutional Law of Canada*, looseleaf ed. (Toronto: Carswell, 1997) vol. 2 at 33-17: “It is never seriously doubted that progressive interpretation is necessary and desirable in order to adapt the Constitution to facts that did not exist and could not have been foreseen at the time when it was written.” Hogg adds at 33-18: “Moreover, in the case of Canada's Charter of Rights, I think it is clear as a matter of fact that the original understanding of many of the framers of 1982 was not that the Charter rights should be frozen in the shape that seemed good in 1982, but rather that the rights should be subject to changing judicial interpretation over time.”

<sup>221</sup> The “living tree” doctrine is described in the text accompanying supra notes 75–77.



*Constitution*. Thus, Indigenous peoples' rights must be interpreted in a manner that accommodates their progressive development<sup>222</sup> both in Canadian and international law.<sup>223</sup>

Further, the Canadian government has a duty under section 35 of the *Constitution Act, 1982* to uphold the honour of the Crown.<sup>224</sup> This obligation applies to the Crown in "all its dealings" with Aboriginal peoples including its "historical and future relationship" with Indigenous peoples. In particular, there must be no appearance of "sharp dealing".<sup>225</sup>

The government also has a constitutional duty under section 35 to "consult with Aboriginal peoples and accommodate their interests" and this duty "is grounded in the honour of the Crown".<sup>226</sup> This and other duties under section 35 apply to the Crown when addressing Indigenous peoples' inherent rights that are elaborated in the *UN Declaration*.

The duty to consult Indigenous peoples and accommodate their concerns applies to a broad range of circumstances. The duty arises "when a Crown actor has knowledge, real or constructive, of the potential existence of Aboriginal rights or title and contemplates conduct that might adversely affect them. . . . Responsiveness is a key requirement of both consultation and accommodation."<sup>227</sup> International considerations are not excluded.

<sup>222</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, *supra* note 115 at para. 22: "In line with the recognition by the State party of the inherent right of self-government of Aboriginal peoples under section 35 of the *Constitution Act, 1982*, the Committee recommends that the State party ensure that the new approaches taken to settle aboriginal land claims *do not unduly restrict the progressive development of aboriginal rights*." [emphasis added] See also Human Rights Council (Working Group on the Universal Periodic Review), *Report of the Working Group on the Universal Periodic Review: Canada: Addendum*, Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review, UN Doc. A/HRC/11/17/Add.1 (8 June 2009), at para. 22: "Canada is continually seeking to improve land claims processes, whose *goal is not to restrict the progressive development of Aboriginal rights*, but rather to reconcile competing interests in a manner that allows for harmonious co-existence of Aboriginal and non-Aboriginal Canadians." [emphasis added]

<sup>223</sup> All domestic and international legal systems necessarily engage in the "progressive development" of law. See, *e.g.*, General Assembly, *United Nations Decade of International Law*, UN Doc. A/RES/44/23 (17 November 1989), para. 2: "Considers that the main purposes of the Decade should be, inter alia: . . . (c) To encourage the progressive development of international law and its codification".

<sup>224</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 S.C.R. 550, 2004 CarswellBC 2655, 2004 CarswellBC 2654, ¶24 (S.C.C.).

<sup>225</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, 1996 CarswellAlta 587, 1996 CarswellAlta 365F, ¶41 (S.C.C.).

<sup>226</sup> *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 16.

<sup>227</sup> *Taku River Tlingit First Nation*, *supra* note 224 at para. 25.

At the United Nations, States have made commitments to consult and co-operate with Indigenous peoples, both in regard to the formulation<sup>228</sup> of the *Declaration* and its implementation.<sup>229</sup> In developing procedures for consultation and accommodation,<sup>230</sup> the government failed to include its actions at the international level, especially when its conduct may severely affect Indigenous peoples' rights.<sup>231</sup> This includes opposing the *Declaration* in international forums — in a manner that fails to uphold the honour of the Crown,<sup>232</sup> since the Conservative government was elected in early 2006.

In relation to the *Declaration*, Canadian government strategies, policies and decisions on Indigenous peoples' rights are generally made in Canada — with a view to primarily affecting the application of the *Declaration* within Canada. The Canadian government cannot undermine Indigenous peoples' constitutional rights or circumvent its constitutional duties — such as its duty to consult and accommodate — simply because certain related actions may occur outside Canada. Such constitutional rights and duties are enforceable *within Canada* in Canadian courts. This set of circumstances<sup>233</sup> does not give rise to problems of extraterritoriality that

<sup>228</sup> 2005 *World Summit Outcome*, *supra* note 102 at para. 127: “We [Heads of State and Government] reaffirm our commitment to continue making progress in the *advancement of the human rights of the world’s indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them*, and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.” [emphasis added]

<sup>229</sup> *UN Declaration*, *supra* note 1, at art. 38 (States shall “achieve the ends” of the *Declaration*, in “consultation and cooperation” with Indigenous peoples).

<sup>230</sup> See generally Government of Canada, “Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult” (February 2008) [Government of Canada, “Interim Guidelines for Federal Officials”].

<sup>231</sup> See also Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, *supra* note 78 at para. 38: “It should be emphasized that the duty of States to consult with indigenous peoples on decisions affecting them finds prominent expression in the United Nations Declaration on the Rights of Indigenous Peoples, and is firmly rooted in international human rights law.” And at para. 39: “This duty is a corollary of a myriad of universally accepted human rights, including the right to cultural integrity, the right to equality and the right to property . . . More fundamentally, it derives from the overarching right of indigenous peoples to self-determination and from related principles of democracy and popular sovereignty.”

<sup>232</sup> *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, *supra* note 224 at para. 24: “In all its dealings with Aboriginal peoples, the Crown must act honourably, in accordance with its historical and future relationship with the Aboriginal peoples in question. The Crown’s honour cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation mandated by s. 35(1).”

<sup>233</sup> The *Declaration* was conceived and adopted through standard-setting processes at the United Nations, where member States are free to craft their own positions and participate in accordance with the *Charter of the United Nations* and related State obligations. This context is very different from other situations, where a host State has enforcement jurisdiction and Canadian courts may determine that it cannot interfere.

may exist in certain other situations relating to the *Canadian Charter of Rights and Freedoms*.<sup>234</sup>

The Canadian government cannot take unilateral actions that would adversely affect these rights simply because the standard-setting activities largely occur outside of Canada. Any undermining of Indigenous peoples' rights in international forums could have far-reaching negative impacts of a foreseeable and unforeseeable nature.<sup>235</sup> For example, the government should not be advocating standards that may fall below existing constitutional rights or obligations.

A further concern is that, in its *Interim Guidelines for Federal Officials*, the Canadian government describes "consulting" in broad terms — but then sets out a limited framework for its constitutional duty to consult and accommodate Indigenous peoples:

Consulting is an important part of good governance, sound policy development and decision-making. In addition to good governance objectives, the federal government consults with Aboriginal people for legal reasons. . . . The focus of the Interim Guidelines however is not on the broader context but on when, who and how to consult pursuant to the common law duty to consult most recently described by the Supreme Court of Canada in *Haida*, *Taku River* and *Mikisew Cree*.<sup>236</sup>

Curiously, the government does not view good governance,<sup>237</sup> sound policy development<sup>238</sup> and decision-making as factoring into the constitutional duty owed to Indigenous peoples. All three elements relate to the underlying constitutional principle of democracy, which is interlinked with the protection of Aboriginal and treaty rights.<sup>239</sup> The democratic principle is also linked to the duty to consult,<sup>240</sup> which should not be viewed as based solely on reconciliation.<sup>241</sup>

<sup>234</sup> For example, extraterritorial enforcement of the *Canadian Charter of Rights and Freedoms* may not be possible in certain circumstances such as competing concerns relating to the jurisdiction of a foreign State: see *R. v. Hape*, *supra* note 72 at paras. 60–90, especially para. 85.

<sup>235</sup> A substandard *Declaration* could have been invoked in Canadian courts by governments and others on countless Indigenous issues, with a view to diminishing the nature and scope of Indigenous peoples' human rights. In regard to the legal effect of the *Declaration* and its application in Canada, see generally *infra* heading 7.

<sup>236</sup> Government of Canada, "Interim Guidelines for Federal Officials", *supra* note 230 at 5.

<sup>237</sup> See *infra* notes 598–602 and accompanying text. See also *UN Declaration*, *supra* note 1, art. 46, para. 3, where "good governance" is one of the principles that must be considered in interpreting the provisions of this instrument.

<sup>238</sup> See, e.g., *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 47: "When the consultation process suggests amendment of Crown policy, we arrive at the stage of accommodation. Thus the effect of good faith consultation may be to reveal a duty to accommodate."

<sup>239</sup> See *supra* notes 105–107 and accompanying text.

<sup>240</sup> See *supra* note 231.

<sup>241</sup> See, e.g., Dwight Newman, *The Duty to Consult: New Relationships with Aboriginal Peoples* (Saskatoon, Sask.: Purich Publishing Limited, 2009), at 94: ". . . it would be a mistake to choose just one underlying principle for the doctrine [duty to consult]. It is a

In interpreting and respecting Indigenous peoples' rights and related obligations of the Crown, the *Constitution* must be considered as a whole. This would include the full range of relevant international rights, obligations and other norms, including the *UN Declaration on the Rights of Indigenous Peoples*.

### (b) Opposing Actions by the Canadian Government

In the last few years of negotiations in Geneva on the draft text of the *Declaration*, the previous Canadian government had engaged in in-depth discussions with representatives of Indigenous and human rights organizations from Canada. The government did not table key positions at the UN standard-setting process, before trying to reach common positions through these substantive talks.<sup>242</sup> Following the election of the Conservative government in early 2006, these initiatives to co-operate were terminated.<sup>243</sup> This was the first sign that collaborative relations with the government of Canada were about to be drastically altered.

Almost three years later, a renowned international jurist and former Justice of the Supreme Court of Canada observed that the government's commitment to Indigenous peoples' human rights had significantly diminished. In regard to the *Declaration*, former UN High Commissioner for Human Rights, Louise Arbour, commented:

The commitment of Canada has greatly changed and this is surprising. On the question of Indigenous rights, Canada had committed itself to this file in good faith for 20 years. Then, overnight, it dug in its heels. Not only has it not signed this declaration, but it engaged in a negative campaign to stop other countries from signing it.<sup>244</sup> [unofficial translation]

It is beyond the scope of this article to describe all of the actions by the government of Canada to oppose the adoption of the *Declaration*. Key examples are briefly illustrated below:

i) *Failure to consult Indigenous peoples and accommodate their concerns*. When engaged in processes that elaborate Indigenous peoples' rights and reconcile them with other rights and interests, the Crown has a

---

complex doctrine that embodies a number of related aims and aspirations that give rise to various principles related to it. It has room to grow in these principled ways . . ."

<sup>242</sup> *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 26 "Honourable negotiation implies a duty to consult with Aboriginal claimants and conclude an honourable agreement reflecting the claimants' inherent rights." And at para. 76: "Decisions made during strategic planning may have potentially serious impacts on Aboriginal right and title."

<sup>243</sup> See *infra* note 246 and accompanying paragraph.

<sup>244</sup> A. Gruda, "Louise Arbour : 'Le Canada a délaissé son rôle'" *La Presse* (4 October 2008) A21: « L'engagement du Canada a beaucoup changé et cela surprend. Sur la question des droits des Autochtones, le Canada s'était engagé dans ce dossier de bonne foi pendant 20 ans. Puis, du jour au lendemain, il s'est braqué. Non seulement il n'a pas signé cette déclaration, mais il a fait une campagne négative pour empêcher d'autres pays de la signer. »

duty to consult and accommodate Indigenous peoples.<sup>245</sup> Since February 2006, when the final text of the *Declaration* was made public by the Chair of the intersessional Working Group, the Canadian government has not engaged in any genuine consultations. For more than three years, numerous government positions and actions have been taken in opposition to Indigenous rights and interests.<sup>246</sup> Such conduct, in both procedural and substantive terms, constituted repeated violations of the rule of law in Canada.<sup>247</sup>

On 3 February 2009, the human rights performance of Canada was assessed under the Human Rights Council's Universal Periodic Review (UPR). In preparing its national report<sup>248</sup> for the UPR, the Canadian government failed to consult Indigenous and human rights organizations in Canada.<sup>249</sup> The government also omitted in its report any reference to the *UN Declaration*.

ii) *Refusal to meet and discuss Canada's concerns*. Requests by Indigenous organizations for substantive<sup>250</sup> meetings on the *Declaration* were

<sup>245</sup> *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 20: "It is a corollary of s. 35 [of the *Constitution Act, 1982*] that the Crown act honourably in defining the rights it guarantees and in reconciling them with other rights and interests. This, in turn, implies a duty to consult and, if appropriate, accommodate."

<sup>246</sup> Many of these adverse positions and actions, which are substantive and procedural in nature, are described throughout this article.

<sup>247</sup> See, e.g., *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *supra* note 168 at para. 57: "Were the Crown to have barrelled ahead with implementation of the winter road without adequate consultation, it would have been in violation of its *procedural* obligations, quite apart from whether or not the Mikisew could have established that the winter road breached the Crown's *substantive* treaty obligations as well."

<sup>248</sup> Canada, "National Report Submitted in accordance with Paragraph 15 (A) of the Annex to Human Rights Council Resolution 5/1: Canada", Working Group on the Universal Periodic Review, Human Rights Council, UN Doc. A/HRC/WG.6/4/CAN/1 (5 January 2009), online: <[http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/A\\_HRC\\_WG6\\_4\\_CAN\\_1\\_E.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/A_HRC_WG6_4_CAN_1_E.pdf)>.

<sup>249</sup> Cf. Human Rights Council, *Institution-building of the United Nations Human Rights Council*, *supra* note 91, Annex (United Nations Human Rights Council: Institution-Building), para. 15(a): "States are encouraged to prepare the information through a broad consultation process at the national level with all relevant stakeholders."

<sup>250</sup> An initial meeting took place with government officials on 10 October 2006, in which the agenda allotted 70 minutes to discuss the *Declaration*. However, the letter of invitation indicated that the purpose was "to more fully understand the issues and perspectives of the parties in relation to these issues, rather than engage in detailed discussion and debate concerning points of law": Letter from Associate Deputy Minister James Lahey, Indian Affairs and Northern Development Canada, to Assembly of First Nations National Chief Phil Fontaine (5 October 2006) at 1 (copy on file with the author). In the meetings of 10 October 2006 and 4 April 4 2007, the Canadian government only invited the five national Aboriginal organizations and not others which had actively

refused by the government for more than a year. Such a meeting took place with government officials on 4 April 2007. Government representatives made clear at that time that, unless Indigenous peoples could persuade the Minister of Indian Affairs, government positions would not change.<sup>251</sup>

Despite the absence of consultation, accommodation and collaboration, the Indian Affairs Minister indicated incorrectly to Parliament in June 2007: “We have not yet arrived at a text that provides appropriate recognition of the Canadian charter, the many treaties that have been signed, and other statutes and policies of the Government of Canada, and *we continue to work with our aboriginal partners to try to achieve such a text.*”<sup>252</sup>

iii) *Lobbying of States against the Declaration — based on erroneous, extreme and unsubstantiated positions.* From early June 2006 until mid-September 2007, the Canadian government increasingly lobbied<sup>253</sup> other States to prevent adoption of the *Declaration*.

The government prepared a document on “Canada’s Position”<sup>254</sup> at the end of September 2006. According to the legal analysis by the Assembly of First Nations, “almost every paragraph of this government article is

---

participated in the UN standard-setting process for over two decades. Both Indigenous and human rights organizations were excluded.

<sup>251</sup> Cf. *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, *supra* note 168 at para. 54: “Consultation that excludes from the outset any form of accommodation would be meaningless.”

<sup>252</sup> *House of Commons Debates*, No. 169 (12 June 2007) at 10489 (Hon. Jim Prentice). [emphasis added] Contrary to the Minister’s comments, the government was not working with Aboriginal organizations in regard to the *Declaration* and certainly not for the reasons described by Mr. Prentice. The purpose of the *Declaration* is not to alter it to conform to inadequate laws and policies in Canada. It is to provide uplifting standards consistent with international human rights law and its progressive development.

<sup>253</sup> For the first eight months since early June 2006, Canada denied lobbying States on the *Declaration*. States disclosed confidentially that this information was not accurate. They indicated to representatives of Indigenous and human rights organizations that Canada was devoting more financial and human resources to oppose the *Declaration* than any other State.

<sup>254</sup> Indian and Northern Affairs Canada, “Canada’s Position: United Nations Draft Declaration on the Rights of Indigenous Peoples — June 29, 2006”, online: <<http://www.ainc-inac.gc.ca/ap/ia/pubs/ddr/ddr-eng.asp>> [INAC, “Canada’s Position”]. The document was completed and put on the Indian Affairs Web site on 28 September 2006, but then backdated to three months earlier. This gave the impression that the information was available at the time of the vote on the *Declaration* at the Human Rights Council on June 29, 2006. Government officials claimed that the wrong date was an “error by the web master”, but no correction has ensued.

replete with errors, omissions, contradictions, extreme and unjust interpretations or other misrepresentations.”<sup>255</sup>

iv) *Misleading the Canadian public.* In defending its own position of countering the *Declaration*, the current government has made a wide range of unsubstantiated, misleading and erroneous statements. This served to generate public fear, opposition and discrimination.

At the time of the vote at the General Assembly, Indian Affairs Minister Chuck Strahl publicly stated that “the rights of non-native Canadians would have been threatened had the government not opposed” the *Declaration*.<sup>256</sup> The Minister indicated that this new instrument is “inconsistent with Canadian legal tradition” and added “[t]he reality is the document is unworkable in a Western democracy under a constitutional government”.<sup>257</sup>

v) *Misleading other States.* To cite a recent example — on 1 May 2008, the Indian Affairs Minister conveyed to Ambassadors of various countries in New York that “Canada . . . supported the renewal of the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people.”<sup>258</sup> What the Minister omitted to mention was that Canada’s support had been conditional. In 2007, Canada had insisted at the Human Rights Council that the Special Rapporteur be mandated only to promote the implementation of the *UN Declaration* “where appropriate”.<sup>259</sup> It had erroneously concluded at that time in Geneva that, since Canada had voted against the adoption of the *Declaration*, it is “inappropriate for the Special Rapporteur to promote the imple-

<sup>255</sup> Assembly of First Nations, “Patterns of Deception: Canada’s Failure to Uphold the Honour of the Crown: A Commentary on the Government of Canada’s Paper: ‘Canada’s Position: United Nations Draft Declaration on the Rights of Indigenous Peoples — June 29, 2006’”, November 2006, at 1.

<sup>256</sup> S. Edwards, “Tories defend ‘no’ in native rights vote” *The [Montreal] Gazette* (14 September 2007) A16.

<sup>257</sup> *Ibid.*

<sup>258</sup> Indian and Northern Affairs Canada, “Luncheon Hosted by Canada’s Permanent Mission to the United Nations” (1 May 2008) (speech to Ambassadors by Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians Chuck Strahl) (copy on file with the author). The purpose of this event appeared to be damage control, since Canada had been repeatedly criticized the week before at the UN Permanent Forum on Indigenous Issues in New York.

<sup>259</sup> Human Rights Council, *Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Res. 6/12, 6th Sess., 28 September 2007, para. 1(g): “Decides to extend the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people for a period of three years: . . . (g) To promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate”.

mentation of this *Declaration* with respect to Canada”.<sup>260</sup> Canada should not be trying to affect the “objectivity, independence and discretion” of the Special Rapporteur.<sup>261</sup>

In April 2008, the government made similar statements that misled Parliament on Canada’s support for the renewal of the Special Rapporteur’s mandate. At that time, it was added: “These actions clearly demonstrate Canada’s determination to advance the rights and interests in indigenous people throughout the world, but especially in Canada.”<sup>262</sup>

vi) *Legal meaning and effect of Canada’s proposals not disclosed.* In regard to the *UN Declaration* and the OAS draft *American Declaration*, the current government has consistently refused to provide any written legal analysis as a means of substantiation. It incorrectly invokes “solicitor-client privilege”,<sup>263</sup> in order to justify non-disclosure of the legal implications of its various positions on Indigenous peoples’ rights.

In view of the real and potential adverse impacts of Canada’s positions on the rights of Indigenous peoples, the government has an obligation to substantiate in legal terms its positions and disclose their legal implications. In the absence of relevant legal information,<sup>264</sup> meaningful consultations on Indigenous peoples’ rights are in effect precluded. On questions of pure law, the standard set by the Supreme Court of Canada is

<sup>260</sup> Canada, “Statement to the Human Rights Council on the Mandate of the UN Special Rapporteur on the situation of the human rights and fundamental freedom of indigenous people” (Delivered to the Human Rights Council, 6th Sess., 18th mtg., Geneva, 26 September 2007).

<sup>261</sup> *Strengthening United Nations action in the field of human rights through the promotion of international cooperation and the importance of non-selectivity, impartiality and objectivity*, GA Res. 62/165, UN GAOR, 62nd Sess. Supp. No. 49, Vol. I, UN Doc. A/62/49, (2008) 409 (adopted on 18 December 2007 without vote), preamble: “Affirming the importance of the objectivity, independence and discretion of the special rapporteurs and representatives on thematic issues and on countries, as well as of the members of the working groups, in carrying out their mandates”.

<sup>262</sup> *House of Commons Debates*, No. 073 (7 April 2008) at 4567 (Rod Bruinooge (Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Metis and Non-Status Indians, CPC)).

<sup>263</sup> Representatives of Indigenous organizations have made clear that no requests have been made for access to any privileged documents prepared by Canada’s legal counsel.

<sup>264</sup> See, e.g., *Halfway River First Nation v. British Columbia (Ministry of Forests)*, [1999] 4 C.N.L.R. 1, 1999 CarswellBC 1821 (B.C. C.A.), at para. 160 (quoted with approval by Binnie J in *Mikisew First Nation*, *supra* note 168 at para. 64): “The Crown’s duty to consult imposes on it a positive obligation to reasonably ensure that aboriginal peoples are provided with all necessary information in a timely way so that they have an opportunity to express their interests and concerns, and to ensure that their representations are seriously considered and, wherever possible, demonstrably integrated into the proposed plan of action.”



“correctness”.<sup>265</sup> If incorrect, Canada would not be considered as fulfilling its constitutional obligations to consult with Indigenous peoples and accommodate their concerns.

The government is not upholding the honour of the Crown in making untenable claims in diverse international forums or within Canada. It is not possible to negotiate international standards, if the Canadian government will not disclose the legal intent or effect of its own proposals. Such a closed approach offends the principles of accountability and transparency.

vii) “*Lands and resources*” concerns unsubstantiated. “Canada’s Position”<sup>266</sup> on the *UN Declaration* states that “Article 26 is the *most problematic* of the lands and resources provisions, especially the phrase: ‘Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.’” However, article 26 reflects the criteria used in Canada and elsewhere in order to establish Aboriginal title and rights to lands and resources.

Such Aboriginal rights are based on traditional occupation and use that are rooted well into the past. These are the criteria required by the Supreme Court of Canada<sup>267</sup> and federal land claims policies.<sup>268</sup> Moreover, the *Report of the Royal Commission on Aboriginal Peoples* explicitly considers article 26 (i.e. the similar Sub-Commission text version) and urges the government of Canada to “protect Aboriginal lands and resources in accordance with these norms”.<sup>269</sup>

The Canadian government is well aware that the land and resource rights affirmed in article 26 of the *Declaration* are relative<sup>270</sup> in nature and not

<sup>265</sup> *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 61: “On questions of law, a decision-maker must generally be correct . . . On questions of fact or mixed fact and law, on the other hand, a reviewing body may owe a degree of deference to the decision-maker.”

<sup>266</sup> INAC, “Canada’s Position”, *supra* note 254.

<sup>267</sup> *Delgamuukw v. British Columbia*, *supra* note 216 at para. 144: “In order to establish a claim to aboriginal title, the aboriginal group asserting the claim must establish that it occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title.”

<sup>268</sup> Indian and Northern Affairs Canada, *Comprehensive Claims (Modern Treaties) in Canada: March 1996* (copy on file with the author). “The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.”

<sup>269</sup> *Report of the Royal Commission on Aboriginal Peoples*, *supra* note 43, vol. 2(2) at 567-568.

<sup>270</sup> *Delgamuukw v. British Columbia*, *supra* note 216 at para. 161; and *Sparrow v. The Queen*, *supra* note 111 at 1109: “Rights [of Aboriginal peoples] that are recognized and affirmed are not absolute.” See also S.J. Toope, “Cultural Diversity and Human Rights (F.R. Scott Lecture)” (1997) 42 McGill L.J. 169 at 177-178: “None of this is to say, however, that rights are absolute. They are defeasible under certain circumstances by

absolute.<sup>271</sup> Yet the government continues to mislead Parliament by stating that the “declaration suggests that we must return to that pre-contact moment as a starting point. How does [a parliamentarian] reconcile that fact with the existence of Canada?”<sup>272</sup>

viii) *Failure to uphold Canada’s international obligations.* In relation to the *UN Declaration* and Indigenous peoples’ human rights, the Canadian government has repeatedly violated the rule of law internationally. The government has failed to respect the purposes and principles of the *UN Charter* and has reneged on its commitment to “uphold the highest standards in the promotion and protection of human rights”.<sup>273</sup> In August 2009, in a joint statement on the *Declaration*, Indigenous and human rights organizations indicated to the Expert Mechanism on the Rights of Indigenous Peoples: “During its three-year term [on the Human Rights Council], Canada pursued the lowest standards of any Council member within the Western European group of States.”<sup>274</sup>

ix) *Undermining Indigenous security, development and human rights.* Canadian government opposition to the *Declaration* adversely impacts Indigenous peoples in Canada and elsewhere across the globe. As emphasized by the High Commissioner for Human Rights, “Respecting human rights is not only a legal obligation. It is also a precondition for our societies to grow and prosper in peace and security.”<sup>275</sup>

Similarly, the UN General Assembly and its member States have affirmed that “development, peace and security and human rights are inter-

---

other rights . . . This desire for balance is manifest in the principal international instruments”.

<sup>271</sup> Consistent with international law, art. 46 of the *Declaration* makes clear that the rights in this instrument are generally balanced with the rights of others. In comparison, except for gender equality, there are no explicit balancing provisions in Part II of the *Constitution Act, 1982* in regard to s. 35.

<sup>272</sup> *House of Commons Debates*, *supra* note 262 at 4567 (Mr. Rod Bruinooge (Parliamentary Secretary to the Minister of Indian Affairs). Mr. Bruinooge adds: “. . . when we see a declaration that contemplates having Canada set aside its treaties, some that go back to before to our Confederation, to enter into a new legal context with our first peoples, we obviously look at that with a very serious perspective. As such, we cannot proceed with a signature. We take these obligations seriously. . . . Is the member opposite suggesting that she would entertain Canada returning to a pre-contact state in terms of our legal obligations to first nations people?”

<sup>273</sup> UN General Assembly, *Human Rights Council*, *supra* note 33 at para. 9.

<sup>274</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, “Implementation of the *UN Declaration on the Rights of Indigenous Peoples*: Positive Initiatives and Serious Concerns”, Expert Mechanism on the Rights of Indigenous Peoples, 2nd Sess., Geneva (joint global statement by Indigenous and human rights organizations delivered 12 August 2009), para. 36 (copy on file with the author).

<sup>275</sup> UN General Assembly, *Report of the United Nations High Commissioner for Human Rights*, 61 Sess., Supp. No. 36, A/61/36, New York, 2006, at 11, para. 52.

linked and mutually reinforcing”.<sup>276</sup> This has been articulated by the UN Secretary-General as follows: “. . . we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights.”<sup>277</sup>

x) *Politicization of Indigenous peoples’ human rights.* The politicization of Indigenous peoples’ human rights by the Canadian government remains a serious concern. It is evidenced by the government’s persistent violations of the rule of law in Canada and internationally; lack of accountability and transparency; false denials of government actions; refusal to substantiate government positions on the basis of international human rights law; public misinformation on the *Declaration* and Indigenous peoples’ human rights; encouragement of States with abusive human rights records to oppose the adoption and implementation of the *Declaration*; and undermining of the international human rights system.<sup>278</sup>

## 6. SPECIFIC GOVERNMENT ARGUMENTS AGAINST THE DECLARATION

Prior to examining the specific arguments that the Canadian government has invoked in opposing the *UN Declaration*, it is useful to provide additional context and background.

First, it is worth noting that the Conservative government is a minority government. The three opposition parties — Liberal, New Democratic Party and Bloc Québécois — all support the *Declaration*. None of these parties expressed support for the specific arguments put forward by the government. The following Motion was adopted in April 2008 by a majority<sup>279</sup> of the Members of the House of Commons:

That the government endorse the United Nations Declaration on the Rights of Indigenous Peoples as adopted by the United Nations General Assembly on 13 September 2007 and that Parliament and Government of Canada fully implement the standards contained therein.<sup>280</sup>

<sup>276</sup> UN General Assembly, *2005 World Summit Outcome*, *supra* note 102 at para. 9.

<sup>277</sup> UN General Assembly, *In larger freedom: towards development, security and human rights for all: Report of the Secretary-General, A/59/2005* (21 March 2005), at para. 17.

<sup>278</sup> For a detailed analysis of the politicization of Indigenous peoples’ human rights by the government of Canada, see letter, dated 21 August 2006, and accompanying Annex, from Beverley Jacobs, President, Native Women’s Association of Canada, to the Minister of Indian Affairs and Northern Development Jim Prentice (copy on file with the author).

<sup>279</sup> The vote was 148-113 in favour of the Motion: see *House of Commons Debates*, No. 074 (8 April 2008) at 4656.

<sup>280</sup> The text of the Motion is reproduced in *House of Commons Debates*, *supra* note 279 (7 April 2008).

In late September 2006, the government produced a lengthy list of concerns relating to the *Declaration* in its lobbying document regarding “Canada’s Position”.<sup>281</sup> Except for provisions on lands, territories and resources,<sup>282</sup> the government did not disclose<sup>283</sup> any proposed amendments to Indigenous and human rights organizations until mid-August 2007 — one month prior to the vote on the *Declaration* in the General Assembly. Despite months of effort, the Canadian government failed to generate any significant State support for its suggested revisions.

Further, Canada had been actively lobbying other States with seemingly hard-line positions so that they might take the lead. In mid-May 2007, the African Group of States submitted its initial proposal<sup>284</sup> calling for 33 amendments to the *Declaration*. This proposal was strongly criticized by the Indigenous Peoples’ Caucus, as being highly discriminatory.<sup>285</sup>

In May 2007, the Canadian government and six other States sent a letter to the President of the General Assembly indicating that “the amended text put forward by the Africa Group helpfully provide[s] a good basis for discussions.”<sup>286</sup> One

<sup>281</sup> See INAC, “Canada’s Position”, *supra* note 254, where the vague list of government concerns included the following: Self-government (art. 4); language; culture; education; Indigenous legal systems; free, prior and informed consent (arts. 10, 11, 19, 28, 29 & 32); lands, territories and resources (arts. 25, 26, 27 & 28); conservation and environmental protection (art. 29); military activities on Indigenous lands or territories (arts. 10 & 30); and intellectual property (art. 31).

<sup>282</sup> In May 2007, these far-reaching amendments proposed by the Canadian government were shared with Indigenous representatives in Canada. The amendments were in an undated document entitled “Lands, Territories and Resources” (copy on file with the author). The government did not put its name on the document.

The government’s suggested revisions deleted the terms “independent” and “impartial” in relation to the process to recognize and adjudicate the land and resource rights of Indigenous peoples in art. 27. This ran counter to the government’s declared plans within Canada to create an “independent” specific claims tribunal: see “Prime Minister Harper Announces Major Reforms to Address the Backlog of Aboriginal Treaty Claims” (12 June 2007), online: <<http://pm.gc.ca/eng/media.asp?id=1695>>.

<sup>283</sup> The government of Canada did not provide any prior notice to Indigenous peoples in Canada and did not provide copies of its proposed amendments, until after they were submitted jointly with three other States to the President of the General Assembly on 13 August 2007.

<sup>284</sup> Copy on file with the author.

<sup>285</sup> Indigenous Peoples’ Caucus, “*UN Declaration on the Rights of Indigenous Peoples*, African Group of States’ Proposed Revised Text: A Model for Discrimination and Domination” (June 2007), online: <<http://www.converge.org.nz/pma/inipc0607.pdf>> (copy on file with the author).

<sup>286</sup> Letter from Australia, Canada, Colombia, Guyana, New Zealand, Russian Federation and Suriname to the President of the UN General Assembly, H.E. Sheikh Haya Rashed Al Khalifa (30 May 2007). Even among this small group of States, there was no common agreement on concerns. See “Non-Paper, United Nations Declaration on the Rights of Indigenous Peoples: Summary of Key Areas of Concerns” (28 June 2007) [“Non-Paper”], submitted by Canada and the other six States to a closed meeting of the UN General Assembly. Canada refused to share this document with Indigenous repre-

month later, a similar message in favour of the African text was again conveyed.<sup>287</sup> Subsequently, the African Group of States demonstrated flexibility and leadership in significantly revising its proposal. Much to the credit of the African States and the many supportive countries led by Mexico and Peru, an agreement was reached in late August 2007 on nine amendments to the existing text. This agreement ensured the successful adoption of the *UN Declaration* at the General Assembly.

It is disturbing that Canada would align itself with States with abusive<sup>288</sup> human rights records and lobby them to not support a human rights instrument.<sup>289</sup> This unacceptable conduct persisted not only in relation to the General Assembly, but also the Human Rights Council. As criticized by Amnesty International (Canada):

Over the intervening year, Canada was at the forefront of urging the UN to undertake wholesale renegotiation of key provisions of the Declaration, a process that would have greatly delayed adoption and would likely have resulted in a greatly weakened text. In doing so, Canada aligned itself with

---

sentatives prior to tabling it at the meeting. None of these seven States put their names on the document.

<sup>287</sup> See “Non-Paper, United Nations Declaration on the Rights of Indigenous Peoples, Framework to Achieve an Irreducible Minimum of Amendments”, 28 June 2007, also submitted by Canada and the other six States to a closed meeting of the UN General Assembly: “The African Group text helpfully provides a basis and reference point for consideration of the text [of the *Declaration*].” Again, the seven States did not put their names on the document.

<sup>288</sup> In regard to those States that jointly signed the 30 May 2007 letter with Canada, see the following human rights reports: *Australia*: Committee on the Elimination of Racial Discrimination, “Decision 2 (54) on Australia” in Report of the Committee on the Elimination of Racial Discrimination, UN GAOR, 54th Sess., Supp. No. 18, UN Doc. A/54/18 (1999) at 5; *Colombia*: “Colombia” in International Work Group For Indigenous Affairs, *The Indigenous World 2007* (Copenhagen: IWGIA, 2007), 144 at 150 (murders, forced disappearances, kidnappings, sexual violence or torture and arbitrary detentions, most of them at the hands of State agents); *Guyana*: Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Guyana*, CAT/C/GUY/CO/1, 7 December 2006, at 5, para. 16 (alleged practice of extrajudicial killings by members of the police); *New Zealand*: Committee on the Elimination of Racial Discrimination, *Early Warning and Urgent Action Procedure: New Zealand*, Decision 1 (66), *New Zealand Foreshore and Seabed Act 2004*, CERD/C/DEC/NZL/1, Geneva, 27 April 2005; *Russian Federation*: Committee against Torture, *Conclusions and recommendations of the Committee against Torture: Russian Federation*, CAT/C/RUS/CO/4, 6 February 2007, at 3, para. 9 (numerous, ongoing and consistent allegations of acts of torture and other cruel, inhuman or degrading treatment or punishment committed by law enforcement personnel); and *Suriname*: I/A Court H.R., *Case of Moiwana Village v. Suriname*, (*Preliminary Objections, Merits, Reparations and Costs*), Judgment of 15 June 2005, Series C No. 124 (crimes against humanity).

<sup>289</sup> For a description of the “obstructionist” role played by the Harper government, see, e.g., J. Khan, “Droits des peuples autochtones : Amnistie accuse le Canada de sabotage” *La Presse* (8 June 2007) A9.

states with poor records of supporting the UN human rights system and with histories of brutal repression of Indigenous rights advocates.<sup>290</sup>

In opposing the *UN Declaration*, the Tory government continues to use flawed arguments. A number of examples are analyzed below.

### (a) Balancing of Collective and Individual Rights

At the time of the historic vote on the adoption of the *Declaration* by the UN General Assembly, Canada's Indian Affairs Minister defended the government's strong opposition as follows:

In Canada, you are balancing individual rights vs. collective rights, and (this) document . . . has none of that . . . By signing on, you default to this document by saying that the only rights in play here are the rights of the First Nations. And, of course, in Canada, that's inconsistent with our constitution.<sup>291</sup>

This statement is contradicted by the text of the *Declaration*. Seventeen provisions in the *Declaration* address individual rights.<sup>292</sup> In addition, the *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument.<sup>293</sup> Ironically, key aspects were drafted by officials of the previous Liberal government together with representatives of Indigenous organizations. The same government also encouraged other States to endorse these provisions.

The Conservative government has not appeared to favour the balancing of individual and collective rights. For example, Parliament has repealed section 67 of the *Canadian Human Rights Act*<sup>294</sup> (which would remove the exemption relating to provisions of the *Indian Act*<sup>295</sup>). While all parties agreed that this change was necessary, the government opposed for more than a year any interpretive clause of a balancing nature. This position was not supported by the Canadian Human Rights Commission or virtually all non-government witnesses that appeared before the Standing Committee on Aboriginal Affairs and Northern Development. After the

<sup>290</sup> Amnesty International (Canada), "Canada and the International Protection of Human Rights: *An Erosion of Leadership?*, An Update to Amnesty International's Human Rights Agenda for Canada", December 2007, at 7.

<sup>291</sup> Minister of Indian Affairs, Chuck Strahl, quoted in S. Edwards, "Tories defend 'no' in native rights vote" *The [Montreal] Gazette* (14 September 2007) A16.

<sup>292</sup> See preambular paras. 4 and 22 and arts. 1, 2, 6, 7, 8, 9, 14, 17, 21, 22, 24, 33, 40, 44 and 46.

<sup>293</sup> *E.g.*, according to art. 46, para. 3, the provisions in the *Declaration* "shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith."

<sup>294</sup> R.S.C. 1985, c. H-6, s. 67: "Nothing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

<sup>295</sup> R.S.C. 1985, c. I-5.

Standing Committee proposed an interpretive clause and other relevant amendments,<sup>296</sup> the government capitulated and a compromise was finally reached.<sup>297</sup>

In regard to the balancing provisions in the *Declaration*, the mid-August 2007 amendments jointly submitted by the Canadian government and three other States disclosed a different and more extreme purpose.<sup>298</sup> It was proposed that the *Declaration* be also interpreted in accordance with the “constitutional frameworks” of each State. No such qualification is found in the *Universal Declaration on Human Rights* or the two international human rights Covenants. In past years, Indigenous peoples have rejected such proposals as constituting a discriminatory double standard and as likely to legitimize State actions to deny them their rights.<sup>299</sup> As further explained at the August 2009 session of the Expert Mechanism session in Geneva, the essential human rights principle of universality<sup>300</sup> could be severely affected:

The interpretation of Indigenous peoples’ human rights in accordance with “constitutional frameworks” could severely undermine the principle of “uni-

<sup>296</sup> Bill C-21, *An Act to amend the Canadian Human Rights Act*, reprinted as amended by the Standing Committee on Aboriginal Affairs and Northern Development as a working copy for the use of the House of Commons at Report Stage and as reported to the House on 4 February 2008. See also Senate of Canada (Standing Senate Committee of Legal and Constitutional Affairs), *Taking Section 35 Rights Seriously: Non-Derogation Clauses Relating to Aboriginal and Treaty Rights*, Final Report of the Standing Senate Committee on Legal and Constitutional Affairs, December 2007.

<sup>297</sup> *House of Commons Debates*, No. 097 (16 May 2008) (re *Canadian Human Rights Act*). As a result of this compromise, see *An Act to amend the Canadian Human Rights Act*, S.C. 2008, c. 30 (assented 18 June 2008).

<sup>298</sup> Letter from the Permanent Missions of Canada, Colombia, New Zealand and the Russian Federation, to the President of the United Nations General Assembly (13 August 2007), attaching a “Non-Paper on Proposed Amendments” [August 2007 Proposed Amendments] (copy on file with the author), art. 46.

<sup>299</sup> For example, in Latin America, a number of States constitutions provide that all subsurface resources are the property of the State: see, e.g., Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, UN Doc. CERD/C/64/CO/9 (28 April 2004) at para. 11. This type of argument has been used to dispossess Indigenous peoples of their resource rights. In the United States, the added qualification of “constitutional frameworks” could lend legitimacy to the plenary power doctrine of Congress that has been used to deny Indigenous peoples their basic rights (even though the U.S. Constitution makes no specific reference to such plenary power: see, e.g., Comment, “Federal Plenary Power in Indian Affairs After *Weeks* and *Sioux Nation*” (1982) 131 U. Pa. L. Rev. 235; and Nell Jessup Newton, “Federal Power over Indians: Its Sources, Scope, and Limitations” (1984) 132 U. Pa. L. Rev. 195. In Canada, it could open the door to further specious constitutional arguments by the government for severely limiting or denying Indigenous peoples’ human rights.

<sup>300</sup> The international human rights principle of universality is elaborated in the *Vienna Declaration and Programme of Action*, *supra* note 102 at para. 5:

All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis. While the significance of national and regional particularities

versality". Indigenous peoples in States with national constitutions that deny Indigenous rights could be denied rights that exist for Indigenous peoples in other countries.<sup>301</sup>

In regard to the *UN Declaration*, the government's discriminatory strategy contradicts its own explicit commitments in *Canada's Aboriginal Action Plan*: "Canada is committed to achieving a declaration that reflects the unique place of indigenous peoples in the world and *applies universally*; that promotes and protects indigenous rights; that *works against discrimination* . . ." <sup>302</sup>

### (b) Effects on Canadian Charter, Constitution, Etc.

On June 21, 2006, the Indian Affairs Minister declared to Parliament the following objection to the *Declaration*:

. . . it is inconsistent with the Canadian Charter of Rights and Freedoms. It is inconsistent with our Constitution. It is inconsistent with the *National Defence Act*. It is inconsistent with our treaties. It is inconsistent with all of the policies under which we have negotiated land claims for 100 years.<sup>303</sup>

No Canadian government representative has been able to provide Indigenous representatives in Canada with a coherent explanation. Three months later, in "Canada's Position",<sup>304</sup> the government quietly altered its previous statement and suggested that the *Declaration* "could be interpreted as being inconsistent with" the *Canadian Charter of Rights and Freedoms*, etc. Even this vague assertion is squarely contradicted by article 46 of the *Declaration*.

Such specious claims by Canada have been criticized by a broad range of Indigenous and human rights organizations from different regions of the world.<sup>305</sup> In

---

and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.

See *UN Declaration*, *supra* note 1, preambular para. 16, where explicit reference is made to the *Vienna Declaration*.

<sup>301</sup> Grand Council of the Crees (Eeyou Istchee) *et al.*, "Implementation of the *UN Declaration on the Rights of Indigenous Peoples*: Positive Initiatives and Serious Concerns", *supra* note 274 at para. 47.

<sup>302</sup> Indian Affairs and Northern Development, *Gathering Strength — Canada's Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services, 1997. [emphasis added])

<sup>303</sup> *House of Commons Debates*, No. 045 (21 June 2006) at 2719 (Hon. Jim Prentice). In regard to the government's claim that the *Declaration* is inconsistent with the Canadian Charter, see, e.g., H. de Grandpré, « On implore Ottawa de signer la Déclaration sur les peuples autochtones » *La Presse* (2 May 2008) A8, where law professor Sébastien Grammond describes the Canadian government's reasoning "insidious".

<sup>304</sup> INAC, "Canada's Position", *supra* note 254.

<sup>305</sup> See, e.g., Grand Council of the Crees (Eeyou Istchee) *et al.*, "Joint Submission to the United Nations Human Rights Council in regard to the Universal Periodic Review Concerning Canada", Working Group on the Universal Periodic Review, Human Rights Council (September 2008), online: <<http://lib.ohchr.org/HRBodies>>



particular, Amnesty International has indicated to the Human Rights Council: “Meritless claims by Canadian officials that the Declaration is inconsistent with the Canadian Constitution are harmful to the reconciliation of Indigenous and non-Indigenous peoples and contrary to Canada’s duty to promote the human rights of all.”<sup>306</sup>

In the absence of any specific fact situation, it is irresponsible for the government to presume a whole range of illegal and illegitimate consequences. This serves to incite fear among Canadians and generate opposition to Indigenous peoples’ human rights. As the Supreme Court of Canada has ruled, it is “improper” to assess an “alleged collision of rights” without any factual context.<sup>307</sup>

In concluding that the *Declaration* is “inconsistent with the *National Defence Act*”, the government was contradicting its own Department of National Defence. A freedom of information request revealed that the Department recommended that the government support the *Declaration* with a statement of understanding.<sup>308</sup>

### (c) Military Uses on Indigenous Lands

Article 30 of the *Declaration* states:

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.

In regard to military uses on Indigenous lands, the government incorrectly claimed that the *Declaration* would prevent the military from providing assistance in the event of natural disasters and other emergencies.<sup>309</sup> On 13 August 2007,

---

/UPR/Documents/Session4/CA/JS4\_EI\_CAN\_UPR\_S4\_2009\_GrandCouncilof theCreesEeyouIstchee\_Etal\_JOINT.pdf>, at 2. This Submission was made by Indigenous and human rights organizations from different regions of the world.

<sup>306</sup> Amnesty International, “Canada: Submission to the UN Universal Periodic Review, Fourth session of the UPR Working Group of the Human Rights Council, February 2009” (8 September 2008), online: <[http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/AI\\_CAN\\_UPR\\_S4\\_2009\\_AmnestyInternational.pdf](http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/CA/AI_CAN_UPR_S4_2009_AmnestyInternational.pdf)>, at 3.

<sup>307</sup> *Same-Sex Marriage, Re*, [2004] 3 S.C.R. 698, 2004 CarswellNat 4423, 2004 CarswellNat 4422, ¶51 (S.C.C.).

<sup>308</sup> G. Galloway, “Back UN on native rights, Ottawa urged” *Globe and Mail* (8 June 2007) A1.

<sup>309</sup> INAC, “Canada’s Position”, *supra* note 254. In regard to natural disasters, it is a widely accepted international standard that advance preparation with local people is necessary. See UN General Assembly, *Draft Programme of Action*, *supra* note 130 at para. 64: “All relevant actors are encouraged to develop and implement programmes and projects for natural disaster management at the national and community levels with indigenous peoples’ full and meaningful participation.”

when Canada finally disclosed its proposed amendments<sup>310</sup> relating to such military activities, the government's changes suggested a more far-reaching objective.

Canada's proposed amendments would have limited State consultations with Indigenous peoples in article 30(2) of the *Declaration*. States would have a duty to consult only "where military activities take place by agreement or upon request" of Indigenous peoples. This would invite unilateral military activities to take place on Indigenous lands with no consultation — clearly a lesser standard than what is required currently under section 35 of the *Constitution Act, 1982*. The government's amendments ignore the gross atrocities committed with impunity by the military against Indigenous peoples in various regions of the world. These include: extrajudicial killings, rapes, environmental degradation, burning of homes and forced labour, including prostitution.<sup>311</sup> Such an amendment would have descended well below what is essential to ensure the "survival, dignity and well-being" of the world's Indigenous peoples.

#### (d) Treaties with Indigenous Peoples

In regard to the *Declaration's* effect on treaties with Indigenous peoples, the government claims:

Five hundred treaties have been signed over the past 250 years. . . . The government does not support the declaration because that declaration *jeopardizes those treaties, the enforceability and the meaning of them*.<sup>312</sup>

Under Canadian law, it is not possible for a declaration to upend the treaties that Canada or others have entered into with Indigenous peoples. The treaty rights of Indigenous peoples are protected by section 35 of the *Constitution Act, 1982* and the treaties themselves cannot be "jeopardized" by international human rights instruments. This is further evident, since Indigenous peoples' treaty rights generally constitute an elaboration of human rights.<sup>313</sup>

The government's statements are contradicted by the *Declaration* itself. The preamble recognizes "the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties".<sup>314</sup> It also affirms that "treaties . . . and the relationship they represent . . . are the basis for a strengthened partnership between in-

<sup>310</sup> Letter from Missions and accompanying proposed amendments (13 August 2007), *supra* note 298, art. 30.

<sup>311</sup> Working Group on Indigenous Populations, *Principal Theme: "Utilization of Indigenous Peoples' Lands by Non-Indigenous Authorities, Groups or Individuals for Military Purposes"*: Note by the Secretariat, UN Doc. E/CN.4/Sub.2/AC.4/2006/2, 14 June 2006, at para. 44.

<sup>312</sup> *House of Commons Debates*, No. 083 (21 November 2006) at 5147 (Hon. Jim Prentice, Minister of Indian Affairs and Northern Development). [emphasis added]

<sup>313</sup> P. Joffe & W. Littlechild, *supra* note 63 at 12–14: "Their treaties often entail a wide range of human rights considerations. Whether in general or specific terms, Indigenous peoples' treaties constitute an elaboration of arrangements relating to the political, economic, social, cultural or spiritual rights and jurisdictions of the Indigenous peoples concerned. These treaties also often include important dimensions relating to the collective and individual security of Indigenous peoples and individuals."

<sup>314</sup> *UN Declaration*, *supra* note 1, preambular para. 8.

digenous peoples and States”.<sup>315</sup> Further, article 37 affirms that “Indigenous peoples have the right to the recognition, observance and enforcement of treaties . . . concluded with States . . . and to have States honour and respect such treaties”.<sup>316</sup> All of these provisions serve to honour, protect and enforce treaties with Indigenous peoples as sacred<sup>317</sup> and living agreements.

The former Indian Affairs Minister had also concluded that the *Declaration* is “inconsistent with all of the policies under which we have negotiated land claims for 100 years”.<sup>318</sup> This statement lacks coherence and accuracy. For 24 of the last 100 years (1927–1951), it was an offence under the *Indian Act* for “Indians” to raise funds or retain a lawyer for the advancement and prosecution of land claims.<sup>319</sup> At the AFN General Assembly on 16 July 2006, former Indian Affairs Minister Jim Prentice decried the specific claims process: “I have been one of the most outspoken critics in this country over the last 20 years of how the claims process isn’t working.”<sup>320</sup>

According to international law, domestic laws and policies do not prevail over international law.<sup>321</sup> It is neither necessary nor appropriate for an international human rights instrument, such as the *Declaration*, to reflect national laws and policies. If that were true, the *Declaration* would also have to reflect the laws, treaties and policies of approximately 70 other countries that include Indigenous peoples. This would serve to perpetuate the status quo and the regressive laws and policies

<sup>315</sup> *Ibid.*, preambular para. 15.

<sup>316</sup> See also art. 37, para. 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.”

<sup>317</sup> *R. v. Badger*, [1996] 1 S.C.R. 771, 1996 CarswellAlta 587, 1996 CarswellAlta 365F (S.C.C.), at 793 [S.C.R.] (per Cory J.): “First, it must be remembered that a treaty represents an exchange of solemn promises between the Crown and the various Indian nations. It is an agreement whose nature is sacred.”

<sup>318</sup> *House of Commons Debates*, No. 045 (21 June 2006) at 2719 (Hon. Jim Prentice). See also H. de Grandpré, « On implore Ottawa de signer la Déclaration sur les peuples autochtones » *La Presse* (2 May 2008) A8, where law professor Sébastien Grammond describes the Canadian government’s reasoning as “insidious”.

<sup>319</sup> *Indian Act*, R.S.C. 1927, c. 98, s. 141. See also W. Moss, *History of Federal and Provincial Laws Discriminating Against Aboriginal People* (Ottawa: Library of Parliament, 1987) at 24.

<sup>320</sup> Jim Prentice “Address” (Delivered at Assembly of First Nations 27th Annual General Assembly, Vancouver, British Columbia, 13 July 2006), online: Indian and Northern Affairs Canada <<http://www.ainc-inac.gc.ca/ai/mr/spch/2006/af27-eng.asp>>.

<sup>321</sup> See *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, Advisory Opinion, [1988] I.C.J. Rep. 12 at 34, para. 57, which confirmed that “the fundamental principle of international law [is] that international law prevails over domestic law”.

of countless governments.<sup>322</sup> Rather, a key purpose of the *Declaration* is to provide universal and elevating international human rights norms.<sup>323</sup>

### (e) Self-government

The Tory government opposes the right of Indigenous peoples to self-government affirmed in the *Declaration*,<sup>324</sup> based on the belief that the provision does not recognize the “importance of negotiations”.<sup>325</sup> This vague description does not reveal the far-reaching dimensions of the government’s position.

In its August 2007 Proposed Amendments,<sup>326</sup> Canada seems to convert the right of self-government into a joint or contingent right to be exercised “in cooperation with the State”.<sup>327</sup> The inherent<sup>328</sup> right of self-government is a human

<sup>322</sup> See also *Media Rights Agenda and Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples’ Rights, Communications 105/93, 128/94, 130/94, 152/96, Twelfth Activity Report, 1998-1999, Annex V, 52 at 58, para. 66: “To allow national law to have precedent over the international law of the [African] Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law.”

<sup>323</sup> E. Heinze, “Beyond Parapraxes: Right and Wrong Approaches to the Universality of Human Rights Law” (1994) 12 *Nethl. Q.H.R.* 369 at 381: “Unlike most traditional branches of law, international human rights law is not intended merely to recapitulate the wishes and practices of States. It arises from the positive consent of nations; yet, once born, it is not necessarily constrained by those nations’ individual objectives. It does, so to speak, take on a life of its own.”

<sup>324</sup> *UN Declaration*, *supra* note 1, art. 4.

<sup>325</sup> Letter from the Minister of Indian Affairs and Northern Development Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (10 December 2007) at 1 (copy on file with the author).

<sup>326</sup> Letter from the Permanent Missions, *supra* note 310, art. 4.

<sup>327</sup> Indian and Northern Affairs Canada, “Update Paper: United Nations Declaration on the Rights of Indigenous Peoples”, 10 January 2008, online: <<http://www.ainc-inac.gc.ca/ap/ia/pubs/updir/updir-eng.asp>> [INAC, “Update Paper”]: “Canada remains concerned that this provision does not reflect the need for processes to achieve harmony with other levels of government, including negotiations.” The Update Paper includes no page numbering.

<sup>328</sup> Minister of Indian Affairs and Northern Development, *Aboriginal Self-Government: The Government of Canada’s Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Public Works and Government Services, 1995): “The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act, 1982*.”

right<sup>329</sup> that flows from the right of self-determination.<sup>330</sup> In international human rights instruments, human rights are recognized as inherent and inalienable.<sup>331</sup> They are not defined as contingent on State co-operation or as requiring joint exercise with the State.

In the current Organization of American States (OAS) standard-setting process on a draft *American Declaration on the Rights of Indigenous Peoples*, the government of Canada has proposed even more limitations on governance rights. For example, in regard to the right of Indigenous peoples “to establish and control their educational systems and institutions”, the government tabled a proposal at the OAS that this right must be exercised “*in conjunction with the State and in accordance with applicable standards*”.<sup>332</sup> These proposed restrictions, if adopted, could be used to prevent Indigenous peoples from improving their educational systems or institutions. Canada’s amendments would have introduced qualifications upon the human rights of Indigenous peoples that are not imposed upon other peoples. Such discriminatory double standards are inconsistent with genuine reconciliation.

A further concern is the emphasis placed by the government of Canada<sup>333</sup> that the right of self-government is limited by article 4 of the *Declaration* to Indigenous peoples’ “internal and local affairs”.<sup>334</sup> Some States may also take the view that article 4 limits the right of self-determination in article 3 to “internal” self-determi-

<sup>329</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*, A/HRC/6/15, 15 November 2007, at 7, para. 11: “The United Nations Declaration on the Rights of Indigenous Peoples specifically recognizes self-determination and autonomy as human rights of indigenous peoples.”

<sup>330</sup> S.J. Anaya, *Indigenous Peoples in International Law*, *supra* note 45 at 150: “Self-government is the overarching political dimension of ongoing self-determination.”

<sup>331</sup> *Universal Declaration of Human Rights*, preamble: “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”

<sup>332</sup> Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), “Proposals by Canada for Articles XIV, XV, XVI”, Tenth Meeting of Negotiations in the Quest for Points of Consensus, OEA/Ser.G, GT/DADIN/doc.291/07, 19 March 2007, art. XIV (Education).

<sup>333</sup> INAC, “Canada’s Position”, *supra* note 254: “Canada views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as a government or institution.” It is discriminatory to seek to limit the right of an Aboriginal people to self-government — an integral part of the human right to self-determination — to matters that are “integral to its distinct Aboriginal culture, and essential to its operation as a government or institution”. No such criteria apply to other “peoples” when they exercise their right of self-determination or other human rights. The Canadian government’s limitations on Indigenous peoples’ right of self-government have profound adverse implications, since the right of self-determination is a prerequisite to the exercise and enjoyment of all other human rights: see *supra* note 78 and accompanying text.

<sup>334</sup> *UN Declaration*, *supra* note 1, art. 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.”

nation. However, such interpretations are contradicted by international human rights law and practice, as well as the *Declaration* when read as a whole.<sup>335</sup>

Article 4 describes a specific form of self-government or autonomy, but it cannot “limit” it to “internal and local affairs”. Article 43 stipulates that the rights in the *Declaration* constitute “minimum standards” — not the sole standards that exist in favour of Indigenous peoples. Clearly there are additional relevant standards in the human rights Covenants, among other international and domestic instruments and law.<sup>336</sup>

The provisions of the *Declaration* extend well beyond internal matters. Article 36 affirms the right of Indigenous peoples to engage in a wide range of activities in an *international* cross-border context.<sup>337</sup> States have an explicit obligation to “facilitate the exercise and ensure the implementation of this right”.<sup>338</sup> At the international level, article 41 requires the establishment of “ways and means of ensuring participation of indigenous peoples on issues affecting them”.<sup>339</sup> As international actors, Indigenous nations and their governments have actively played a direct role for the past three decades in standard-setting and other matters in diverse international and regional forums. This international practice is widely accepted and goes well beyond “internal and local affairs”.

In different regions of the world, the traditional territories of many Indigenous peoples transcend national boundaries. Therefore, the provisions of the *Declaration* regarding, *inter alia*, rights to lands, territories, resources and environmental protection are not necessarily limited to the boundaries of any given State.

Also, the *Declaration* confirms that the rights of Indigenous peoples in “treaties, agreements and constructive arrangements . . . are, in some situations, matters of *international concern, interest, responsibility and character*.”<sup>340</sup> Such treaty-

<sup>335</sup> See also Dalee Sambo Dorough, “Reflections on the UN Declaration on the Rights of Indigenous Peoples: An Arctic Perspective” in Stephen Allen & Alexandra Xanthaki (eds.), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples and International Law* (Oxford, UK: Hart Publishing) [forthcoming].

<sup>336</sup> For example, Inuit self-government arrangements in Nunavik, Québec and in Nunavut are not limited to the Inuit in each region and include all residents within their respective boundaries.

<sup>337</sup> *Ibid.*, art. 36, para. 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.”

<sup>338</sup> *Ibid.*, art. 36, para. 2: “States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.”

<sup>339</sup> See also *ibid.*, art. 39: “Indigenous peoples have the right to have access to financial and technical assistance . . . through international cooperation, for the enjoyment of the rights contained in this Declaration.”

<sup>340</sup> *Ibid.*, preambular para. 14. In this international context, article 37 affirms that Indigenous peoples have the right to “recognition, observance and enforcement” of treaties, agreements and other constructive arrangements concluded with States or their successors.

making is an integral aspect of the right of Indigenous peoples to self-determination, including self-government.

Article 4 affirms that the right of Indigenous peoples to self-government flows from their right of self-determination. This right of self-determination in article 3 of the *Declaration* is the same right that is affirmed in the two international human rights Covenants.<sup>341</sup> Moreover, treaty monitoring bodies have repeatedly confirmed that the right of self-determination in the Covenants applies to Indigenous peoples in the different regions of the world.<sup>342</sup>

No lesser right can be created in the *Declaration* since it stipulates: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.”<sup>343</sup> It explicitly affirms that “Indigenous peoples . . . are free and equal to all other peoples . . . and have the right to be free from any kind of discrimination”.<sup>344</sup> The *Declaration* is also guided by the purposes and principles of the *Charter of the United Nations*, which includes the principle of “equal rights and self-determination of peoples”.<sup>345</sup> Any State that fails to respect this principle would not be able to invoke the principle of territorial integrity under international law.

<sup>341</sup> Identical art. 1 of the ICCPR and ICESCR, *supra* note 47. See also Human Rights Council, *Report of the Special Rapporteur, S. James Anaya, supra* note 4 at para. 22: “Acting under the reporting procedure, the Human Rights Committee has further considered aspects of indigenous political participation, self-government and autonomy within the framework of the self-determination clause of article 1 of the Covenant.”

<sup>342</sup> See, e.g., Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006) at para. 37; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Morocco*, UN Doc. E/C.12/MAR/CO/3 (4 September 2006) at para. 35; Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc. E/C.12/1/Add.94 (12 December 2003) at para. 11.

<sup>343</sup> *UN Declaration, supra* note 1, art. 45. See also preambular para. 17: “*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*”. [emphasis added]

<sup>344</sup> *Ibid.*, art. 2. Other relevant equality and non-discrimination provisions are found in the second preambular para. and art. 46, para. 3. In addition, the prohibition against racial discrimination is a peremptory norm: see *supra* notes 65-66 and accompanying text.

<sup>345</sup> See text accompanying *supra* notes 207–209.

International law carefully balances the right of self-determination with the principle of territorial integrity.<sup>346</sup> However, article 46, para. 1 of the *UN Declaration* includes the principle of territorial integrity in a possibly ambiguous manner:

Nothing in this Declaration may 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.

Instead of balancing solely the right of self-determination, the principle of territorial integrity could be read literally in the *Declaration* as applying to every right in this human rights instrument. Such an expansive literal interpretation is not supported by other provisions in the *Declaration*.<sup>347</sup> First, a different interpretation from what currently exists under international law<sup>348</sup> would constitute a discriminatory double standard that would be contrary to the equality and non-discrimination provisions in the *Declaration*, as well as international law as a whole. Second, article 44 does not permit any provision in the *Declaration* to be construed in a manner that would diminish the existing rights of Indigenous peoples. Third, the preamble<sup>349</sup> of the *UN Declaration* makes explicit reference to the *Vienna Declaration and Programme of Action* in the context of the right of self-determination.

<sup>346</sup> See the following “saving clause” in *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 UN GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1971), reprinted in (1970) 9 I.L.M. 1292: “Nothing in the foregoing paragraphs [on the principles and right of self-determination of peoples] 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.” [emphasis added]

<sup>347</sup> See also Dalee Sambo Dorough, “Reflections on the UN Declaration on the Rights of Indigenous Peoples: An Arctic Perspective”, *supra* note 335.

<sup>348</sup> The right of self-determination and the principle of territorial integrity in the *UN Declaration* has been confirmed to reflect contemporary international law. See UN General Assembly, *Second International Decade of the World’s Indigenous People: Note by the Secretary-General*, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, in accordance with paragraph 1 of General Assembly resolution 63/161, UN Doc. A/64338 (4 September 2009), para. 44:

The Declaration affirms, in article 3, the right of indigenous peoples to self determination, in terms that restate the common provisions of article 1 of the two 1966 international human rights covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. *Reflecting the state of contemporary international law in relation to this principle* as well as the demands of indigenous peoples themselves, the affirmation of self determination in the Declaration is deemed compatible with the principle of territorial integrity and political unity of sovereign and independent States. [emphasis added]

<sup>349</sup> *UN Declaration*, *supra* note 1, sixteenth preambular para.



tion.<sup>350</sup> The *Vienna Declaration* balances the right of self-determination with the principle of territorial integrity, in the same terms as now exists in international law.<sup>351</sup>

### (f) Cultural Heritage and Intellectual Property

Article 31(1) of the *Declaration* affirms:

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.

In Canada's August 2007 Proposed Amendments,<sup>352</sup> the right to "control" and "protect" cultural heritage, traditional knowledge, and traditional cultural expressions is deleted from the above provision. In addition, the "right" to maintain, control, protect and develop their intellectual property over such heritage, knowledge and expressions was changed to "may have the right". At the OAS negotiations on a draft *American Declaration on the Rights of Indigenous Peoples*, the Harper government has refused to use the terms "tangible"<sup>353</sup> and "intangible"<sup>354</sup> in relation to

<sup>350</sup> *Vienna Declaration and Programme of Action*, *supra* note 102.

<sup>351</sup> *Ibid.* at para. 2.

<sup>352</sup> See *supra* note 310.

<sup>353</sup> "Tangible heritage" refers to both cultural and natural heritage of outstanding universal value. "Tangible cultural heritage" may include monuments and structures of an architectural or archaeological nature; buildings; sites and human-made elements with cultural significance. See, e.g., *Convention Concerning the Protection of the World Cultural and Natural Heritage*, adopted by the General Conference of the United Nations Educational, Scientific and Cultural Organization at its 17th Sess. in Paris, 23 November 1972, art. 1.

<sup>354</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, MISC/2003/CLT/CH/14, adopted by the General Conference of the United Nations Educational, Scientific, Cultural Organization at its 32nd Sess. in Paris, 17 October 2003, art. 2: "For the purposes of this Convention, 1. The 'intangible cultural heritage' means the practices, representations, expressions, knowledge, skills — as well as the instruments, objects, artefacts and cultural spaces associated therewith — that communities, groups and, in some cases, individuals recognize as part of their cultural heritage."

cultural heritage. These two aspects are interdependent<sup>355</sup> and both relate to Indigenous peoples.<sup>356</sup>

Canada's positions in regard to cultural heritage and traditional knowledge are not consistent with approaches being taken by international bodies<sup>357</sup> or in international instruments. For example, the *Convention on the Protection and Promotion of the Diversity of Cultural Expressions* recognizes "the importance of traditional knowledge as a *source of intangible and material wealth*, and in particular the knowledge systems of indigenous peoples . . . as well as the *need for its adequate protection and promotion*".<sup>358</sup>

In relation to intellectual property, the Harper government claims: "Throughout 2006 and 2007, Canada continued to advocate for . . . [a] negotiation process in order to achieve changes to *the most problematic portions* of the Declaration. With respect to substance, *our areas of greatest concern* relate to the portions of the text having to do with the following: . . . intellectual property".<sup>359</sup> This position is contradicted by an earlier government paper in late September 2006 that indicated in regard to intellectual property, "such concerns could have been dealt with in the context of a statement delivered at the time of adoption [of the *Declaration* at the General Assembly]."<sup>360</sup> At the time of the vote on the draft Declaration at the Human Rights Council on 29 June 2006, the Canadian government raised a few areas of concern but was silent on the issue of intellectual property.<sup>361</sup>

<sup>355</sup> *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, 2368 U.N.T.S. 3 (entered into force 20 April 2006), preamble: "Considering the deep-seated interdependence between the intangible cultural heritage and the tangible cultural and natural heritage". For a definition of "intangible cultural heritage", see art. 2 of the Convention.

<sup>356</sup> K. Matsuura, "Message of the Director-General of UNESCO on the occasion of the International Day of the World's Indigenous People — 9 August 2004", online: UNESCO <[http://portal.unesco.org/en/ev.php-URL\\_ID=22036&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=22036&URL_DO=DO_TOPIC&URL_SECTION=201.html)>: ". . . the conditions in which indigenous peoples live very often remain precarious. Their tangible and intangible cultural heritage is still vulnerable".

<sup>357</sup> See, e.g., Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Canada*, *supra* note 179 at para. 67: "The Committee recommends that the State party undertake the adoption and implementation of concrete plans, with relevant benchmarks and time frames . . . in the area of intellectual property for the protection and promotion of ancestral rights and traditional knowledge of Aboriginal peoples."

<sup>358</sup> *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, adopted at the General Conference of the United Nations Educational, Scientific and Cultural Organization, 33rd Sess., Paris (20 October 2005) (entered into force 18 March 2007), preamble. [emphasis added]

<sup>359</sup> INAC, "Update Paper", *supra* note 327.

<sup>360</sup> INAC, "Canada's Position", *supra* note 254.

<sup>361</sup> Canada, "Statement by Ambassador Paul Meyer, Head of Delegation, Working Group on the Draft Declaration on the Rights of Indigenous Peoples to the 1st Sess. of the Human Rights Council" (Statement delivered to the Human Rights Council, 1st Sess., 21st mtg., Geneva, 29 June 2006) [Canada, "Statement by Ambassador Paul Meyer"].

By early summer 2007, it became increasingly clear that the Canadian government was seeking major revisions<sup>362</sup> to the cultural heritage and intellectual property provisions in the *UN Declaration*. Intellectual property rights should not prevail over the human rights of Indigenous peoples.<sup>363</sup> Yet, in June 2007, Canada indicated that in regard to the rights of Indigenous peoples to cultural heritage in the *Declaration*, “the text goes well beyond current and evolving intellectual property rights regimes and could undermine complex negotiations in other fora”.<sup>364</sup>

This position does not reflect that of the World Intellectual Property Organization (WIPO) and other relevant international bodies. For example, in regard to the protection of traditional knowledge and traditional cultural expressions against misappropriation and misuse, “WIPO member States have . . . emphasized that no outcome of the work of WIPO in this area is excluded . . . They have also emphasized that *the work of WIPO should not prejudice developments in other forums*.”<sup>365</sup>

The Canadian government’s position is also contradicted by the United Nations Educational, Scientific and Cultural Organization (UNESCO). This prominent organization has confirmed that the *UN Declaration* “echoes the principles of the UNESCO Universal Declaration on Cultural Diversity (2001) and related Conventions — notably the 1972 World Heritage Convention, the 2003 Convention for the Safeguarding of the Intangible Cultural Heritage, and the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expressions.”<sup>366</sup>

<sup>362</sup> Arts. 11 and 31.

<sup>363</sup> See, e.g., UN Sub-Commission on the Promotion and Protection of Human Rights, *Intellectual property rights and human rights*, resolution 2000/7, adopted without a vote 17 August 2000, para. 3: “Reminds all Governments of the primacy of human rights obligations over economic policies and agreements”. [emphasis in original] See also *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, art. 2 (Guiding Principle 3): “The protection and promotion of the diversity of cultural expressions presuppose the recognition of equal dignity of and respect for all cultures, including the cultures of . . . indigenous peoples.”

<sup>364</sup> See “Non-Paper”, *supra* note 286 (28 June 2007), available in Hilario G. Davide, Jr., “Supplement to the Report of the Facilitator on the Draft Declaration on the Rights of Indigenous Peoples” (20 July 2007) Annex I, online: <<http://www.un.org/ga/president/61/letters/23July07/ReportSupplement-20July07.pdf>>. This “non-paper” was submitted by Canada and six other States (Australia, Colombia, Guyana, New Zealand, the Russian Federation and Suriname) to a closed meeting of the UN General Assembly hosted by Ambassador Davide. The seven States did not put their names on the “Non-Paper”. In this document, it was indicated that not all of these States shared all of the concerns raised therein.

<sup>365</sup> Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: World Intellectual Property Organization*, E/C.19/2007/3/Add.14, 22 March 2007, at 3, para. 3. [emphasis added]

<sup>366</sup> UNESCO, “Message from Mr. Koïchiro Matsuura, Director-General of UNESCO, on the occasion of the International Day of the World’s Indigenous People 9 August 2008”, online: <[http://www.un.org/esa/socdev/unpfii/en/news\\_internationalday2008.html](http://www.un.org/esa/socdev/unpfii/en/news_internationalday2008.html)>. UNESCO adds: “Each of these [instruments] recognizes the pivotal role of indigenous peoples as custodians of cultural diversity and biodiversity. Yet, in seeking to promote and protect indigenous cultures, these standard setting instruments also recognize the vulnerability of many of those cultures, the material, environmental and

In addition, the Committee on Economic, Social and Cultural Rights has commended Bolivia for adopting a law to implement the *UN Declaration*<sup>367</sup> and urged that:

[Bolivia] should develop a special intellectual property regime that protects the collective rights of the indigenous peoples, including their scientific products and traditional knowledge and traditional medicine. To this end the Committee recommends that a registry of intellectual property rights of indigenous peoples should be opened and that the State party should ensure that the profits derived therefrom benefit them directly.<sup>368</sup>

### (g) Free, Prior and Informed Consent (FPIC)

The Canadian government has raised particular concerns regarding “free, prior and informed consent. As elaborated below, FPIC is affirmed in various provisions of the *Declaration*.<sup>369</sup>

---

spiritual conditions of indigenous peoples, their worldviews and their intimate relationship with the land and natural resources in our rapidly changing world.”

<sup>367</sup> Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Bolivia*, UN Doc. E/C.12/1/BOL/CO/2 (8 August 2008), para. 8.

<sup>368</sup> *Ibid.* at para. 37. See also Committee on Economic, Social and Cultural Rights, General Comment No. 17, *The right of everyone to benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author (article 15, paragraph 1 (c), of the Covenant)*, 35th Sess., UN Doc. E/C.12/GC/17 (12 January 2006), para. 32:

In adopting measures to protect scientific, literary and artistic productions of indigenous peoples, States parties should take into account their preferences. Such *protection might include the adoption of measures to recognize, register and protect the individual or collective authorship of indigenous peoples under national intellectual property rights regimes and should prevent the unauthorized use of scientific, literary and artistic productions of indigenous peoples by third parties.* In implementing these protection measures, States parties should respect the *principle of free, prior and informed consent* of the indigenous authors concerned, the oral or other customary forms of transmission of scientific, literary or artistic production and, where appropriate, they should *provide for the collective administration by indigenous peoples of the benefits derived from their productions.* [emphasis added]

<sup>369</sup> *UN Declaration*, *supra* note 1, arts. 10, 11(2), 19, 28(1), 29(2) and 32(2).

In relation to Indigenous peoples, FPIC is increasingly used as a standard in diverse ways by international<sup>370</sup> and domestic<sup>371</sup> bodies and mechanisms. These include: UN treaty monitoring bodies,<sup>372</sup> special rapporteurs and other independent experts,<sup>373</sup> UN specialized agencies<sup>374</sup> and the Permanent Forum on Indigenous

<sup>370</sup> In regard to the International Labour Organization, see *Indigenous and Tribal Peoples Convention, 1989*, art. 4: “1. Special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned. 2. Such special measures shall not be contrary to the freely-expressed wishes of the peoples concerned.”

<sup>371</sup> *Cal et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 171, and *Coy et al. v. Attorney General of Belize and Minister of Natural Resources and Environment*, Claim No. 172, Consolidated Claims, Supreme Court of Belize, judgment rendered on 18 October 2007 by the Hon. Abdulai Conteh, Chief Justice, para. 136(d): “. . . order that the defendants cease and abstain from any acts that might lead the agents of the government itself, or third parties acting with its acquiescence or its tolerance, to affect the existence, value, use or enjoyment of the property located in the geographic area occupied and used by the Maya people of Santa Cruz and Conejo unless such acts are pursuant to their informed consent and in compliance with the safeguards of the Belize Constitution”. [emphasis in original]

<sup>372</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation XX-III (51) concerning Indigenous Peoples*, in General Assembly, *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd Sess., Supp. No. 18, UN Doc.A/52/18 (1997) Annex V at para. 5: “The Committee especially calls upon States parties to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return these lands and territories.” See also Human Rights Committee, *Concluding observations of the Human Rights Committee: Nicaragua*, UN Doc. CCPR/C/NIC/CO/3 (12 December 2008), para. 21.

<sup>373</sup> UN Commission on Human Rights, *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted pursuant to Commission resolution 2005/51, Addendum: Progress report on preparatory work for the study regarding best practices carried out to implement the recommendations contained in the annual reports of the Special Rapporteur*, E/CN.4/2006/78/Add.4, 26 January 2006, at 4, para. 11: “Free, prior and informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes.”

<sup>374</sup> United Nations Development Group, “United Nations Development Group Guidelines on Indigenous Peoples’ Issues”, *supra* note 48 at 25: “The principle of free, prior and informed consent is an integral part of the human rights based approach.”

Issues,<sup>375</sup> as well as by relevant bodies within the Inter-American human rights system.<sup>376</sup>

FPIC is the standard that was highlighted by the General Assembly and Member States in the objectives of the *Programme of Action for the Second International Decade of the World's Indigenous People*.<sup>377</sup> FPIC is also consistent with “the highest standards in the promotion and protection of human rights”,<sup>378</sup> which all State members of the Human Rights Council are bound to uphold.

The Indian Affairs Minister has indicated that “free, prior and informed consent when used as a veto” is a “core concern” for the government.<sup>379</sup> However, as evident in article 46, the provisions in the *Declaration* are generally *relative* in nature.<sup>380</sup> In interpreting and implementing the *Declaration*, the rights of others must be taken into account. The scope of specific rights and the degree of balancing required are determined by examining the facts and law in each particular situation.

Therefore, States that simply frame their FPIC concerns in terms of a “veto” are not analyzing the *Declaration* in a fair and balanced manner. In his September 2009 report, Special Rapporteur James Anaya has cautioned that “focusing the de-

<sup>375</sup> Permanent Forum on Indigenous Issues, *Ongoing priorities and themes: Note by the Secretariat*, E/C.19/2006/8, 26 March 2006, at 6-7, para. 10 (c): “In the context of the Millennium Development Goals, free, prior and informed consent should apply not only to land development initiatives, but to all development initiatives focused on improving the lives of indigenous peoples”. See also Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples’ rights and corporate social responsibility*, UN Doc. E/C.19/2009/CRP.8, Manila, Philippines (4 May 2009), para. 13: “According to the provisions of the [UN Declaration], extractive industries must not operate on indigenous lands or territories without obtaining the free, prior and informed consent (FPIC) of the relevant communities and Indigenous Peoples. This includes the right to say no to extraction or exploration.”

<sup>376</sup> *Case of the Saramaka People v. Suriname*, (Preliminary Objections, Merits, Reparations, and Costs), I/A Court H.R. Series C No. 172 (Judgment) 28 November 2007, para. 134 (the *UN Declaration* was cited in para. 131 of this case): “. . . the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions.”

<sup>377</sup> UN General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, *supra* note 309 at para. 9: “Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.”

<sup>378</sup> UN General Assembly, *Human Rights Council*, *supra* note 33 at para. 9.

<sup>379</sup> Letter from the Minister of Indian Affairs and Northern Development Chuck Strahl to Assembly of First Nations National Chief Phil Fontaine (10 December 2007) at 1.

<sup>380</sup> Few, if any, rights are said to be absolute: see generally D. Shelton, “Hierarchy of Norms and Human Rights: Of Trumps and Winners” (2002) 65 Sask. L. Rev. 301 (at the highest normative level, non-derogable rights include those relating to genocide, slavery and torture).

bate in this way is not in line with the spirit or character of the principles of consultation and consent as they have developed in international human rights law and have been incorporated into the Declaration.”<sup>381</sup>

States are generally required to “achieve the ends of th[e] Declaration” in “consultation and cooperation” with Indigenous peoples.<sup>382</sup> In regard to Indigenous peoples’ lands and territories, two provisions in the *Declaration* require the “free, prior and informed consent” of the Indigenous peoples concerned. These articles relate to forcible removal of Indigenous peoples<sup>383</sup> and storage and disposal of hazardous materials.<sup>384</sup> Two other provisions have a different formulation, requiring States to “consult and cooperate in good faith with the indigenous peoples concerned . . . in order to obtain” their free, prior and informed consent. These articles relate to administrative and legislative matters adopted by the State<sup>385</sup> and to approval of projects affecting Indigenous lands, territories or resources.<sup>386</sup>

Each of the four provisions cited above requires a balanced and reasonable interpretation. In relation to FPIC or, more generally, the duty to consult, it is clear that extreme or absolutist interpretations lack validity.<sup>387</sup> Rather, what is necessary is “a purposive interpretation of the various relevant articles of the United Nations Declaration on the Rights of Indigenous Peoples, in light of other international instruments and related jurisprudence”.<sup>388</sup>

In many cases, even after the rights of others are fully and fairly considered, the FPIC of Indigenous peoples must prevail. In *Haida Nation*, Canada’s highest court has ruled that the nature and scope of the Crown’s duty to consult would require the “full consent of [the] aboriginal nation . . . on very serious issues”.<sup>389</sup>

381 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, *supra* note 78 at para. 48.

382 *UN Declaration*, *supra* note 1, art. 38.

383 *Ibid.*, art. 10.

384 *Ibid.*, art. 29, para. 2.

385 *Ibid.*, art. 19.

386 *Ibid.*, art. 32, para. 2.

387 See, e.g., Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, *supra* note 78 at para. 43: “It would be unrealistic to say that the duty of States to consult directly with indigenous peoples through special, differentiated procedures applies literally, in the broadest sense, whenever a State decision may affect them, since almost all legislative and administrative decisions that a State adopts may affect the indigenous peoples of the State along with the rest of the population in one way or another.”

388 *Ibid.*

389 *Haida Nation v. British Columbia (Minister of Forests)*, *supra* note 199 at para. 24: “The Court’s seminal decision in *Delgamuukw*, *supra*, at para. 168, in the context of a claim for title to land and resources, confirmed and expanded on the duty to consult, suggesting the content of the duty varied with the circumstances: from a minimum “duty to discuss important decisions” where the “breach is less serious or relatively minor”; through the “significantly deeper than mere consultation” that is required in “most cases”; to “full consent of [the] aboriginal nation . . .” on very serious issues. These words apply as much to unresolved claims as to intrusions on settled claims.”

To date, the government of Canada has not substantively addressed this criterion of “consent”<sup>390</sup> in its Guidelines on consultation and accommodation.<sup>391</sup> It is irresponsible for the government to fail to provide any indicators as to what may constitute “very serious issues”. It appears that the predominant focus is on those potential consequences that are less serious. The government’s Guidelines should substantively address a full range of issues. All essential guidelines should be determined together with Indigenous peoples, consistent with international human rights standards.

#### (h) Opposing the Declaration in the Climate Change Context

At the December 2008 world meeting on climate change in Posnan, Poland,<sup>392</sup> it is reported that Canada, Australia, New Zealand and the United States spearheaded the removal of any references to the term “rights” in relation to Indigenous peoples or to the *UN Declaration on the Rights of Indigenous Peoples*.<sup>393</sup> Those same States “used the phrase ‘indigenous people’ instead of ‘indigenous peoples’ with an ‘s’ which is the internationally accepted language”.<sup>394</sup> Further, in a press conference in Poland, Canada’s Environment Minister Jim Prentice claimed that the *UN Declaration* “has nothing whatsoever to do with climate change”.<sup>395</sup>

<sup>390</sup> *Delgamuukw v. British Columbia*, *supra* note 216 at para. 168: “In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”

<sup>391</sup> In regard to the requirement of obtaining Aboriginal “consent”, there is only one minor reference in the government’s Interim Guidelines. See Government of Canada, “Interim Guidelines for Federal Officials”, *supra* note 236 at 53: “An “established” right or title may suggest a requirement for consent from the Aboriginal group(s). As this is not always the case, it is important to consult legal counsel when making the assessment.”

<sup>392</sup> This meeting was the 14th Conference of Parties of the United Nations Framework Convention on Climate Change (UNFCCC), opened for signature 4 June 1992, S. Treaty Doc. 102–38 (1992), 31 I.L.M. 849 (1992) (entered into force 21 March 1994).

<sup>393</sup> Victoria Tauli-Corpus (Executive Director, TEBTEBBA and Chair, UN Permanent Forum on Indigenous Issues), “International Human Rights Day 2008: A Sad Day for Indigenous Peoples”, Press Statement (10 December 2008). The references to Indigenous peoples and the *Declaration* were removed from United Nations Framework Convention on Climate Change (Subsidiary Body for Scientific and Technological Advice (SBSTA)), “Reducing emissions from deforestation in developing countries: approaches to stimulate action: Draft conclusions proposed by the Chair”, FCCC/SBSTA/2008/L.23 (10 December 2008), online: FCCC <<http://unfccc.int/resource/docs/2008/sbsta/eng/l23.pdf>>.

<sup>394</sup> *Ibid.* In regard to the term “peoples”, Tauli-Corpus adds: “This was a battle fought by indigenous peoples for more than 30 years within the United Nations. The ‘s’ in peoples means that indigenous peoples have the right to self-determination (Article 3, UN [Declaration]) and have collective rights.”

<sup>395</sup> Bill Curry & Martin Mittelstaedt, “Ottawa’s stand at talks hurting native rights, chiefs say” *Globe and Mail* (12 December 2008) A10.



Such actions serve to unfairly politicize Indigenous peoples' human rights. They also undermine global attempts to respond effectively to climate change. In addition, the above statement by Canada's Minister of the Environment detracts from a human rights-based approach to climate change.<sup>396</sup>

The *UN Declaration* includes a wide range of economic, social, cultural, political, spiritual and environmental rights that may be severely affected by the impacts of climate change.<sup>397</sup> Special Rapporteur S. James Anaya adds: "The Declaration further acknowledges indigenous peoples' inter-generational responsibilities, including environmental stewardship, with regard to their traditional lands, territories and resources (arts. 25 and 29)."<sup>398</sup> Overall, this universal human rights instrument is highly relevant in addressing the effects of climate change. The UN Permanent Forum on Indigenous Issues emphasizes the central importance of the *Declaration* in climate change issues:

The United Nations Declaration on the Rights of Indigenous Peoples should serve as a key and binding framework in the formulation of plans for development and should be considered fundamental in all processes related to climate change at the local, national, regional and global levels.<sup>399</sup>

<sup>396</sup> Previously, as Minister of Indian Affairs and Northern Development, Jim Prentice played a leading role in the Conservative government's strategy to oppose the *Declaration* at home and abroad. The government continues to defend ongoing tar sands oil development in Alberta, regardless of its adverse impacts on Indigenous peoples and climate change. In this regard, see, e.g., Letter from Greenpeace Canada to Jim Prentice, Minister of the Environment, Canada and Rob Renner, Minister of Environment, Alberta (11 December 2008) (endorsed by about 60 environmental and Indigenous organizations). See generally A. Nikiforuk, *Tar Sands: Dirty Oil and the Future of a Continent* (Vancouver/Toronto: Douglas & McIntyre Publishing Group, 2009); and J. Simpson, M. Jaccard & N. Rivers, *Hot Air: Meeting Canada's Climate Change Challenge* (Toronto: McClelland & Stewart, 2007).

<sup>397</sup> See Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights*, UN Doc. A/HRC/10/61 (15 January 2009) at para. 53: "The United Nations Declaration on the Rights of Indigenous Peoples sets out several rights and principles of relevance to threats posed by climate change." In regard to the wide-ranging impacts, see Tebtebba Foundation, *Guide on Climate Change & Indigenous Peoples* (Baguio City, Philippines: Tebtebba Foundation, 2008), at 11–22. See also Permanent Forum on Indigenous Issues, *Conference on Indigenous Peoples and Climate Change, Copenhagen, 21–22 February 2008, Meeting Report, Submitted by the International Work Group for Indigenous Affairs (IWGIA)*, UN Doc. E/C.19/2008/CRP.3 (10 March 2008), para. 4: "For indigenous peoples around the world, climate change brings different kinds of risks, brings threats to cultural survival and undermines indigenous human rights. The consequences of ecosystem changes have implications for the use, protection and management of wildlife, fisheries, and forests, affecting the customary uses of culturally and economically important species and resources."

<sup>398</sup> Human Rights Council, *Report of the Special Rapporteur, S. James Anaya, supra note 4* at para. 77.

<sup>399</sup> Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April–2 May 2008)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2008/43, E/C.19/2008/13, para.18.

In 2008, the World Conservation Congress of the International Union for the Conservation of Nature (IUCN) adopted a resolution to endorse and implement the *UN Declaration*.<sup>400</sup> This resolution recognizes that the *Declaration* is “the accepted international mechanism for relieving the tremendous pressures and crises faced by indigenous peoples throughout the world as they endeavor to protect indigenous ecosystems, including biological, cultural, and linguistic diversity”.<sup>401</sup>

The Deputy High Commissioner for Human Rights calls for a “human rights approach” to climate change. In this regard, she stresses: “As climate change will inevitably affect the enjoyment of human rights, safeguarding of human rights should be a key consideration in efforts to address the impact of climate change.”<sup>402</sup> Specifically in relation to Indigenous peoples, the Office of the High Commissioner for Human Rights urges “greater integration of human rights in climate change discussions”.<sup>403</sup>

As the UN Development Group cautions: “The direct and indirect impacts of climate change may threaten the very existence of the peoples of the Arctic, of small islands, high altitude areas, drylands and other vulnerable environments.”<sup>404</sup> In light of the growing dangers relating to climate change, the Canadian government should be adopting a principled approach,<sup>405</sup> in collaboration with Indigenous peoples. Such approach should be fully consistent with the promotion and protection of their human rights, as affirmed in the *UN Declaration*.<sup>406</sup>

<sup>400</sup> International Union for the Conservation of Nature (IUCN), “Implementing the United Nations Declaration on the Rights of Indigenous Peoples”, Resolution 4.052, adopted by the IUCN World Conservation Congress, 4th Sess., Barcelona, Spain, 5–14 October 2008, online: <<http://data.iucn.org/dbtw-wpd/edocs/WCC-4th-005.pdf>>.

<sup>401</sup> *Ibid.*, preamble.

<sup>402</sup> “Climate Change and Human Rights”, Address by Ms. Kyung-wha Kang, Deputy High Commissioner for Human Rights, Office of the United Nations High Commissioner for Human Rights, Conference of the Parties to the United Nations Framework Convention on Climate Change and its Kyoto Protocol, 3–14 December 2007, Bali, Indonesia, online: <<http://www.unhchr.ch/hurricane/hurricane.nsf/0/013DC0FAA475EC87C12573B10074796A?opendocument>>.

<sup>403</sup> Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: Office of the High Commissioner for Human Rights*, UN Doc. E/C.19/2008/4/Add.14 (14 February 2008) at para. 31 (Climate change and indigenous peoples).

<sup>404</sup> United Nations Development Group, *supra* note 48 at 18.

<sup>405</sup> See also Sheila Watt-Cloutier, “Returning Canada to a Path of Principle: an Arctic and Inuit Perspective”, Speech Notes for: The 9th LaFontaine-Baldwin Lecture Institute for Canadian Citizenship, Iqaluit, Nunavut, Canada (29 May 2009) at 30-31: “Instead of aggressively dealing with climate change and becoming an international leader in these global efforts, Canada has decided that the best way to defend its Arctic sovereignty is with the military through a new fleet of armed ice breakers. Canada, a peaceful nation, will now ‘defend’ the Arctic . . . Canada should take another approach — a more principled and human-centered approach.”

<sup>406</sup> *Anchorage Declaration*, agreed by consensus of the participants in the Indigenous Peoples’ Global Summit on Climate Change, Anchorage, Alaska (24 April 2009): “We uphold that the inherent and fundamental human rights and status of Indigenous Peo-

The 2009 *Anchorage Declaration* expresses the urgency and concern that Indigenous peoples feel globally in regard to the climate crisis:

We are deeply alarmed by the accelerating climate devastation brought about by unsustainable development. We are experiencing profound and disproportionate adverse impacts on our cultures, human and environmental health, human rights, well-being, traditional livelihoods, food systems and food sovereignty, local infrastructure, economic viability, and our very survival as Indigenous Peoples. . . . Mother Earth is no longer in a period of climate change, but in climate crisis.<sup>407</sup>

Yet the Canadian government rigidly demonstrates ongoing insensitivity to Indigenous rights and concerns. At the October 2009 meeting in Bangkok, Thailand on climate change, it is reported that the same few States that are opposed to the *UN Declaration* “are clearly not manifesting support for language respecting and recognizing indigenous’ peoples rights”.<sup>408</sup> Canada’s Environment Minister is still intent on lowering climate change expectations, goals and targets. The government continues to justify inadequate greenhouse gas emissions standards, at the expense of human rights and environmental security.<sup>409</sup>

Canada’s unbalanced and short-sighted approach is cause for growing concern.<sup>410</sup> Recent reports on climate change indicate that the adverse impacts are being seriously underestimated.<sup>411</sup> This exacerbates the challenges faced by present

---

ples, affirmed in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), must be fully recognized and respected in all decision-making processes and activities related to climate change.”

<sup>407</sup> *Anchorage Declaration*, agreed by consensus of the participants in the Indigenous Peoples’ Global Summit on Climate Change, Anchorage, Alaska (24 April 2009).

<sup>408</sup> Tebtebba, “Consolidating text: A process that MUST respect, recognize and promote indigenous peoples’ rights”, Indigenous Information Service No. 2, Bangkok Climate Talks, Bangkok, Thailand (7 October 2009), online: <[http://www.tebtebba.org/index.php?option=com\\_content&view=article&id=83:consolidating-text-a-process-that-must-respect-recognize-and-promote-indigenous-peoples-rights&catid=50:unpfii](http://www.tebtebba.org/index.php?option=com_content&view=article&id=83:consolidating-text-a-process-that-must-respect-recognize-and-promote-indigenous-peoples-rights&catid=50:unpfii)>.

<sup>409</sup> Shawn McCarthy, “Ottawa dashes hope for climate treaty in Copenhagen” *Globe and Mail* (23 October 2009) A1: “Canada will continue to insist that it should have a less aggressive target for emission reductions than Europe or Japan because of its faster-growing population and energy-intensive industrial structure, Mr. Prentice said in an interview Thursday.”

<sup>410</sup> Jeffrey Simpson, “Copenhagen climate-change talks will produce only disappointment” *Globe and Mail* (27 October 2009) A21: “As for Canada, its record on reducing emissions is recognized internationally to have disgraced the country’s good name. It broke all its promises at Kyoto. Domestic emissions continue to rise. What is known about the Harper government’s intentions has the world believing that, once again, Canada will talk a much better game than it delivers.”

<sup>411</sup> United Nations Environment Programme (Catherine P. McMullen & Jason Jabbour, eds.), *Climate Change Science Compendium* (Nairobi: EarthPrint, 2009) at iii (Achim Steiner, UN Environment Programme): “The Arctic, with implications for the globe, is emerging as an area of major concern. There is growing evidence that the ice there is melting far faster than had been previously supposed. Mountains glaciers also appear to

and future generations, especially Indigenous peoples. Regretfully, the Canadian government is failing to champion this environmental emergency<sup>412</sup> and is increasing the risks and consequences for all.<sup>413</sup>

### (i) Canada's Strategies at the OAS

Canada's arguments have repeatedly failed to convince other States. Nevertheless, the Canadian government has opposed the implementation of the *UN Declaration* at the Organization of American States.

In relation to the draft *American Declaration on the Rights of Indigenous Peoples*, representatives of States and Indigenous peoples met in Washington, D.C. in November 2007 for a special "meeting of reflection".<sup>414</sup> The government of Canada indicated that it "cannot accept the UN Declaration text as the starting point or minimum outcome for these negotiations".<sup>415</sup> No consideration was given that this regional human rights instrument should complement and reinforce the *UN Declaration*,<sup>416</sup> which constitutes a universal and principled framework for the promotion and protection of Indigenous peoples' human rights.

Only Canada and the United States have expressed opposition to using the *UN Declaration* as a minimum standard in the OAS negotiations. In April 2008, Can-

be retreating faster. Scientists now suggest that the Arctic could be virtually ice free in September of 2037 and that a nearly ice-free September by 2028 is well within the realms of possibility." See also Louis-Gilles Francoeur, "Ottawa 'oublie' des tonnes de GES, selon Greenpeace" *Le Devoir* (4 October 2009) A8; and Jeffrey Simpson, "It gets harder to ignore signs of climate change" *Globe and Mail* (2 October 2009) A13.

412 See, e.g., Jeffrey Simpson, "Canada and climate change: Nothing gets done, fingers get pointed" *Globe and Mail* (2 October 2009): "... climate change is something Mr. Harper has been forced to tackle with the greatest reluctance. He was long a skeptic about the science, and he has always feared the economic fallout of serious action. . . . He certainly does not want to upset anyone in the fossil-fuel-producing provinces of Alberta and Saskatchewan, which are the core of his party's political base." See also Bill Curry, "Global warming critics appointed to science boards" *Globe and Mail* (11 May 2009) A6: "Top Canadian scientists are accusing the Harper government of politicizing science funding and jeopardizing climate research by naming global warming critics to key boards that fund science."

413 Josée Boileau, "Les irresponsables", editorial *Le Devoir* (2 November 2009) A10 (irresponsible inaction and delay on climate change by the Conservative government of Canada).

414 Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), *Report of the Chair on the Meetings for Reflection on the Meetings of Negotiations in the Quest for Points of Consensus (Washington, D.C., United States — November 26–28, 2007)*, OEA/Ser.K/XVI, GT/DADIN/doc.321/08 (14 January 2008).

415 Canada, "Notes for a Statement by the Government of Canada at the Special Session of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples", Organization of American States, Washington, D.C. (26 November 2007).

416 See, e.g., UN General Assembly, *International Covenants on Human Rights*, Res. 62/147, 18 December 2007 (adopted without vote), preamble: "Recognizing the impor-

ada formally reserved its position on the final text under negotiation.<sup>417</sup> The government would no longer actively negotiate or table text, but would continue to be present and to occasionally speak about Canadian experience and perspectives.

In the event any final draft text did not adequately meet Canada's concerns, the government would block any future consensus unless two conditions were met. First, the document adopted must clearly indicate that Canada did not give its support; and second, there must be an explicit understanding that the *American Declaration* text therefore did not apply to Canada.<sup>418</sup>

The Indigenous Peoples' Caucus of the Americas emphasized that Canada's conditions "are inconsistent with the rule of law, international practice and domestic precedent within Canada and are, therefore, inappropriate, unacceptable and discriminatory."<sup>419</sup> The Caucus added:

. . . Canada is seeking to create a dangerous precedent within the OAS. That is, any State that chooses to oppose the adoption of any declaration within the Inter-American system could simply opt to oppose it and prevent its domestic application. This would severely undermine the principle of international cooperation that is a crucial element of the *UN Charter* and the *OAS Charter*. It would also undermine the progressive development of human rights within the Hemisphere.<sup>420</sup>

Canada's attempt to use the tradition of consensus within the OAS for the government's own self-serving political interests serves to undermine the Inter-American system and its essential human rights objectives. As James Anaya commented in a presentation to the OAS that same day:

In the process of negotiation . . . the goal of consensus should not be used to impede progress on a progressive text. Consensus does not imply a veto power of every participant at every step . . . Consensus does not mean perfect unanimity of opinion nor bowing to the lowest common denominator. It

---

tance of regional human rights instruments and monitoring mechanisms in complementing the universal system of promotion and protection of human rights". See also *Vienna Declaration and Programme of Action*, *supra* note 102, Part I, at para. 37: "Regional arrangements play a fundamental role in promoting and protecting human rights. They should reinforce universal human rights standards, as contained in international human rights instruments, and their protection."

417 Canada, "Canada's Statement to the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples: April 14, 2008", in OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, *Report of the Chair on the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (United States, Washington, D.C., April 14 to 18, 2008)*, OEA/Ser.K/XVI, GT/DADIN/doc. 339/08 (2008) at 35 [OAS, *Report of the Chair on the Eleventh Meeting*].

418 Canada, "Canada's Statement to the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples", *supra* note 417, Appendix V, at 35.

419 Indigenous Peoples' Caucus of the Americas, "The Positions of Canada and the United States Expressing Reservations and Opposing Consensus are Unacceptable: Response of the Indigenous Peoples' Caucus of the Americas, Washington, D.C., April 15, 2008" in OAS, *Report of the Chair on the Eleventh Meeting*, *supra* note 417 at 42.

420 *Ibid.* at 43.

means coming together in a spirit [of] mutual understanding and common purpose to build and settle upon common ground.<sup>421</sup>

The arguments of the government of Canada do not justify its aggressive opposition to the adoption and implementation of the *UN Declaration*. Over 100 scholars and experts in Canada have reached similar conclusions in May 2008:

No credible legal rationale has been provided to substantiate these extraordinary and erroneous claims. . . . We are concerned that the misleading claims made by the Canadian government continue to be used to justify opposition, as well as impede international cooperation and implementation of this human rights instrument.<sup>422</sup>

In May 2007, the UN Committee on the Elimination of Racial Discrimination did not accept Canada's reasons for opposing the *Declaration*. The Committee indicated its regret in "the change in the position" of Canada from the previous government and recommended that Canada "support the immediate adoption of the United Nations Declaration".<sup>423</sup>

## 7. LEGAL STATUS OF UN DECLARATION AND APPLICATION BY CANADIAN COURTS

A central aspect of the Canadian government's strategy against the *UN Declaration* is exemplified by the following "boiler-plate"<sup>424</sup> statement:

As explained in our statement to the [General] Assembly,<sup>425</sup> delivered prior to the vote, this Declaration has no legal effect in Canada, and its provisions do not represent customary international law. It is therefore inappropriate for the Special Rapporteur to promote the implementation of this Declaration with respect to Canada.<sup>426</sup>

By proclaiming that the *Declaration* has "no legal effect in Canada" and "its provisions do not represent customary international law", the Conservative government is indicating that this international instrument has no application in Canada. Since Canada voted against the resolution that adopted the *Declaration*, it feels justified in invoking the above conclusions.

<sup>421</sup> S.J. Anaya, Presentation, 14 April 2008, in OAS, *Report of the Chair on the Eleventh Meeting*, *supra* note 417 at 27.

<sup>422</sup> "UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument", Open Letter, *supra* note 201.

<sup>423</sup> Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, *supra* note 115 at para. 27.

<sup>424</sup> Similar statements have been made by the Tory government in a wide range of international forums. See, e.g., Canada, "Statement by Ambassador Paul Meyer", *supra* note 361.

<sup>425</sup> Canada, "Statement by Ambassador John McNee, Permanent Representative of Canada to the United Nations to the 61st Session of the General Assembly on the Declaration on the Rights of Indigenous Peoples", New York (13 September 2007).

<sup>426</sup> Canada, "Statement to the Human Rights Council on the Mandate of the UN Special Rapporteur on the situation of the human rights and fundamental freedom of indigenous people", Geneva, 26 September 2007.

Further, in the Convention on Biological Diversity (CBD)<sup>427</sup> process relating to Indigenous peoples and their rights, the Canadian delegation “objected to the use of the United Nations Declaration on the Rights of Indigenous Peoples as an international standard.”<sup>428</sup> As illustrated throughout this article, Canada’s position runs counter to the positive approaches, statements and conclusions of the UN Secretary-General; High Commissioner for Human Rights; Human Rights Council and its mandate-holders of special procedures; treaty monitoring bodies; Expert Mechanism on the Rights of Indigenous Peoples; Permanent Forum on Indigenous Issues; Special Rapporteurs and other independent experts; and UN specialized agencies.<sup>429</sup>

This appears to be the first time that Canada is vigorously opposing a human rights instrument adopted by the General Assembly.<sup>430</sup> In its December 2007 report, Amnesty International cautions that this position by Canada “attempts to set a very dangerous precedent for UN human rights protection”.<sup>431</sup> The report adds:

The proposition that governments can opt out . . . by simply voting against a Declaration, resolution or other similar document, even when an overwhelming majority of states have supported the new standards, *dramatically undercuts the integrity of the international human rights system*.<sup>432</sup> . . . It is impossible to recall a similar example of Canada taking such a *harmful position* on the basic principles of global human rights protection.<sup>433</sup>

In addition to setting a dangerous precedent, Canada’s arguments against the application of the *Declaration* in Canada are inaccurate. This is examined below.

<sup>427</sup> *Convention on Biological Diversity*, concluded at Rio de Janeiro (5 June 1992) (entered into force 29 December 1993), reprinted in (1992) 31 I.L.M. 818.

<sup>428</sup> *Convention on Biological Diversity, Report of the Ad Hoc Open-Ended Working Group on Access and Benefit-Sharing on the Work of its Fifth Meeting*, UNEP/CBD/WG-ABS/5/8 (15 October 2007), para. 83.

<sup>429</sup> In the Human Rights Council resolution that creates the Expert Mechanism, the only international human rights instrument that is explicitly highlighted is the *UN Declaration*: see Human Rights Council, *Expert mechanism on the rights of indigenous peoples*, Res. 6/36 (14 December 2007), preamble.

<sup>430</sup> In 1948, Canada initially abstained from the vote on the *Universal Declaration on Human Rights* in the Committee that considered it. However, Canada voted in favour of the *Universal Declaration on Human Rights* in the full General Assembly. See Louise Arbour, “6th Annual Lafontaine-Baldwin Lecture, La Capitale, Québec City, Québec, Friday 4 March 2005” in Rudyard Griffiths, ed., *Dialogue on Democracy: The Lafontaine-Baldwin Lectures: 2000–2005* (Toronto: Penguin, 2006) 153 at 161: “. . . the initial abstention decision embarrassed Canada internationally, and in the words of Professor William Schabas, ‘left a blemish that fifty years have not erased.’”

<sup>431</sup> Amnesty International (Canada), “Canada and the International Protection of Human Rights: *An Erosion of Leadership?*”, *supra* note 290 at 7.

<sup>432</sup> *Ibid.* [emphasis added]

<sup>433</sup> *Ibid.* at 8. [emphasis added]

**(a) Legal Effect of UN Declaration**

The government is incorrect in declaring that the *UN Declaration* “has no legal effect in Canada”. Such statements cannot dictate, or prevail over, the rulings of Canadian courts. For example, in the 1987 *Reference re Public Service Employee Relations Act (Alta.)*, Chief Justice Dickson stated:

The various sources of international human rights law — *declarations, covenants, conventions, judicial and quasi-judicial decisions of international tribunals, customary norms* — must, in my opinion, be *relevant and persuasive sources for interpretation* of the Charter’s provisions.<sup>434</sup>

Within their respective mandates, international<sup>435</sup> and regional<sup>436</sup> bodies are free to rely upon the *UN Declaration* in interpreting the rights of Indigenous peoples in Canada and elsewhere. As already described,<sup>437</sup> in the Indigenous context, the *Declaration* can be used to interpret other international human rights instruments.<sup>438</sup>

<sup>434</sup> *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, 1987 CarswellAlta 705, 1987 CarswellAlta 580 at 348 (S.C.C.). [emphasis added] This same passage has been cited with approval in subsequent cases: see *McIvor v. Canada (Registrar of Indian & Northern Affairs)*, [2007] 3 C.N.L.R. 72, 2007 CarswellBC 1327 (B.C. S.C.); additional reasons at (2007), 2007 CarswellBC 2891 (B.C. S.C.); reversed (2009), 2009 CarswellBC 843 (B.C. C.A.); leave to appeal refused (2009), 2009 CarswellBC 2987, 2009 CarswellBC 2988, ¶184 (S.C.C.); and *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 CarswellBC 273, 2001 CarswellBC 272, ¶80 (S.C.C.).

<sup>435</sup> International bodies can invoke the *UN Declaration*, even if a given State opposes it. See Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc. CERD/C/USA/CO/6 (8 May 2008), para. 29: “While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.”

<sup>436</sup> *Case of the Saramaka People v. Suriname*, *supra* note 376 at para. 131 (citing *UN Declaration*, art. 32 relating to development projects and free, prior and informed consent).

<sup>437</sup> See text accompanying *supra* note 149.

<sup>438</sup> See, e.g., Committee on the Rights of the Child, *Concluding observations: The Plurinational State of Bolivia*, UN Doc. CRC/C/BOL/CO/4 (2 October 2009), at para. 3; and Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Fiji*, CERD/C/FJI/CO/17 (16 May 2008), at para. 13. See also Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (12 February 2009), at para. 82: “. . . the Committee urges States parties to adopt a rights-based approach to indigenous children based on the Convention and other relevant international standards, such as ILO Convention No.169 and the United Nations Declaration on the Rights of Indigenous Peoples.”



Despite Canada's objections, the *UN Declaration* is already being used at the OAS as "the baseline for negotiations and . . . a minimum standard" for the draft *American Declaration*.<sup>439</sup> Moreover, the Inter-Agency Support Group on Indigenous Issues at the UN has emphasized the "legal" and other significance of the *UN Declaration*.<sup>440</sup>

At the domestic level, Canadian courts have the legal capacity to take into account the *Declaration* in interpreting Indigenous peoples' rights. For interpretative purposes, such courts can invoke any human rights instrument, regardless of whether it has been approved, acceded to or ratified.<sup>441</sup> In particular, international declarations have been cited by the judiciary on countless occasions.<sup>442</sup>

As the High Commissioner for Human Rights has emphasized: "Human rights protection can only be achieved by national actors operating under the international normative framework, and in cooperation with the international human rights protection machinery."<sup>443</sup> Human rights bodies in Australia and New Zealand have already declared that they will use the *Declaration* as a standard in their work, despite the opposition of their national governments.<sup>444</sup>

In considering the legal effect of the *UN Declaration*, it is useful to determine its legal status under international law. The *Declaration* was adopted as an Annex to a General Assembly resolution. General Assembly resolutions, including decla-

<sup>439</sup> Organization of American States (Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples), "Report of the Chair . . .", *supra* note 414 at 3: "The majority of States and all of the indigenous representatives supported the use of the UN Declaration as the baseline for negotiations and indicated that this represented a minimum standard for the OAS Declaration. Accordingly, the provisions of the OAS Declaration ha[ve] to be consistent with those set forth in the United Nations Declaration." See also text accompanying *supra* note 414.

<sup>440</sup> Inter-Agency Support Group on Indigenous Issues, Statement on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at its Annual Meeting in September 2007: "The Declaration sends out a clear message to the entire international community, reaffirming the human rights of the world's indigenous peoples. This landmark action of the United Nations bears political, legal, symbolic and moral significance".

<sup>441</sup> W.A. Schabas & S. Beaulac, *supra* note 69 at 87: ". . . the distinction . . . between ratified and unratified instruments has generally been ignored. Canadian judges rarely, if ever, consider international law sources by taking into account whether they have a legally binding effect on Canada. Instead, they tend to consider all sources of international law as 'relevant and persuasive'."

<sup>442</sup> For a lengthy list of examples where Canadian courts have referred to declarations, see W.A. Schabas & S. Beaulac, *supra* note 69 at 136, n. 90. See also Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, supra* note 4 at 16, para. 54: "Even if not empowered to directly apply the Declaration, domestic courts may and should use the Declaration as an interpretive guide in applying provisions of domestic law."

<sup>443</sup> United Nations High Commissioner for Human Rights, "National human rights institutions as a catalyst for change", Statement by Ms. Louise Arbour, delivered to the Canadian Human Rights Commission, Ottawa (22 October 2007), at 4.

<sup>444</sup> See text accompanying *supra* note 55.

rations, are generally considered to be non-binding.<sup>445</sup> However, such instruments may have diverse legal effects<sup>446</sup> both presently and in the future:

. . . General Assembly resolutions do not *per se* create binding international law. That said, they may either influence or reflect international law in several ways. First, as the [International Court of Justice] concluded in the *Nicaragua Case*,<sup>447</sup> they may be *evidence of opinio juris*<sup>448</sup> which confirms the existence of a rule of customary international law. Second, they may be invoked as an authoritative interpretation of a binding treaty obligation, such as those set out in the UN Charter. Third, they may be regarded as assessments of general principles of law accepted by States, a third source of international law anticipated in Article 38 of the Statute of the International Court of Justice . . . And in all of these various ways, they may influence the practice and *opinio juris* of states and, thus, the future content of customary international law.<sup>449</sup>

The value of “hard” law instruments, such as international conventions or treaties, should not be underestimated. At the same time, it is important to appreciate that “soft” law instruments, such as resolutions and declarations adopted by the General Assembly and other multinational forums, can have diverse uses and benefits. This may well be the case both domestically and internationally. In various situations, their use may prove more advantageous than resorting to hard law instruments. As Kenneth Abbott and Duncan Snidal explain:

Soft law offers many of the advantages of hard law . . . and has certain advantages of its own. Importantly because one or more of the elements of legalization can be relaxed, softer legalization is often easier to achieve than hard legalization. . . . Soft law also provides certain benefits not available under hard legislation. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time. In addition, soft law facilitates compro-

<sup>445</sup> H.M. Kindred *et al.*, eds., *International Law: Chiefly as Interpreted and Applied in Canada*, 6th ed. (Toronto: Emond Montgomery Publications, 2000) at 157: “Under the Charter, the General Assembly has clear authority to make binding decisions only with respect to budgetary and administrative matters of the United Nations. (See art. 17 . . .) For all its other work, the General Assembly is empowered to make “recommendations” (articles 10–16), which are not considered binding *per se* but can have value as means for the determination of international law.”

<sup>446</sup> See also R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994) at 24–25: “. . . in the *Namibia Advisory Opinion* . . . The Court . . . found that the General Assembly resolutions, while manifestly not binding, were not without legal effect . . .” See *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276*, Advisory Opinion, [1971] I.C.J. Rep. 16.

<sup>447</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, [1986] I.C.J. Rep. 14.

<sup>448</sup> “*Opinio juris*” refers to a sense of legal duty that motivates States to adhere to a particular State practice. See *infra* note 463 and accompanying text.

<sup>449</sup> J.H. Currie, C. Forcese & V. Oosterveld, *International Law: Doctrine, Practice, and Theory* (Toronto: Irwin Law, 2007) at 130.

mise, and thus mutually beneficial cooperation, between actors with different interests and values . . . and different degrees of power.<sup>450</sup>

In the case of the *UN Declaration*, it affirms Indigenous peoples' human rights, highlights international and national obligations, and elaborates universal standards. The *Declaration* also provides for the implementation of all its provisions, with the collaboration of Indigenous peoples, by international institutions and States.<sup>451</sup> These essential elements in the *Declaration* are highly beneficial, especially since it did not seem feasible to negotiate a convention during the past 25 years.<sup>452</sup> Regardless of whether the *Declaration* constitutes the first step towards the realization of a convention, the *Declaration* has diverse merits in its own right.<sup>453</sup>

At the international level, soft law is utilized much more than traditional law-making and clearly outpaces its ability to generate international norms.<sup>454</sup> Further, as Dinah Shelton indicates: "The line between law and not-law may appear blurred. Treaty mechanisms are including more 'soft' law obligations, such as undertakings to endeavor to strive to cooperate. Non-binding instruments in turn are incorporating supervisory mechanisms traditionally found in hard law texts. Both types of procedures may have compliance procedures that range from soft to hard. . . . In

<sup>450</sup> K. Abbott & D. Snidal, "Hard and Soft Law in International Governance" in C. Ku & P.F. Diehl, eds., *International Law: Classic and Contemporary Readings*, 3d ed. (Boulder, Colorado: Lynne Rienner Publishers, 2009) 21 at 22-23.

<sup>451</sup> In addition to specific processes or mechanisms in the *Declaration*, *supra* note 1, see generally arts. 37-42. These implementation provisions are further reinforced, *inter alia*, by preambular paras. 7, 8, 14, 18 -21 and 24.

<sup>452</sup> A. Roberts, "Traditional and Modern Approaches to Customary International Law: A Reconciliation" in C. Ku & P.F. Diehl, eds., *supra* note 450 at 68: "While hard law that is always enforced may be preferable to soft law, the choice in areas such as human rights is often between soft law and no law."

<sup>453</sup> See, e.g., D. Shelton, "Editor's Concluding Note: The Role of Non-binding Norms in the International Legal System" in D. Shelton, ed., "Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System" (Oxford/New York: Oxford University Press, 2003) 554 at 555: "In the field of human rights, soft law usually preceded hard law in the past, helping to build consensus on the norms. . . . The situation has changed now that the 'easy' topics on which there was widespread consensus have been completed and there are fewer treaties being concluded on the global level. Instead, the United Nations increasingly adopts declarations without subsequent treaties."

<sup>454</sup> See C. Ku & P.F. Diehl, "Filling in the Gaps: Extrasystemic Mechanisms for Addressing the Imbalances Between International Legal Operating and Normative Systems" in C. Ku & P.F. Diehl, eds., *supra* note 450 at 178: ". . . soft law is also a phenomenon that is here to stay because international affairs have outpaced the ability of the traditional law-making machinery 'through international organizations, specialized agencies, programmes, and private bodies . . .'" (quoting in part C. Chinkin, "Normative Development in the International Legal System" in D. Shelton, ed., *supra* note 453, 21 at 42).

fact, it is rare to find soft law standing in isolation”.<sup>455</sup> Professor Shelton adds: “Soft law can be used to fill in gaps in hard law instruments or supplement a hard law instrument with new norms.”<sup>456</sup>

These characteristics appear to be particularly relevant to the *UN Declaration*. As is evident from this human rights instrument, a declaration *per se* allows for a great deal of flexibility. It is not limited in terms of the purposes, subject matters, language or implementation processes that it can address. In this regard, Christine Chinkin generally states: “There is a wide diversity in the instruments of so-called soft law which makes the generic term a misleading simplification. Even a cursory examination of these diverse instruments inevitably exposes their many variables in form, language, subject matter, participants, addressees, purposes, follow up and monitoring procedures.”<sup>457</sup>

A further aspect worth highlighting is that the *Declaration* can have legal effect insofar as it reflects customary international law. In September 2006, Canada’s Indian Affairs Minister restated that the *Declaration* does not represent customary international law.<sup>458</sup> At the same time, he added that, at least to some extent, the *Declaration* reflects international standards that are binding on Canada:

With respect to provisions of the *Draft Declaration*, such as those against racial discrimination, to the extent that they reflect standards that Canada has already accepted, such as the *Convention for the Elimination of Racial Discrimination*, Canada will continue to be bound by its international obligations.<sup>459</sup>

In regard to the prohibition against racial discrimination, it is binding on Canada as both a conventional treaty obligation and as customary international law.<sup>460</sup> This is also true for a number of other international obligations, rights or principles. In cases where norms exist both in a treaty and in customary international law, the treaty norm and the customary international norm each have a “separate applicability”.<sup>461</sup>

<sup>455</sup> D. Shelton, “Introduction: Law, Non-Law and the Problem of ‘Soft Law’” in D. Shelton, ed., *supra* note 453, 1 at 10.

<sup>456</sup> *Ibid.* at 14. See also C. Chinkin, “Normative Development in the International Legal System” in Dinah Shelton, ed., *supra* note 453, 21 at 36: “Soft law thus straddles international . . . and national . . . regulation and fills gaps. In this way it can be seen as a ‘bridge’ between international legality and legitimacy.”

<sup>457</sup> C. Chinkin, “The Challenge of Soft Law: Development and Change in International Law” (1989) 38 I.C.L.Q. 850.

<sup>458</sup> Letter from the Minister of Indian Affairs and Northern Development, Jim Prentice, to Assembly of First Nations National Chief Phil Fontaine (20 September 2006), Annex at 6 (copy on file with the author).

<sup>459</sup> *Ibid.*

<sup>460</sup> Committee on the Elimination of Racial Discrimination, *Statement on racial discrimination and measures to combat terrorism, A/57/18* (Chapter XI)(C.) (11 January 2002) at para. 4: “. . . the prohibition of racial discrimination is a peremptory norm of international law from which no derogation is permitted . . .”

<sup>461</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, *supra* note 447 at 94, para. 175: “. . . even if a treaty norm and a cus-

As Professor Malcolm Shaw explains: “Parties that do not sign and ratify the particular treaty in question are not bound by its terms. This is a general rule . . . However, where treaties reflect customary law then non-parties are bound, not because it is a treaty provision but because it reaffirms a rule or rules of customary international law.”<sup>462</sup>

Such rules have important implications for the application of the *Declaration*. The existing norms of customary international law affirmed by the *Declaration* apply to Canada regardless of its opposition to this human rights instrument.

### (b) UN Declaration and Customary International Law

A norm of customary international law has binding effect when: (i) most countries adhere to the norm in practice, and (ii) those countries follow the norm because they feel obligated to do so by a sense of legal duty (*opinio juris*).<sup>463</sup> No State can exercise a veto over the emergence of a customary norm.<sup>464</sup>

Absolute adherence by all States is not necessary in order to establish a customary rule. Rather, the conduct of States should, in general, be consistent with such rules. Thus, instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule.<sup>465</sup>

With respect to the Indigenous context, evidence of State practice may be found at both the international<sup>466</sup> and domestic<sup>467</sup> level.<sup>468</sup> Different levels of

---

tomary norm . . . were to have exactly the same content, this would not be reason for the Court to take the view that the operation of the treaty process must necessarily deprive the customary norm of separate applicability.” Similarly, see M. Shaw, *International Law*, 4th ed. (Cambridge: Cambridge University Press, 1997) at 76.

<sup>462</sup> M. Shaw, *International Law*, *supra* note 461 at 75.

<sup>463</sup> A. Cassese, *International Law*, 2d ed. (Oxford/New York: Oxford University Press, 2005) at 156: “. . . custom is made up of two elements: general practice, or *usus or diuturnitas*, and the conviction that such practice reflects, or amounts to, law (*opinio juris*) or is required by social, economic, or political exigencies (*opinio necessitates*).” See also *Statute of the International Court of Justice*, concluded at San Francisco, 26 June 1945, entered into force, 24 October 1945. Art. 38.1(b) lists among the sources of law that the Court shall apply, “international custom, as evidence of a general practice accepted as law”.

<sup>464</sup> R. Higgins, *supra* note 446 at 34.

<sup>465</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, *supra* note 447 at 98, para. 186.

<sup>466</sup> Internationally, examples of relevant practices include, international judicial decisions, provisions in treaties and other international instruments, and official governmental conduct, as well as the practice of international and regional governmental organizations, such as the United Nations and the Organization of American States and their organs.

<sup>467</sup> At the domestic level, examples of relevant practices include judicial decisions, constitutional and other laws that affirm and safeguard indigenous rights.

<sup>468</sup> For a broad description of such normative processes, see S.J. Anaya & R.A. Williams, Jr., “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources

proof may be found in UN resolutions and declarations,<sup>469</sup> as well as in the writings of prominent jurists.<sup>470</sup> Ratification of international human rights treaties “provides compelling evidence of both state practice and *opinio juris*”.<sup>471</sup>

Customary international law, when proven, is binding in the same way as treaties. However, its existence does not require or depend on any treaty or other written instrument. Defining the scope of customary international norms can still prove highly difficult, particularly in relation to human rights.<sup>472</sup>

It is inaccurate for the Canadian government to declare that the provisions of the *Declaration* “do not represent customary international law”.<sup>473</sup> Various rights, obligations and principles affirmed in the *Declaration* are considered to be customary international law — if not also peremptory norms.<sup>474</sup>

Examples in the *Declaration* include, *inter alia*: the general principle of international law<sup>475</sup> of *pacta sunt servanda* (“treaties must be kept”),<sup>476</sup> the prohibition

Under the Inter-American Human Rights System” (2001) 14 Harv. Hum. Rts. J. 33 at 53–55.

<sup>469</sup> S. Narula, “The Right to Food: Holding Global Actors Accountable Under International Law” (2006) 44 Colum. J. Transnat’l L. 691 at 787: “Declarations provide additional evidence of state practice and, in some circumstances, *opinio juris*. Multi-state declarations are gaining importance as states increasingly act collectively by forming conferences, groups, and compacts.”

<sup>470</sup> *Ibid.* at 779.

<sup>471</sup> *Ibid.*

<sup>472</sup> W.A. Schabas & S. Beaulac, *supra* note 69 at 68.

<sup>473</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, supra* note 4 at para. 41: “Albeit clearly not binding in the same way that a treaty is, the Declaration relates to already existing human rights obligations of States . . . In addition, insofar as they connect with a pattern of consistent international and State practice, some aspects of the provisions of the Declaration can also be considered as a reflection of norms of customary international law.”

<sup>474</sup> I. Brownlie, *Principles of Public International Law, supra* note 66 at 515: “[Peremptory norms or *jus cogens*] are rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect.”

<sup>475</sup> A. D’Amato, “The Concept of Human Rights in International Law” (1982) 82 Colum. L. Rev. 1110 at 1127: “. . . treaties containing generalizable principles of international law generate rules of customary international law that bind even non-signatories.” See also A. Cassese, *International Law*, 2d ed., *supra* note 463 at 188: “. . . *general principles of international law* . . . are sweeping and loose standards of conduct that can be deduced from treaty and customary rules by extracting and generalizing some of their most significant points.”

<sup>476</sup> M.W. Janis, *An Introduction to International Law*, 2d ed. (Boston/New York/Toronto: Little, Brown & Company, 1993) at 65: “Probably no rule better fits the definition of a norm of *jus cogens* than *pacta sunt servanda*, for it is essential to the theory of both conventional and customary international law that contracts between states be legally binding.” The relevant provisions in the *UN Declaration* are preambular paras. 8 and 14, and art. 37.

against racial discrimination;<sup>477</sup> the right to self-determination;<sup>478</sup> the right to one's own means of subsistence;<sup>479</sup> the right not to be subjected to genocide;<sup>480</sup> the *UN Charter* obligation of States to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all";<sup>481</sup> and the requirement of good faith in the fulfilment of the obligations assumed by States in accordance with the *Charter*.<sup>482</sup> Some prominent jurists have highlighted that the rule banning gender discrimination is also now customary international law.<sup>483</sup>

<sup>477</sup> I. Brownlie, *Principles of Public International Law*, *supra* note 66. In regard to the prohibition of racial discrimination, the relevant provisions in the *UN Declaration* include: preambular paras. 5, 9, 18 and 22 and arts. 1, 2, 8(2)(e), 9, 14, 15(2), 16(1), 17(3), 21(1), 24(1), 29(1), 46(2) and 46(3).

<sup>478</sup> R. McCorquodale, "Self-Determination: A Human Rights Approach" (1994) 43 I.C.L.Q. 857 at 858: "This right [of self-determination] has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*." The relevant provisions in the *UN Declaration* are: preambular paras. 1, 16 and 17 and arts. 3 and 4. See also *Reference re Secession of Québec*, *supra* note 73 at para. 114: "The existence of the right of a people to self-determination is now so widely recognized in international conventions that the principle has acquired a status beyond 'convention' and is considered a general principle of international law."

<sup>479</sup> In relation to Indigenous peoples and the right of self-determination in identical art. 1 of the international human rights Covenants, see Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8: "... the Committee emphasizes that the right to self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (art. 1, para. 2)." In the *UN Declaration*, the provisions on subsistence are arts. 3 and 20(1).

<sup>480</sup> I. Brownlie, *Principles of Public International Law*, *supra* note 66 at 515. The relevant provision in the *UN Declaration* is art. 7.

<sup>481</sup> *UN Charter*, art. 1(3); see also arts. 55 c and 56. The relevant provisions in the *UN Declaration* are: PP1 and arts. 38 and 42. See also Office of the High Commissioner for Human Rights & International Bar Association, *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Professional Training Series No. 9 (New York/Geneva: United Nations, 2003), online: <<http://www.ohchr.org/Documents/Publications/training9chapter1en.pdf>> at 10: "It is ... beyond doubt that basic human rights obligations form part of customary international law."

<sup>482</sup> *UN Charter*, art. 2(2). See M. Shaw, *International Law*, *supra* note 461 at p. 81: "Perhaps the most important general principle, underpinning many international legal rules is that of good faith. The principle is enshrined in the United Nations Charter". The relevant provision in the *UN Declaration* is PP1.

<sup>483</sup> Louise Arbour, "National Human Rights Institutions as Catalysts for Change" (Key-note address delivered to the Canadian Human Rights Commission, Ottawa, 22 October 2007), at 3, online: <[http://www.chrc-ccdp.ca/whats\\_new/default-en.asp?id=438&content\\_type=2](http://www.chrc-ccdp.ca/whats_new/default-en.asp?id=438&content_type=2)> (customary law includes prohibition against discrimination towards women). The relevant provisions in the *UN Declaration* are arts. 22(2) and 44. See also M. Shaw, *International Law*, *supra* note 461 at 213: "Dis-

### (c) Application of UN Declaration in Canadian Courts

With regard to the application of the *UN Declaration* in Canadian courts, it can be invoked to reinforce other legal arguments that are a key aspect of any given litigation. This should be accomplished by adopting a human rights-based approach that uses the *Declaration* to further depict an Indigenous context. In so doing, the *Declaration* should be read as a whole and the various relevant provisions combined so as to construct strong and cohesive legal positions. Existing international human rights instruments should also be cited, using the *Declaration* to ensure more relevant, contextual interpretations of these instruments.

Through such a human rights-based approach, judicial interpretation of the Aboriginal and treaty rights of Indigenous peoples in Canada may be significantly strengthened. The *Declaration* may also be used to further the development or crystallization of new customary international law standards.

Generally, it may not prove effective to raise legal arguments based solely on the *UN Declaration* since it is *per se* a non-binding instrument. However, as illustrated above, in a number of instances, this comprehensive human rights instrument is declaratory<sup>484</sup> of customary international law. It may also provide evidence of *opinion juris* which confirms the existence of customary international law.<sup>485</sup>

In relation to existing customary international human rights norms that are reflected in the *Declaration*, they can be directly invoked in Canadian courts and independently provide the basis for a remedy.<sup>486</sup> In addition, these customary international standards can be of assistance in interpreting and applying domestic law.<sup>487</sup>

### (d) Persistent Objector Doctrine

To avoid being bound by the *Declaration* or any of its provisions, the government of Canada is also attempting to use the “persistent objector” doctrine. As illustrated below, the government is incorrectly applying this doctrine.

---

crimination on other grounds may also be contrary to customary international law, such as religion and gender.”

<sup>484</sup> G. van Ert, *Using International Law in Canadian Courts* (The Hague: Kluwer Law International, 2002), at p. 30, n. 78: “. . . a General Assembly resolution may represent customary international law. While such resolutions are generally not binding, they may in some cases be declaratory of customary international law.”

<sup>485</sup> See text accompanying *supra* note 449.

<sup>486</sup> A.F. Bayefsky, *International Human Rights Law: Use in Canadian Charter of Rights and Freedoms Litigation* (Toronto: Butterworths, 1992) at 17. See also W.A. Schabas & S. Beaulac, *supra* note 69 at 77: “Customary international law may be applied by Canadian courts without any need for an express legislative act, unless there is a clear conflict with statute law or common law.” Similarly, see the text accompanying *supra* note 72 quoting *R. v. Hape*.

<sup>487</sup> A.F. Bayefsky, *supra* note 486 at 20. Professor Bayefsky adds: “There is a presumption at common law that Parliament and the legislatures do not intend to act in breach of international law, either customary or conventional. Concomitantly . . . there is an interpretive presumption, applicable in the context of construing the Charter, that Parliament and the legislatures intend to fulfil Canada’s international obligations.”



The notion of “persistent objector” is described as follows:

... a persistent objector is a state that has actively and consistently denied the existence or applicability to it of a rule of customary international law prior to and since the crystallization of that rule. The effect of this is to escape the binding effect of the rule.<sup>488</sup>

In other words, the persistent objector doctrine would only apply to norms that may be in the process of becoming customary international law. The doctrine has no application to existing customary international law, including peremptory norms.<sup>489</sup> It has already been demonstrated that the *UN Declaration* contains certain provisions that are declaratory of existing customary international law, including peremptory norms. Therefore, the Canadian government cannot rely on the persistent objector doctrine in all such instances.

For example, the right to self-government is a political dimension of the right to self-determination.<sup>490</sup> Since the latter right is widely accepted as a customary international norm,<sup>491</sup> the Canadian government cannot invoke the “persistent objector” doctrine in relation to the right of self-government.

While many writers support the persistent objector “rule”, the legal precedents in its favour are weak. As Professor Antonio Cassese explains, “there is no firm support<sup>492</sup> in State practice and international case law for a rule on the ‘persistent objector’”. The only explicit contention in favour of this doctrine is set out in two *obiter dicta* of the ICJ (in *Asylum* and *Fisheries*) and in the pleadings of the UK and Norway in *Fisheries*.<sup>493</sup> Jonathon Charney similarly concludes, “the proponents of the persistent objector rule have not put forward persuasive evidence of State practice or even judicial opinions that would definitively establish the persistent objector rule”.<sup>494</sup>

Further, there appear to be no cited cases where an objector effectively maintained its status after the rule became well accepted in international law.<sup>495</sup> Thus,

<sup>488</sup> J.H. Currie, C. Forcese & V. Oosterveld, *supra* note 449 at 141.

<sup>489</sup> J. Charney, “The Persistent Objector Rule and the Development of Customary International Law” (1985) 56 B.Y.I.L. 1 at 19: “Not only are new States, as well as passive and subsequent objectors, bound, but all States are bound by rules of *jus cogens* whether they presently consent to be so bound or not.” See also R. Higgins, *Problems and Process: International Law and How We Use It*, *supra* note 446 at 21.

<sup>490</sup> See *supra* note 330.

<sup>491</sup> See *supra* note 478.

<sup>492</sup> *Ibid.*, p. 16.

<sup>493</sup> A. Cassese, *International Law*, 2d ed. *supra* note 463 at 163. See *Asylum Case (Colombia v. Peru)*, 1950 I.C.J. 266 at 277-78; and *Fisheries Case (U.K. v. Norway)*, 1951 I.C.J. 116 at 131. In the pleadings in the *Fisheries* case, “neither the Norwegian nor the British government provided any examples for the Court, although they concurred on the validity of the principle”: T. Stein, “The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law” (1985) 26 Harv. Int’l L.J. 457 at 460.

<sup>494</sup> J. Charney, *supra* note 489 at 16.

<sup>495</sup> *Ibid.* at 22. The author adds: “In fact, it is unlikely that such a status could be maintained in light of the realities of the international legal system. This is certainly the

commentators suggest that opposing States may have the effect of slowing down the formation of new customary international law. However, this does not amount to any legal entitlement to be exempted, once the rule has crystallized.<sup>496</sup>

In regard to international human rights issues, the persistent objector rule gives rise to additional considerations and concerns — which had not been previously discussed in the earlier *Fisheries* and *Asylum* cases. In particular, human rights are recognized internationally as universal in nature. As Holning Lau explains:

The human rights regime’s universalist assumption is at odds with the effects of the persistent objector doctrine. By allowing individual states to exempt themselves from international human rights law, the human rights regime’s universalist nature is necessarily compromised.<sup>497</sup>

Thus, Lau generally concludes that the persistent objector doctrine is not compatible with the international human rights context.<sup>498</sup> This conclusion is reinforced by the purposes and principles of the *UN Charter*, which obliges all member States to promote “universal respect for, and observance of, human rights and fundamental freedoms for all”. For example, the customary rule prohibiting racial discrimination matured during the period that South Africa consistently objected. Yet the persistent objector rule never prevented the application of the rule prohibiting racial discrimination to South Africa.<sup>499</sup>

Although the Canadian government takes the position that it has persistently objected to the *Declaration*, the facts reveal the opposite. In the August 2007 Proposed Amendments,<sup>500</sup> Canada and three other States submitted proposed revisions to 13 articles in the *UN Declaration*. Therefore, Canada did not object to the 24 preambular paragraphs and 33 other articles.

In regard to the 13 articles where changes were proposed by Canada, these articles either reflect Canadian practice<sup>501</sup> or were not persistently objected to by

---

plight that befell the US, the UK and Japan in the law of the sea. Their objections to expanded coastal State jurisdiction were ultimately of no avail”.

<sup>496</sup> A. Cassese, *International Law*, 2d ed., *supra* note 463 at 163.

<sup>497</sup> H. Lau, “Rethinking the Persistent Objector Doctrine in International Human Rights Law” (2005) 6 *Chicago J. Int’l L.* 495 at 501.

<sup>498</sup> *Ibid.* And at 503: “Principles of consent are not violated because that state already consented to the universality of human rights. Requesting an exception would be in violation of its original consent to universalism.”

<sup>499</sup> T. Stein, *supra* note 493 at 463.

<sup>500</sup> See *supra* note 310.

<sup>501</sup> In regard to Canada’s most problematic provision, art. 26 (lands, territories and resources), Canadian judicial decisions and land claims policies contradict what the government is now arguing. See text accompanying *supra* note 266. See also S.J. Anaya & R.A. Williams, Jr., “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System” (2001) 14 *Harv. Hum. Rts. J.* 33 at 55: “The relevant practice of states and international institutions establishes that, as a matter of customary international law, states must recognize and protect indigenous peoples’ rights to land and natural resources in connection with traditional or ancestral use and occupancy patterns.”

the previous Canadian government during the standard-setting process. When this was raised with Canadian officials, they erroneously indicated that the period for persistent objection only began at the General Assembly on 13 September 2007.<sup>502</sup>

Previous Canadian governments raised concerns regarding certain draft provisions in the two Working Groups that considered the draft *Declaration*. However, these concerns varied over the years and, in any event, did not constitute “persistent” objections. Rather, former Prime Minister Paul Martin indicated in a press conference in October 2006 that his government “would have unequivocally signed the declaration”.<sup>503</sup>

The objections by the Conservative government evolved slowly beginning in June 2006. Despite repeated requests from representatives of Indigenous peoples, the government chose not to disclose the full range of its objections.<sup>504</sup> Many government concerns, such as those relating to language, education, Indigenous legal systems, conservation and environmental protection; and intellectual property, were not publicly raised until late September 2006 when the government issued “Canada’s Position”.<sup>505</sup>

As already described,<sup>506</sup> a Motion was adopted in April 2008 by a majority of the Members of the House of Commons. This Motion called for the government to endorse the *UN Declaration* and for the Parliament and government of Canada to “fully implement the standards contained therein”. This raises the basic question as to whether the minority Conservative government can even claim to be a “persistent objector” to the *Declaration*, since its own Parliament has formally indicated its full endorsement of this human rights instrument by a majority vote. It is undemocratic for the government to deny the will of Parliament.

As an elected member of the Human Rights Council, Canada accepted in June 2006 the commitment to “uphold the highest standards in the promotion and protection of human rights . . . [and] fully cooperate with the Council”.<sup>507</sup> This cooperation includes Canada supporting the Council in carrying out its responsibility “for promoting *universal* respect for the protection of all human rights . . . for all, without distinction of any kind and in a fair and equal manner”.<sup>508</sup> Such consent, ex-

<sup>502</sup> Communication made by the Canadian government’s legal counsel at an informal meeting with representatives of Indigenous organizations at the OAS in Washington, D.C., 26 November 2007. I was present at this meeting.

<sup>503</sup> B. Adeba, “Aboriginal Rights Treaty Should Have Been Signed” *Embassy* (4 October 2006) 1.

<sup>504</sup> On 29 June 2006, the date of the vote adopting the *UN Declaration* in the Human Rights Council, the government only indicated in its Statement the following areas: lands, territories and resources; land claims process, including balancing of rights of “Aboriginal peoples and other Canadians”; free, prior and informed consent; and self-government. See Canada, “Statement by Ambassador Paul Meyer,” *supra* note 361.

<sup>505</sup> See *supra* note 254.

<sup>506</sup> See text accompanying *supra* note 279.

<sup>507</sup> UN General Assembly, *Human Rights Council*, *supra* note 33 at para. 9.

<sup>508</sup> *Id.*, para. 2. See also UN General Assembly, *2005 World Summit Outcome*, *supra* note 102 at para. 120: “We [Heads of State and Government] reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the

plicitly given, contradicts the notion that Canada can subsequently claim to act as a “persistent objector” to a universal human rights standard.

## 8. GOVERNMENT ABUSE OF CANADIAN CHARTER AND INTERNATIONAL SYSTEM

### (a) Feigned Concern for the Canadian Charter

As described earlier in this article,<sup>509</sup> the Conservative government of Canada has claimed without justification that the *UN Declaration* is “inconsistent” with the *Canadian Charter of Rights and Freedoms*.<sup>510</sup> The Indian Affairs Minister has also declared that the *Declaration* does not include any individual rights<sup>511</sup> and contains no balancing of collective and individual rights and is therefore “inconsistent with our constitution”.<sup>512</sup> These inaccurate statements pertain, at least in part, to the *Canadian Charter*.

While continuing to raise spurious *Charter* concerns, the government insists that “the issues Canada has raised in relation to the Declaration’s final text are generally consistent with positions taken during negotiations”.<sup>513</sup> However, the previous Canadian government was active in the negotiations on the diverse collective and individual rights in the *Declaration*. The former government played a lead role in drafting the balancing provisions in article 46 of the *Declaration* and in encouraging other State governments to endorse them.

This raises the question as to why the Canadian government would raise arguments that lack a credible factual or legal basis. Such feigned concern for the *Canadian Charter* in Canada’s Constitution could serve to generate the impression that the government is a strong supporter of the *Charter*,<sup>514</sup> particularly in connection with international human rights matters. This latter aspect merits further examination.

In other contexts, the government has argued before Canadian courts that the conduct of its officials outside Canada should not be restricted by the *Canadian Charter* — regardless of the adverse human rights consequences for Canadian na-

---

observance and protection of all human rights and fundamental freedoms for all in accordance with the Charter, the Universal Declaration of Human Rights and other instruments relating to human rights and international law. The universal nature of these rights and freedoms is beyond question.”

<sup>509</sup> See text accompanying *supra* notes 303 *et seq.*

<sup>510</sup> In the exercise of all of the rights in the *UN Declaration*, art. 46, para. 2 stipulates that the “human rights and fundamental freedoms of all shall be respected”.

<sup>511</sup> For a list of the 17 provisions that address individual rights in the *Declaration*, see *supra* note 292.

<sup>512</sup> See text accompanying *supra* notes 291 *et seq.*

<sup>513</sup> INAC, “Update Paper”, *supra* note 327.

<sup>514</sup> In the domestic context, see, e.g., *Canada (Canadian Wheat Board) v. Canada (Attorney General)*, 2008 FC 769, online: QL, para. 55, where the Harper government was found to have violated the rights of the Canadian Wheat Board under the *Canadian Charter*. The government unlawfully attempted to “restrict a particular form of expression namely, advocacy against government policy respecting the Wheat Board.”

tionals abroad.<sup>515</sup> In *Canada (Justice) v. Khadr*,<sup>516</sup> the Harper government took such a position even though it was fully aware that the United States Supreme Court had ruled that the U.S. government had violated both its domestic law and international obligations in its treatment of detainees at Guantánamo.<sup>517</sup> Canada has similar international human rights obligations in this context.<sup>518</sup>

In *Khadr*, the Supreme Court of Canada ruled against the Canadian government. The Court indicated that the content of the government's duty under the *Charter* "is defined by the nature of Canada's participation in the [U.S.] process that violated Canada's international human rights obligations".<sup>519</sup>

It is beyond the scope of this law article to delve into all issues relating to the violations of the rule of law and human rights taking place in Guantánamo. However, it is worth noting that, in December 2007, the UN General Assembly adopted a resolution by consensus entitled *Protection of human rights and fundamental freedoms while countering terrorism*.<sup>520</sup> The resolution specifically raises the

<sup>515</sup> For severe criticism of the Harper government's position, see B. Amyot & L. Waldman, "Le Canada doit sortir de l'indifférence" *Le Devoir* (2 June 2008) A7.

<sup>516</sup> *Khadr v. Canada (Minister of Justice)*, 2008 SCC 28, 2008 CarswellNat 1401, 2008 CarswellNat 1400, [2008] 2 S.C.R. 125 (S.C.C.), online: QL. Omar Khadr, a Canadian citizen, was a child soldier when he was accused of killing an American soldier in Afghanistan in 2002. For almost six years, Khadr has been a detainee in Guantánamo. Prime Minister Harper denies that Khadr was a "child soldier". For a broader view of "child soldiers", see generally UNICEF, "The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups", Paris, February 2007 (endorsed by Canada and 58 other States); and R. Dallaire, "Canada has a duty to defend Omar Khadr's rights" *The [Montreal] Gazette* (30 March 2009) A13.

<sup>517</sup> See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006), where the U.S. Supreme Court held that by significantly departing from established military justice procedure without a showing of military exigency, the procedural rules for military commissions violated both the Uniform Code of Military Justice (10 U.S.C. §836) and Common Article 3 of the *Geneva Conventions* of 1949 (75 U.N.T.S. 31, 85, 135 and 287). See also *Rasul v. Bush*, 542 U.S. 466 (U.S.S.C., 2004), whereby the order under which the detainees had previously been denied the right to challenge their detention by way of *habeas corpus* was in effect held to be illegal.

<sup>518</sup> Canada is a signatory of the four *Geneva Conventions* of 1949, which it ratified in 1965 (Can. T.S. 1965 No. 20) and has incorporated into Canadian law with the *Geneva Conventions Act*, R.S.C. 1985, c. G-3. These obligations are highlighted by the Supreme Court in *Khadr*, at para. 25.

<sup>519</sup> *Canada (Justice) v. Khadr*, *supra* note 516 at para. 3. The Supreme Court balanced "national security and other considerations" in making this ruling (para. 4). In other situations, "principles of international law and comity . . . might otherwise preclude application of the *Charter* to Canadian officials acting abroad" (para. 26). See also *R. v. Hape*, [2007] 2 S.C.R. 292, 2007 CarswellOnt 3564, 2007 CarswellOnt 3563 (S.C.C.), at para. 56: "In interpreting the scope of application of the *Charter*, the courts should seek to ensure compliance with Canada's binding obligations under international law where the express words are capable of supporting such a construction."

<sup>520</sup> UN General Assembly, *Protection of human rights and fundamental freedoms while countering terrorism*, Res. 62/159, 18 December 2007.

human rights situation relating to detainees<sup>521</sup> and generally reaffirms that “States must ensure that any measure taken to combat terrorism complies with their obligations under international law, in particular international human rights, refugee and humanitarian law”.<sup>522</sup>

Thirty-four bar associations and law societies around the world have highlighted to Prime Minister Harper the need to “end the inhuman and inhumane treatment of the Guantánamo detainees”,<sup>523</sup> including Omar Khadr:

Few governmental operations in democratic countries have shown such a profound disrespect for the rule of law. Guantánamo Bay has come to signify injustice for some at the hands of the powerful. The rule of law — that everyone, including governments, is subject to the law, and that the law itself is fair and free from the influence of arbitrary power — has become an inconvenient afterthought.<sup>524</sup>

Despite severe criticism,<sup>525</sup> the Conservative government of Canada continued to endorse<sup>526</sup> the Bush administration’s lawless approach in regard to detain-

<sup>521</sup> *Ibid.*, preamble and para. 10.

<sup>522</sup> *Ibid.* at para. 1. The resolution also highlights the importance of the *United Nations Global Counter-Terrorism Strategy*, adopted by the General Assembly without a vote in Res. 60/288, 8 September 2005 (adopted without a vote). This *Strategy* specifies a human rights-based approach: see Annex, Plan of Action (IV. Measures to ensure respect for human rights for all and the rule of law as the fundamental basis of the fight against terrorism).

<sup>523</sup> “Joint Statement: Time to Close the Doors of Guantánamo”, signed by 34 bar associations and law societies (sent to Prime Minister Stephen Harper by the leaders of the Canadian Bar Association, the Barreau de Paris and the Law Society of England and Wales, February 25, 2008).

<sup>524</sup> *Ibid.*

<sup>525</sup> See, e.g., J.-C. Hébert, “Affaire Khadr: L’incohérence du Canada” *Le Journal*, Barreau du Québec (July 2008) 10 (what Khadr has suffered for a long time is an “odious denial of justice”); “Canada is too ready to ignore the rules” *The [Montreal] Gazette*, editorial (29 June 2008) A16: “Corrupted or polluted by the Bush administration’s treatment of anyone suspected of terror complicity, Canada now displays an alarming willingness to play by no rules”; and M. Bergeron, “Human Rights Watch sermonne le Canada” *La Presse* (28 January 2007) A1 (Canada “closes its eyes” to certain human rights violations, such as the illegal imprisonment of hundreds of presumed terrorists in Guantánamo). E. Broadbent & A. Neve, “Prime Minister Harper is complicit in this injustice” *Globe and Mail* (15 July 2008) A11: “[Prime Minister Harper’s] refusal to act to protect the basic rights of Omar Khadr is a serious betrayal of our trust. . . . In terms of Canadian and international human-rights law — indeed, by the standards of the U.S. Bill of Rights — what Mr. Khadr is being subjected to by the U.S. military commission at Guantánamo Bay is a travesty of justice. Mr. Harper is now complicit.”

<sup>526</sup> See, e.g., C. Clark, “Ottawa won’t seek Khadr’s return” *Globe and Mail* (10 July 2008), which quotes Prime Minister Harper as follows: “. . . frankly, we do not have a real alternative to that [Guantánamo] process now to get to the truth about those accusations, and we believe that this process should continue. So we are looking at that process with great interest.” Since, on his first day in office, President Obama announced that Guantánamo prison would be closed down, Prime Minister Harper may have little choice but to alter his position. See also “Obama clears the way to bring

ees.<sup>527</sup> In such cases involving Canadian nationals, the government has argued against having to act outside Canada in accordance with the *Canadian Charter*. The government has also refused to safeguard the *Charter* rights of such Canadian nationals, unless compelled to do so by Canadian courts.<sup>528</sup> In comparison, in relation to the *UN Declaration*, the Canadian government has invoked the *Canadian Charter*, with a view to justifying its ongoing opposition to this international human rights instrument. However, these self-serving arguments remain unsubstantiated. They continue to be seriously criticized in Canada and internationally.

---

Khadr home” *The [Montreal] Gazette*, editorial (22 January 2009) A16: “For the Harper government to continue to claim that there is some sort of ongoing judicial process at Guantanamo is nothing more than an excuse for not acting . . . We have stood by for nearly seven years while the human rights of a fellow citizen have been flouted.”

<sup>527</sup> See also *Boemediane v. Bush, President of the United States*, U.S. Supreme Court, No. 06-1195, Decided 12 June 2008, Kennedy J. for the majority, Part IV, B, where the Court ruled that the U.S. President and Congress do not have the authority to “govern without legal constraint” in Guantánamo: “Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not ‘absolute and unlimited’ but are subject ‘to such restrictions as are expressed in the Constitution.’ *Murphy v. Ramsey*, 114 U.S. 15, 44 (1885).”

<sup>528</sup> See also *Khadr v. Canada (Prime Minister)*, 2009 FC 405, 2009 CarswellNat 1206, 2009 CarswellNat 1472 (F.C.); affirmed (2009), 2009 CarswellNat 2364, 2009 CarswellNat 2699 (F.C.A.); leave to appeal allowed (2009), 2009 CarswellNat 2603, 2009 CarswellNat 2602 (S.C.C.), at para. 92, where O’Reilly J. ruled: “The ongoing refusal of Canada to request Mr. Khadr’s repatriation to Canada offends a principle of fundamental justice and violates Mr. Khadr’s rights under s. 7 of the *Charter*. To mitigate the effect of that violation, Canada must present a request to the United States for Mr. Khadr’s repatriation to Canada as soon as practicable.” This decision was upheld by a 2-1 majority in the Federal Court of Appeal: see *Khadr v. Canada (Prime Minister)*, 2009 FCA 246, 2009 CarswellNat 2699, 2009 CarswellNat 2364 (F.C.A.). At para. 57, the majority refuted the Crown’s challenge, namely that “the conduct of foreign affairs is a matter of Crown prerogative and thus within the sole purview of the executive”. In *Khadr v. Canada (Prime Minister)*, 2010 SCC 3, 2010 CarswellNat 121, 2010 CarswellNat 122 (S.C.C.), the Supreme Court of Canada unanimously agreed that Khadr’s *Charter* rights had been and continued to be violated. However, the Court ruled that, within a range of constitutional options, the executive branch of government is better placed to determine what action it should take to remedy the violations.

In my view, the Canadian government exercised its prerogative in June 2006 when it sought election to the Human Rights Council and freely accepted the duty of all Council members to “uphold the highest standards in the promotion and protection of human rights”. During its three-year term on the Council, any remedies relating to human rights violations by Canada against Khadr should have been determined on the basis of its international obligation to uphold such “highest standards”. See text accompanying *supra* note 211.

The rule of law, including the *Canadian Charter*, is not being applied with fairness or equality — both in regard to detainees, such as Omar Khadr,<sup>529</sup> and to Indigenous peoples and the *UN Declaration*. As G. Courtemanche describes:

La position du gouvernement canadien dans ce dossier [d'Omar Khadr] symbolise malheureusement une attitude générale à l'égard des droits de la personne. Un désintérêt profond, une sorte de mépris qui a mené le gouvernement à refuser de signer la déclaration des Nations unies sur les droits autochtones.<sup>530</sup>

### (b) Undermining the International System

As described in this article, the ongoing actions of the Canadian government serve to prejudice the rights of Indigenous peoples worldwide. Such actions transcend Indigenous peoples and undermine the international system. This concern may be further illustrated by the government's strategies and conduct in opposing the *UN Declaration on the Rights of Indigenous Peoples*.

It is disturbing that the Canadian government would align itself with States with abusive human rights records and lobby them to not support a human rights instrument.<sup>531</sup> In the August 2007 amendments<sup>532</sup> jointly submitted by Canada, Colombia,<sup>533</sup> the Russian Federation and New Zealand, revisions were proposed to the *UN Declaration* that would have lowered international standards on key issues to an unprecedented level. This was especially evident, in relation to self-government;<sup>534</sup> lands, territories and resources;<sup>535</sup> and cultural heritage.<sup>536</sup>

<sup>529</sup> See, e.g., "Terrorism and the rule of law" *Globe and Mail*, editorial (24 April 2009) A12; and A. Dubuc, "L'ombre de George W." *La Presse* (26 April 2009) A17.

<sup>530</sup> G. Courtemanche, "Négligence criminelle" *Le Devoir* (14-15 février 2009) C2.

<sup>531</sup> See text accompanying *supra* notes 288 *et seq.*

<sup>532</sup> Letter from Missions of Canada *et al.* and accompanying proposed amendments (13 August 2007), *supra* note 298.

<sup>533</sup> It is worth noting that Colombia — which had abstained in the General Assembly vote to adopt the *UN Declaration* — announced on 21 April 2009 that it was endorsing it. See Colombia, "Gobierno anuncia respaldo unilateral a la Declaración de Naciones Unidas sobre los Derechos de los Pueblos Indígenas" (21 April 2009), online: <<http://web.presidencia.gov.co/sp/2009/abril/21/10212009.html>>.

<sup>534</sup> See text accompanying *supra* note 327.

<sup>535</sup> E.g., art. 26, para. 1 of the *Declaration* provides: "Indigenous peoples *have the right* to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired." The 13 August 2007 amendments jointly proposed by Canada and its three allies would have replaced the term "right" with the phrase "*may have rights*". This latter phrase would serve to perpetuate land and resources dispossessions suffered by Indigenous peoples worldwide. The phrase significantly departs from the "rights" standard found in the jurisprudence of international treaty monitoring bodies. Use of the phrase "may have the right" is foreign to international human rights instruments, such as the *Universal Declaration of Human Rights* and the two international human rights Covenants. In Canada, the *Canadian Charter of Rights and Freedoms* and Part II of the *Constitution Act, 1982* (Aboriginal and treaty rights) guarantee the "rights" of individuals and peoples.

<sup>536</sup> See text accompanying *supra* note 352 *et seq.*



In regard to the Philippines, the Canadian government was aware of the horrific human rights violations against Indigenous peoples.<sup>537</sup> The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people had highlighted reports of “arbitrary detentions, persecution and even killings of community representatives . . . destruction of property, summary executions, forced disappearances . . . and also of rape by armed forces, the police or so-called paramilitaries”.<sup>538</sup> Yet, at the June 2006 session of the Human Rights Council, Canada unconscionably<sup>539</sup> lobbied the Philippines to not vote in favour of the *UN Declaration*.<sup>540</sup> Fortunately, as a result of the determined efforts of Indigenous representatives in the Philippines, the government voted in favour of the *Declaration* at the General Assembly.

In terms of lobbying the African States on the *Declaration*, Canada should have demonstrated sensitivity to the urgent need to address human rights violations in diverse African situations that are often exacerbated by the “scourge of conflicts in Africa”.<sup>541</sup> The interrelated issues of peace, security and human rights in the

<sup>537</sup> At the annual meetings of the UN Working Group on Indigenous Populations, Canadian government representatives had heard for years about the human rights violations in the Philippines. In regard to the severe violations committed by Canadian mining companies in the Philippines and other countries, see House of Commons (Standing Committee on Foreign Affairs and International Trade), *Fourteenth Report*, 38th Parliament, 1st Sess., 2005. The 2005 Report recommended: “In this context, particular attention should be paid to the rights of indigenous peoples as currently specified in the United Nations Draft Declaration on the Rights of Indigenous Peoples.”

<sup>538</sup> UN Commission on Human Rights, *Human rights and indigenous issues: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. Rodolfo Stavenhagen, submitted in accordance with Commission on Human Rights resolution 2002/65, Addendum: Mission to the Philippines*, E/CN.4/2003/90/Add.3, 5 March 2003, para. 46. See also UN General Assembly, *The situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General* (Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people), A/62/286, 21 August 2007, para. 31: “The increase in extrajudicial killings, torture, enforced disappearances, unlawful detention and other serious human rights violations committed by the police, the army and paramilitary groups during ongoing social conflicts is . . . extremely serious.”

<sup>539</sup> See letter, dated 21 August 2006, from Beverley Jacobs, President, Native Women’s Association of Canada, to Indian Affairs Minister Jim Prentice, *supra* note 278 at 2: “For Canada to have actively encouraged the Philippines not to support the *Declaration* — a human rights instrument — is unconscionable, callous and cruel beyond words. . . . It undermines the integrity of the international human rights system. It also makes a mockery of Canada’s foreign policy on human rights.”

<sup>540</sup> Despite its explicit support at the May 2006 session of the UN Permanent Forum on Indigenous Issues, the Philippines abstained in the June 29, 2006 vote at the Human Rights Council that adopted the *UN Declaration*.

<sup>541</sup> *Constitutive Act of the African Union*, adopted by Heads of State and Government of the Member States of the Organization of African Unity at Lomé, Togo, 11 July 2000, preamble.

African context are matters of special attention by the African Union (AU)<sup>542</sup> and the UN General Assembly.<sup>543</sup>

Regretfully, in relation to the *UN Declaration*, Canada ignored this ongoing vulnerable situation in Africa. The Conservative government took steps to exploit the African States in pursuing its own agenda of narrow self-interest.<sup>544</sup> Conceivably, if the African States were to obtain far-reaching changes to the *Declaration*, Canada might not be held responsible for contributing to the demise of this human rights instrument.

Canada paid little heed to the efforts of the African Commission on Human and Peoples' Rights to promote and protect Indigenous peoples' human rights in Africa.<sup>545</sup> In November 2006, the Chairperson of the Commission's Working Group on the Rights of Indigenous Populations/Communities in Africa had expressed "deep concern" regarding the issues being raised by the African Group of States at the General Assembly in regard to the *UN Declaration*.<sup>546</sup> The Chairperson added:

The Declaration promotes equality and non-discrimination for all and is based on core international principles and values . . . Undoubtedly, this new international instrument will strengthen the international human rights system as a whole and will support the vital work that the African Commission

<sup>542</sup> *Ibid.*, art. 3f: "The objectives of the Union shall be to: . . . f. Promote peace, security, and stability on the continent". See also art. 4m: "The Union shall function in accordance with the following principles: . . . m. Respect for democratic principles, human rights, the rule of law and good governance".

<sup>543</sup> See, e.g., UN General Assembly, *Implementation of the recommendations contained in the report of the Secretary-General on the causes of conflict and the promotion of durable peace and sustainable development in Africa*, A/RES/61/230, 22 December 2006; and UN General Assembly, *Cooperation between the United Nations and the African Union*, A/RES/61/296, 17 September 2007.

<sup>544</sup> See generally "Canada Criticized Over UN Aboriginal Rights Vote" *The Canadian Press* (22 October 2007), online: <[http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071022/aboriginal\\_rights\\_071022/20071022?hub=Canada](http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20071022/aboriginal_rights_071022/20071022?hub=Canada)>: "[UN High Commissioner for Human Rights Louise Arbour] cited the aboriginal rights issue as one example of a deeper malaise, suggesting her native country is flagging in its historic commitment to rise above narrow self-interest on the world stage."

<sup>545</sup> See also UN General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, *supra* note 309 at para. 48, where it is recommended that "cooperation be developed with the Working Group on the Rights of Indigenous Populations/Communities in Africa of the African Commission on Human and Peoples' Rights with a view to . . . enhancing the understanding of indigenous issues in Africa".

<sup>546</sup> African Commission on Human and Peoples' Rights (Chairperson of the African Commission's Working Group on Indigenous Populations/Communities), Letter from Commissioner M. Kamel Rezag Bara to His Excellency, the Permanent Representative, the Permanent Mission of the Republic of Namibia to the United Nations, acting for the African Group at the UN, New York (20 November 2006) (copy on file with the author).

on Human and Peoples Rights is undertaking for the promotion and protection of indigenous peoples rights.<sup>547</sup>

In May 2007, the African Commission on Human and Peoples' Rights issued an Advisory Opinion that concluded that member States of the African Union should support the adoption of the *Declaration*.<sup>548</sup> Rather than support the positions and work of the African Commission or the Indigenous peoples in Africa,<sup>549</sup> Canada and New Zealand<sup>550</sup> encouraged those few African States that were perceived as taking a hard line against the *UN Declaration* to seek far-reaching changes.<sup>551</sup> Those lobbying efforts did not succeed and the African States signifi-

<sup>547</sup> *Ibid.*

<sup>548</sup> African Commission on Human and Peoples' Rights, "Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples", adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Sess. held in May 2007 in Accra, Ghana. See also African Commission on Human and Peoples' Rights, "Communiqué on the UN Declaration on the Rights of Indigenous Peoples", done in Brazzaville, the Republic of Congo, 28 November 2007, online: <[http://www.achpr.org/english/resolutions/resolution121\\_en.htm](http://www.achpr.org/english/resolutions/resolution121_en.htm)>, where it is confirmed that the *Declaration* "is in line with the position and work of the African Commission on indigenous peoples' rights as expressed in the various reports, resolutions and legal opinion on the subject matter".

<sup>549</sup> For two useful analyses of the initial concerns raised by African States, see Indigenous Peoples of Africa Coordinating Committee (IPACC), "*United Nations Declaration on the Rights of Indigenous Peoples — 'Draft Aide Memoire' of the African Group: A Brief Commentary*" (16 January 2007); and International Work Group for Indigenous Affairs, "Response Note to 'The Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples'", presented by an African Group of Experts (21 March 2007).

<sup>550</sup> See, e.g., the IPACC commentary on the African Group's Draft Aide Memoire, *supra* note 549 at 2: ". . . the Draft Aide Memoire often uses similar arguments, if not also similar wording, as included in the formal positions of a few Western States — New Zealand, Canada, Australia and the United States. Regretfully, the extreme and unsubstantiated positions in the Draft Aide Memoire have been actively encouraged by this small group of Western States. These latter States are engaged in politicizing Indigenous peoples' human rights and undermining the *U.N. Declaration* to the severe detriment of the international human rights system itself."

For example, Canada and New Zealand lobbied Kenya against the *Declaration*. Kenya is plagued with corruption, mass killings, torture and rape by security forces, arbitrary detention, police harassment, and systematic intimidation of human rights defenders by state law enforcement officials: see Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen: Addendum: Mission to Kenya*, UN Doc. A/HRC/4/32/Add.3 (26 February 2007), at paras. 59–60.

<sup>551</sup> The previous position of the African Group had been highly supportive. See Human Rights Council, "Statement of the Ambassador, Permanent Representative of Algeria on Behalf of the African Group", Item concerning the Working Group on a Draft indigenous people Declaration, Geneva, 27 June 2006: "The African Group expresses its concurrence with this Declaration and therefore gives it its full support. . . . In concluding, while recognizing that further improvements to the Declaration have been advo-

cantly contributed to the historic adoption of the *Declaration* by the General Assembly.<sup>552</sup>

The Canadian government subsequently claimed that “the few modifications presented at the last minute to the General Assembly, prepared by a limited number of delegations, did not arise from an open, inclusive or transparent process, and did not address Canada’s key areas of concern.”<sup>553</sup> Such statements are incomplete and lacking in accuracy.

Canada had ample opportunity to lobby African and other States during the eight-month period allowed by the General Assembly for “further consultations.”<sup>554</sup> The government had also engaged in lobbying States in the summer and fall of 2006. Despite its aggressive lobbying strategy, the Canadian government simply failed to convince more than a few States to endorse its substantive or procedural positions. Moreover, Canada only produced its amendment proposals about two weeks before agreement was reached between the African Group and the supportive States. These amendments were not supported by African and most other States. Nor were these proposals disclosed to Indigenous peoples, prior to submission to the President of the General Assembly in mid-August 2007.

Since the Harper government and its three allies failed to obtain State support for their proposed amendments of mid-August 2007 (*i.e.* over 40 revisions in 13 articles), Canada voted against the *Declaration* at the General Assembly. The government insists that, in view of its negative vote, this human rights instrument can have no application in Canada. This claim has already been refuted.<sup>555</sup> However, it is important to reiterate here the potential damage such a position would have, if endorsed by the international community. Amnesty International Canada has underlined that “Canada’s position is deeply troubling” and adds that the adverse consequences transcend Indigenous issues and impact everyone:

Canada’s position, in many ways, drives a stake through the very integrity of the international human rights system, for indigenous peoples and everyone. . . . The essence of Canada’s position is that states should feel free to

---

cated by some States, we would appeal to them to withdraw their reservations so that the Declaration can, as it should, be adopted by consensus.”

<sup>552</sup> For a brief description of events relating to the African States and the lobbying by Canada, see the text accompanying *supra* notes 284 *et seq.* Canadian officials deny that Canada lobbied other States, since the government “did not twist any arms”. Officials argued that they may have shared Canada’s positions with other States, but this did not constitute lobbying. However, former President of the Human Rights Council Luis De Alba has confirmed that “New Zealand and Canada were very active in opposing the Declaration, particularly within the African Group”: see Luis Alfonso De Alba, “The Human Rights Council’s Adoption of the United Nations Declaration on the Rights of Indigenous Peoples” in Claire Charters & Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 108 at 149. And at 125: “[In the fall of 2006], states such as Canada and New Zealand had threatened to use the Third Committee of the UNGA to block its adoption.”

<sup>553</sup> INAC, “Update Paper”, *supra* note 327.

<sup>554</sup> See text accompanying *supra* note 36.

<sup>555</sup> See, generally, *supra* heading 7.

disregard a UN decision, such as the adoption of an important human rights declaration, if they have not voted in favour of it. This easy out for human rights violators therefore is obvious . . .<sup>556</sup>

### (c) Rigid Adherence to Unprincipled Positions

Despite diminishing credibility and a tarnished reputation, the Canadian government has learned little from its unsuccessful strategies to oppose the *UN Declaration*. Thus, it is not surprising that Indigenous peoples and human rights organizations called for Canada's conduct to be reviewed by the Human Rights Council.<sup>557</sup>

Canada's performance on human rights generally was assessed during the Council's Universal Periodic Review (UPR) in February 2009.<sup>558</sup> In relation to Indigenous peoples, it would be appropriate to use the standards in the *UN Declaration* during the UPR process, when evaluating the relevant human rights actions of Canada and other States.<sup>559</sup>

Canada should be held accountable for its failings as a Council member. As underlined by Professor Phillip Alston, ". . . the credibility and legitimacy of the new Human Rights Council . . . will depend significantly on the extent to which it makes itself and the governments that are elected as its members accountable."<sup>560</sup>

<sup>556</sup> A. Neve (Director General, Amnesty International Canada), "Shame on Canada for opposing the UN Indigenous Peoples declaration" *The Lawyers Weekly* (6 June 2008) 5.

<sup>557</sup> Assembly of First Nations *et al.*, "Closing the Implementation Gap: Indigenous Peoples and Human Rights in Canada", A forum to follow up on the 2004 mission to Canada by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous people, Rodolfo Stavenhagen, University of Ottawa, 2-3 October 2006 (2008) at 23 (recommendation 5): ". . . Canada's failure to uphold the highest standards in promoting and protecting human rights and overall conduct as an elected member of the Human Rights Council should be reviewed by the Council in accordance with its procedures". See also Assembly of First Nations, "Call for the Removal of Canada as a Member of the United Nations Human Rights Council", Resolution no. 38/2007 (adopted by consensus), Special Chiefs' Assembly, 11-13 December 2007, Ottawa, Canada. The resolution calls upon the Human Rights Council to review Canada's conduct and requests "Canada to immediately remove itself" as a Council member.

<sup>558</sup> Numerous Indigenous and human rights organizations have made submissions to the UPR, in relation to Canada's performance on a wide range of human rights issues. In regard to a joint submission that focuses on Canada and its positions on the *UN Declaration*, see, *e.g.*, *supra* note 305.

<sup>559</sup> See, *e.g.*, Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya, supra* note 4 at para. 63: "It is foreseeable that, as the Declaration is gradually mainstreamed and operationalized in the practice of both States and human rights bodies and mechanisms, it will become entrenched in the UPR process, contributing to defining the human rights obligations of the States under review and guiding the recommendations of the Human Rights Council's Working Group on the Universal Periodic Review with regard to indigenous peoples."

<sup>560</sup> P. Alston, "Richard Lillich Memorial Lecture: Promoting the Accountability of Members of the New UN Human Rights Council" (2005) 15 *J. Transnat'l L. and Pol.* 49 at

The government appears unwilling to acknowledge its ill-advised actions. It remains unbending in its refusal to change. It indicates that it “will *continue* to take effective action, at home and abroad, to promote and protect the rights of Indigenous peoples”.<sup>561</sup>

The government declared that its action will be based “*not* on the UN Declaration, but on Canada’s international human rights obligations and our existing domestic framework, including Canadian constitutional provisions and other laws, and treaties between the government and Aboriginal groups.”<sup>562</sup> Such government statements profoundly mischaracterize the relationship between international law and Canadian domestic law, as well as the *Declaration* itself.

As already described,<sup>563</sup> the *UN Declaration* reflects a wide range of international human rights obligations — of both a conventional and customary nature — that apply to Canada. One cannot wholly separate the *Declaration* from other international human rights instruments and law.<sup>564</sup> Special Rapporteur S.J. Anaya explains:

Given the complementary and interrelated character of international human rights law, as well as the existing and developing jurisprudence on various human rights treaties by international bodies and mechanisms, it is clear that the provisions of the Declaration should factor into the interpretation of States’ international human rights obligations . . .<sup>565</sup>

A State’s opposing vote at the General Assembly cannot prevent international treaty monitoring bodies from recommending that the *Declaration* “be used as a

94. UN General Assembly, *Report of the United Nations High Commissioner for Human Rights*, 61st Sess., Supp. No. 36, A/61/36, New York, 2006, para. 73: “. . . the ultimate test for the Council will be the establishment of the UPR mechanism by which all States will be subject to a periodic review of the fulfilment of their human rights obligations and commitments.”

<sup>561</sup> INAC, “Update Paper”, *supra* note 327. [emphasis added]

<sup>562</sup> *Ibid.* [emphasis added]

<sup>563</sup> See, generally, *supra* heading 7.

<sup>564</sup> W.A. Schabas & S. Beaulac, *supra* note 69 at 85-86: “. . . international law instruments . . . that, while not necessarily binding upon Canada as a question of law, fit generally into the category of contemporary international human rights law . . . can be found in such important treaties as the *European Convention on Human Rights* and the *American Convention on Human Rights*, as well as a range of declarations and other inherently non-binding norms, such as the *Universal Declaration of Human Rights* . . . and the *Draft Declaration on the Rights of Indigenous Peoples*. Such non-binding or “soft law” norms are above all relevant to [Canadian] *Charter* interpretation because they are sources of comparative law.”

<sup>565</sup> Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, *supra* note 4 at para. 63. See also para. 86 (Conclusions): “. . . the standards of the Declaration connect to existing State obligations under other human rights instruments”. Similarly, see Committee on the Rights of the Child, *Indigenous children and their rights under the Convention*, General Comment No. 11, UN Doc. CRC/C/GC/11 (30 January 2009), where the *UN Declaration* is referred to in the following paragraphs: 10; 29, note 12; 45; 52; 58, note 26; 66, note 30; and 82.

guide to interpret the State party's obligations" under human rights treaties.<sup>566</sup> The *Declaration* itself requires that the "United Nations, its bodies . . . and specialized agencies . . . promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration".<sup>567</sup>

The Tory government maintained that, if the concerns of Canada and others had been addressed, "a stronger Declaration could have emerged".<sup>568</sup> The government criticized the United Nations for adopting a weaker instrument: "Canada regrets that the General Assembly was willing to adopt a Declaration that falls short of what is required to truly address the interests of Indigenous peoples around the world."<sup>569</sup> Through such accounts, the government is doing itself a disservice. Exaggerated claims against the UN General Assembly and the 144 States that voted to adopt the *UN Declaration* undermine international co-operation and relations. Good faith and trust are being seriously eroded.

At the ECOSOC session in July 2008, the government of Canada continued its efforts to diminish the *UN Declaration* in various ways with misleading and erroneous arguments. It repeated its boilerplate statement that the *Declaration* "has no legal effect in Canada, and its provisions do not represent customary international law."<sup>570</sup> It characterized the Declaration as a "set of political principles" that Canada cannot accept.<sup>571</sup>

In relation to the Permanent Forum's *Report on the seventh session*,<sup>572</sup> Canada also stressed its "understanding" to ECOSOC that the term "implement" in relation to the *UN Declaration* refers basically to "those States that have chosen to support it".<sup>573</sup> Thus, in Canada's view, when the Permanent Forum addressed "implementation" of the *Declaration* at its May 2009 session, the term did not apply to those States that did not accept this instrument. A similar interpretation by Canada applied to the three-day international expert group meeting (approved by ECOSOC) on the implementation of article 42 of the *Declaration*.<sup>574</sup> Such interpretations by Canada inappropriately attack the universality of this human rights instrument,

<sup>566</sup> This is what the United States has discovered at the UN Committee on the Elimination of Racial Discrimination. See *supra* note 435.

<sup>567</sup> *UN Declaration*, *supra* note 1, art. 42.

<sup>568</sup> Indian and Northern Affairs Canada, "Update Paper", *supra* note 327.

<sup>569</sup> *Ibid.*

<sup>570</sup> Canada, "Canadian Explanation of Position [on] Report from the United Nations Permanent Forum on Indigenous Issues, Economic and Social Council", 2008 Substantive Session, New York (24 July 2008) [Canada, "Canadian Explanation of Position"] (copy on file with the author).

<sup>571</sup> *Ibid.*

<sup>572</sup> Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April–2 May 2008)*, *supra* note 399. The Canadian government was referring specifically to the three "Draft decisions" in para. 1 of the Report that were subsequently approved by ECOSOC in July 2008. Two of these "decisions" contemplate in some respect the implementation of the *Declaration*.

<sup>573</sup> Canada, "Canadian Explanation of Position", *supra* note 570.

<sup>574</sup> Art. 42 provides: "The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States

which applies to all Indigenous peoples and individuals in every region of the world. Article 42 does not include the qualification or limitation declared by Canada.

Canada's "understanding" directly contradicts the Permanent Forum's Report, which explicitly describes the *Declaration* as a "universal" human rights instrument.<sup>575</sup> Moreover, Canada — as a member of the UN and the Human Rights Council — committed itself to promote the universal respect of all human rights.<sup>576</sup>

This "admit nothing, deny everything" approach<sup>577</sup> of the Conservative government is not conducive to sustaining a constructive foreign policy on international human rights issues. Nor should Canada be fabricating objections with virtually no regard for their prejudicial effects on the international human rights system.

In relation to such far-reaching foreign policy matters, Prime Minister Harper should not be mandating successive Indian Affairs ministers to play a lead role in vigorously opposing a universal human rights instrument.<sup>578</sup> The international strategies that have been crafted are adverse to the interests of the world's Indigenous peoples and to Canada as a whole. These prejudicial positions are shaped by Tory ideology rather than substantiated on the basis of international human rights law.<sup>579</sup> At both the international and domestic levels, the *UN Declaration* cannot

---

shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."

<sup>575</sup> Permanent Forum on Indigenous Issues, *Report on the seventh session*, *supra* note 399 at para. 61. At para. 94, the *UN Declaration* is also described in terms of "human rights standards". See Canadian Human Rights Commission, "Social Equality in Canada: A Submission from the Canadian Human Rights Commission to the United Nations Human Rights Council as part of the Universal Periodic Review (UPR) of Canada's Human Rights Obligations", Human Rights Council, September 2008, online: <[http://www.chrc-ccdp.ca/legislation\\_policies/othersubmission\\_autrememoire/socialequality\\_egalitesociale-en.asp](http://www.chrc-ccdp.ca/legislation_policies/othersubmission_autrememoire/socialequality_egalitesociale-en.asp)> at para. 7, where the *UN Declaration* is characterized as a "universal" instrument.

<sup>576</sup> See text accompanying *supra* note 508.

<sup>577</sup> See also E. Broadbent & A. Neve, "Prime Minister Harper is complicit in this injustice" *Globe and Mail* (15 July 2008): "Prime Minister Stephen Harper has been willing to apologize for the past wrongs of other governments. But he admits no wrongdoing by his own."

<sup>578</sup> Since early 2006, no Foreign Affairs Minister of the Tory government has played a significant or effective role in relation to the *Declaration* and the international human rights of Indigenous peoples. As confirmed by federal officials, Indian Affairs Minister Jim Prentice assumed the lead role. He was the main architect of the Conservative government's international strategies to oppose the *UN Declaration*. The two papers relating to Canada's positions on the *Declaration* were initially drafted within INAC and posted on its Web site: see *supra* notes 254 and 327. On 1 May 2008, it was the Indian Affairs Minister Chuck Strahl — not the Foreign Affairs Minister — that went to New York to meet with Ambassadors of various States to discuss Canada's position on the *Declaration*. See *supra* note 258.

<sup>579</sup> See text accompanying *supra* notes 263 *et seq.*, regarding the refusal of the government to provide any written analysis to substantiate its positions in legal terms. See also M. Cornelier, "Un Canadien laissé à lui-même" *Le Devoir* (29-30 March 2008) B3 (quoting international law professor Michael Byers as to the unjustifiable ideological posi-



be segregated or excluded by the Harper government when addressing the broad range of Indigenous peoples' human rights.

## 9. CONCLUSIONS: MOVING TOWARDS EFFECTIVE IMPLEMENTATION

In regard to the *UN Declaration on the Rights of Indigenous Peoples*, there is no turning back. The *Declaration* is an historic instrument that has universal application to countless Indigenous contexts in over 70 countries. It “represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law.”<sup>580</sup> It is broadly crafted, so as to be capable of addressing a wide range of circumstances both now and in the future.

In relation to Indigenous peoples, the *Declaration* provides a crucial context and framework towards ensuring justice, dignity, security and well-being through a human rights-based approach. This approach is both beneficial and necessary at the international, regional and domestic levels.

Peoples and organizations all over the world are already taking initiatives to use and implement the *Declaration*. Such entities include UN bodies, such as the Human Rights Council; the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people;<sup>581</sup> a vast range of UN specialized agencies;<sup>582</sup> regional and domestic courts; States;<sup>583</sup> and Indigenous peoples. In addition, a growing number of UN General Assembly resolutions are making specific reference to this new international human rights instrument.<sup>584</sup>

---

tion of the Harper government on foreign policy matters involving international human rights law and diplomacy).

580 Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, S. James Anaya, *supra* note 4 at para. 85 (Conclusions).

581 Human Rights Council, *Human rights and indigenous peoples: mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Res. 6/12, 6th Sess., 28 September 2007, para. 1(g).

582 Inter-Agency Support Group on Indigenous Issues (IASG), Statement on the United Nations Declaration on the Rights of Indigenous Peoples, adopted at its Annual Meeting in September 2007: “The IASG pledges to advance the spirit and letter of the Declaration within our agencies’ mandates and to ensure that the Declaration becomes a living document throughout our work.” As of 2008, the IASG was made up of 31 agencies, including, *inter alia*, the World Health Organization (WHO), International Labour Organization (ILO), UNESCO, United Nations Development Programme (UNDP), UNICEF, Secretariat of the Convention on Biological Diversity (SCBD), World Bank and World Intellectual Property Organization (WIPO), online: Permanent Forum on Indigenous Issues: <<http://www.un.org/esa/socdev/unpfii/en/iasg.html>>.

583 *E.g.*, in Bolivia, “Act No. 3760, which approved the United Nations Declaration on the Rights of Indigenous Peoples, has become a legally binding instrument.” See Permanent Forum on Indigenous Issues, *Information received from Governments: Bolivia*, 7th Sess., New York, E/C.19/2008/5/Add.3, 11 February 2008, para. 40.

584 See, *e.g.*, UN General Assembly, *Intensification of efforts to eliminate all forms of violence against women*, A/RES/62/133, 18 December 2007, preamble; UN General

The UN Secretary-General has urged the Permanent Forum on Indigenous Issues to “translate the Declaration into a living document at the national and international levels”.<sup>585</sup> This is an anticipated result of the *Declaration*, which requires all UN bodies, including the Permanent Forum, and specialized agencies to “promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration”.<sup>586</sup>

In its May 2008 report, the Permanent Forum on Indigenous Issues called for the “promotion, use and implementation of the *UN Declaration* as the most universal, comprehensive and fundamental instrument on indigenous peoples’ rights”.<sup>587</sup> It proposed “the establishment, within the Forum itself, of a chamber on the United Nations Declaration”.<sup>588</sup> It also affirmed that the *Declaration* “will be its legal framework” and will therefore ensure that the *Declaration* is integrated in all aspects of its work.<sup>589</sup>

In a November 2008 report relating to Human Rights Council special procedures, it is stated that the rights of Indigenous peoples are “a cross-cutting issue that concerns all thematic and geographic mandates and that the work of all special procedures mandates-holders is important for the promotion and protection of the rights of indigenous peoples.”<sup>590</sup> The mandate-holders agreed that “the effective implementation of the [UN] Declaration constituted a major challenge ahead, and decided to strengthen their efforts in that regard.”<sup>591</sup>

In contrast to these positive developments, the Conservative government in Canada has continued to counter the *Declaration*. By engaging in strategies that undermine the status of this vital instrument and prevent its application, the government is adversely affecting Indigenous peoples in Canada and other regions of the

---

Assembly, *Rights of the child*, A/RES/62/141, 18 December 2007, preamble; UN General Assembly, *Global efforts for the total elimination of racism, racial discrimination, xenophobia and related intolerance and the comprehensive implementation of and follow-up to the Durban Declaration and Programme of Action*, A/RES/62/220, 22 December 2007, para. 25.

585 United Nations Department of Public Information, News and Media Division (New York), Press Release, SG/SM/11524, HR/4945, “Secretary-General, in Video Message, says Indigenous Permanent Forum Assumes New Role in Translating Declaration on Indigenous Peoples’ Rights into ‘Living’ Text” (21 April 2008), online: <<http://www.un.org/News/Press/docs/2008/sgsm11524.doc.htm>>.

586 *UN Declaration*, *supra* note 1, art. 42.

587 Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April–2 May 2008)*, *supra* note 399 at para. 61.

588 *Ibid.* at para. 131.

589 *Ibid.* at para. 132.

590 Human Rights Council, *Note by the United Nations High Commissioner for Human Rights* (report on the fifteenth meeting of special rapporteurs/representatives, independent experts and chairpersons of working groups of the special procedures of the Council, held in Geneva from 23 to 27 June 2008), UN Doc. A/HRC/10/24 (17 November 2008), para. 67.

591 *Ibid.*

world. Regardless of its record of failures,<sup>592</sup> the government exhibits a rigid determination to maintain an ill-fated course. The government's strategies continue to be inspired by discriminatory ideology, rather than international law.

In opposing the *Declaration*, the arguments put forward by the government serve to mislead and confuse. Little or no consideration is accorded to its ongoing violations of Canadian constitutional and international law.

Instead of honouring Canada's commitment to reconciliation, justice and international co-operation, the politicization<sup>593</sup> of human rights remains the government's preferred option. As a result, Canada's international reputation and credibility increasingly suffer.<sup>594</sup> The government's substandard actions serve to weaken the international human rights system.

Lack of respect for Indigenous peoples' human rights and its profound adverse consequences are a permanent part of Canada's collective history. In terms of this history, Indigenous peoples have the right to the truth<sup>595</sup> and it is the duty of States

<sup>592</sup> Significant Canadian government failures include: failure to prevent adoption of the *Declaration* at both the Human Rights Council and the General Assembly; failure to convince States, especially those with abusive human rights records, to vote against the *Declaration*; failure to prevent the Canadian Parliament from adopting a Motion to endorse the *Declaration* and fully implement it in Canada; and failure to prevent the Organization of American States from using the *UN Declaration* as a baseline and minimum standard for negotiations on the draft *American Declaration on the Rights of Indigenous Peoples*. Since 2006, the government failed to respect the rule of law in Canada and internationally and refused to account for its conduct.

<sup>593</sup> See *supra* notes 214 and 278 and accompanying texts. See also "The messages for Harper and Dion" *Globe and Mail*, editorial (24 January 2008) A16, which refers to Prime Minister "Harper's record of politicizing everything he touches".

<sup>594</sup> C. Parsons, "Canada slammed at U.N. over indigenous rights", (1 May 2008), online: <<http://ca.reuters.com/article/domesticNews/idCAN0134751220080501>> (quoting Victoria Tauli-Corpuz, Chair of the Permanent Forum on Indigenous Issues): "Canada used to have a good image on indigenous rights and played a leadership role in drafting the declaration . . . The change of government, however, changed the situation in a totally different direction . . . Now, [Ms. Tauli-Corpuz] said, Canada's reputation was 'very bad.'" Quaker United Nations Office (R. Brett), "Righting Historic Wrongs: First Session of the UN Human Rights Council (19–30 June 2006)", July 2006, online: <<http://www.quno.org/geneva/pdf/humanrights/RightingHistoricWrongs200606.pdf>>, at 3: "Canada's Shame: Short-term political expediency seems to have been the basis for Canada's change of position from supporting to opposing the draft declaration — encouraged by Australia, New Zealand and the USA".

<sup>595</sup> UN Commission on Human Rights, *Right to the truth*, Res. 2005/66, 61st Sess., adopted 20 April 2005, para. 1: "Recognizes the importance of respecting and ensuring the right to the truth so as to contribute to ending impunity and to promote and protect human rights". See also *International Convention for the Protection of All Persons from Enforced Disappearance*, adopted by the United Nations General Assembly on 20 December 2006 and opened for signature on 6 February 2007, preamble: "Affirming the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person, and the right to freedom to seek, receive and impart information to this end".

to preserve such memory.<sup>596</sup> At the same time, Canada's *Constitution* calls for reconciliation between Aboriginal and non-Aboriginal peoples.<sup>597</sup>

As an integral part of the reconciliation process, it is currently imperative to demonstrate unequivocal respect for the human rights of Indigenous peoples. This would require the Canadian government to endorse the *Declaration* without self-serving qualifications and, in collaboration with Indigenous peoples, actively implement it in Canada.

Unprincipled and persistent opposition by the Canadian government to the *Declaration* is inconsistent with the principle of good governance.<sup>598</sup> Respect for and implementation of Indigenous peoples' human rights, as affirmed in the *Declaration*, would strengthen good governance. Such a human rights-based approach is wholly compatible with Canada's *Constitution*.<sup>599</sup> As underscored by the International Labour Organization: "Respect for indigenous and tribal peoples' rights . . . is a fundamental element of good governance."<sup>600</sup> The "mutually reinforcing rela-

<sup>596</sup> UN Commission on Human Rights, *Report of the independent expert to update the Set of principles to combat impunity, Diane Orentlicher, Addendum: Updated Set of principles for the protection and promotion of human rights through action to combat impunity*, E/CN.4/2005/102/Add.1, 8 February 2005, at 7, Principle 3 (Duty to Preserve Memory): "A people's knowledge of the history of its oppression is part of its heritage and, as such, must be ensured by appropriate measures in fulfilment of the State's duty to preserve archives and other evidence concerning violations of human rights and humanitarian law and to facilitate knowledge of those violations. Such measures shall be aimed at preserving the collective memory from extinction and, in particular, at guarding against the development of revisionist and negationist arguments."

<sup>597</sup> The Supreme Court of Canada has interpreted the modern law of aboriginal and treaty rights, as affirmed in s. 35 of the *Constitution Act, 1982*, as including reconciliation as a fundamental objective. See text accompanying *supra* note 168.

<sup>598</sup> UN Commission on Human Rights, *The role of good governance in the promotion of human rights: Note by the United Nations High Commissioner for Human Rights* (Report of the Seminar on good governance practices for the promotion of human rights, held in Seoul on 15-16 September 2004), E/CN.4/2005/97, 14 December 2004, para. 44: "While the element of the rule of law [i]s extremely important as part of good governance for the promotion of human rights, that element should not merely imply respect for national law, but rather for law which [i]s consistent with the international human rights framework, with channels to promote justice." [emphasis added]

<sup>599</sup> In Canada's *Constitution*, three underlying principles that mandate a human rights-based approach are: i) "respect for human rights", *supra* note 109 and accompanying text; ii) "respect for minority rights", *supra* note 104 and accompanying text; and iii) "protection of Aboriginal and treaty rights", *supra* notes 106 and 107 and accompanying texts. As indicated by Canada's highest court in *Reference re Secession of Québec*, *supra* note 73 at para. 52: "[Underlying constitutional] principles assist in the interpretation of the text and the delineation of spheres of jurisdiction, the scope of rights and obligations, and the role of our political institutions. Equally important, observance of and respect for these principles is essential to the ongoing process of constitutional development and evolution of our Constitution as a "living tree" . . ."

<sup>600</sup> International Labour Organization, "ILO Submission to the International Expert Group Meeting on the Millennium Development Goals, Indigenous Participation and Good Governance", New York, 11-13 January 2006, online:

tionship between good governance and human rights” is widely recognized.<sup>601</sup> This essential relationship is reflected in the balancing provisions of the *Declaration*.<sup>602</sup>

With or without the support of the Canadian government, significant steps are being taken by Indigenous peoples and others to ensure implementation of the *Declaration*. By invoking the *Declaration* in a wide range of domestic and international issues, its future as a living human rights instrument may be ensured.

To achieve such objectives, it is important to promote human rights education on the rights of Indigenous peoples among all sectors of Canadian society. This is a key challenge. It is especially useful in light of the government’s adverse positions on the *Declaration*.

As described in this article,<sup>603</sup> the *Declaration* can be effectively used in litigation in Canadian courts. Both domestic courts and international bodies are more likely to substantively consider the *Declaration*, if those parties that invoke it are careful and thorough in their preparation and usage.

In increasing awareness and understanding of the *Declaration*, a lot remains to be done. The *UN Declaration* is much like a tapestry, carefully woven over many years with countless interrelated and mutually reinforcing strands. These fibres are based on the thousands of interventions<sup>604</sup> of Indigenous peoples worldwide, who repeatedly travelled to Geneva to recount the legacy of colonization and the injustices, discriminations and other human rights violations that they continue to suffer.

Should any State seek to remove a “strand” of the *Declaration*, it would affect its integrity. And the overall strength of the tapestry may be severely weakened.

This tapestry of human rights remains a work in progress, since their significance and interrelationships are always evolving. Thus, it is the responsibility of present and future generations of all concerned to continue to weave new strands and collectively reinforce its indelibility and relevance.

---

<[www.un.org/esa/socdev/unpfii/documents/workshop\\_MDG\\_ilo.doc](http://www.un.org/esa/socdev/unpfii/documents/workshop_MDG_ilo.doc)> at 9. And at 3: “. . . ensuring good governance would imply inclusive national legislation and governance structures that provide the framework for recognition of indigenous rights — but also the recognition of indigenous and tribal peoples’ own governance structures that must be respected and strengthened in the process of development.”

<sup>601</sup> See UN Commission on Human Rights, *The role of good governance in the promotion and protection of human rights*, Res. 2005/68 (20 April 2005), preamble. See also UN Commission on Human Rights, *The role of good governance in the promotion of human rights: Note by the United Nations High Commissioner for Human Rights*, *supra* note 598 at para. 8 (High Commissioner): “The two concepts of good governance and human rights [a]re mutually reinforcing and share . . . many core principles, namely participation, accountability, transparency and responsibility.”

<sup>602</sup> *UN Declaration*, *supra* note 1, art. 46(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.” [emphasis added]

<sup>603</sup> See especially the discussion under *supra* heading 7(c).

<sup>604</sup> Victoria Tauli-Corpuz, “Statement of Victoria Tauli-Corpuz”, *supra* note 2: “Each and every article of this Declaration is a response to the cries and complaints brought by indigenous peoples.”