

UN Declaration on the Rights of Indigenous Peoples Not Merely "Aspirational"

Paul Joffe
25 June 2015

Introduction

The *UN Declaration on the Rights of Indigenous Peoples* is an international human rights instrument adopted by the UN General Assembly on 13 September 2007.¹ Currently, no State in the world formally opposes it.² This consensus enhances its legal status and effect.

The *Declaration* affirms the inherent or pre-existing collective and individual human rights of Indigenous peoples. It does not create new rights.³ It provides a framework for justice and reconciliation, applying existing human rights standards to the specific historical, cultural and social circumstances of Indigenous peoples. The rights it contains constitute the minimum standards for the survival, dignity, security and well-being of Indigenous peoples worldwide.⁴

The *Declaration* is the most comprehensive human rights instrument explicitly addressing the rights of Indigenous peoples. It affirms a wide range of political, civil, economic, social, cultural, spiritual and environmental rights. It constitutes a major step towards addressing the widespread and persistent human rights violations against Indigenous peoples worldwide.

New Zealand's Waitangi Tribunal⁵ has concluded that the *UN Declaration* "represents the most important statement of indigenous rights ever formulated."⁶ In 2011, the Australian Human Rights Commission recommended: "All legislation, policies and programs should be reviewed for consistency with the rights affirmed by the Declaration on the Rights of Indigenous Peoples."⁷

The government of Norway has affirmed: "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".⁸

In the *UN Declaration*, all States have recognized the "urgent need to respect and promote the inherent rights of indigenous peoples".⁹ In his 2014 Report on Canada, former UN Special Rapporteur James Anaya concluded: "The United Nations Declaration on the Rights of Indigenous Peoples, which has been endorsed by Canada, provides a common framework within which the issues faced by indigenous peoples in the country can be addressed."¹⁰

In light of its far-reaching significance, it is disturbing that the Canadian government seeks to devalue the legal status of the *UN Declaration* so as to undermine Indigenous peoples' rights and related government obligations.

In November 2010, at the time of its endorsement of the *Declaration*, the government described this historic instrument as an "aspirational" document with no legal effect:

The Declaration is an aspirational document which speaks to the individual and collective rights of Indigenous peoples ... the Declaration is a non-legally binding

document that does not reflect customary international law nor change Canadian laws.¹¹

Such characterization of the *Declaration* is erroneous. In key respects, the positions taken are contradicted by those of previous administrations as well as the government's own statements. To conclude that the *Declaration* is merely aspirational is inconsistent with Canadian and international law.

1. *UN Declaration not merely "aspirational"*

During the years of negotiations, successive governments in Canada viewed the draft Declaration in remedial terms rather than aspirational. In 1997, the Canadian government described its commitment to achieve a declaration that "applies universally; that promotes and protects indigenous rights; that works against discrimination; and that provides clear guidance for developing effective and harmonious relationships between indigenous peoples and the states in which they live."¹²

In 2005, *Canada's Action Plan Against Racism* described the eventual Declaration as addressing Indigenous peoples' human rights and providing guidance domestically and internationally:

Canada's objective is to achieve a strong and effective statement addressing the human rights and fundamental freedoms of indigenous peoples and individuals. The declaration should provide guidance on the relationship between states and the indigenous peoples who live there, and guidance to various UN bodies and other international organizations.¹³

At the United Nations, States and Indigenous peoples devoted more than 20 years to discussing, negotiating and ultimately approving the *Declaration*. The objective was not to attain a solely aspirational instrument. The text consistently uses the term "shall" (not "should") in elaborating State obligations. The *Declaration* requires legislative and other measures to achieve its ends, as well as "effective remedies" for all infringements of individual and collective rights.¹⁴ It also requires States to "promote respect for and full application of the provisions of this Declaration" and follow up its effectiveness.¹⁵

States did not perceive the *Declaration* as merely aspirational:

The text is substantially informed by international law, the rights it proclaims are consistent with general international law and the development of international standards on indigenous rights is widely perceived as an international law project. In addition, the *Declaration* can be perceived as agreed interpretation of the various UN human rights treaties concerning indigenous rights.¹⁶

In 2009, Special Rapporteur James Anaya highlighted the "essentially remedial character" of the *Declaration* and its ties to other human rights instruments:

The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human rights. From this perspective, the

standards of the Declaration connect to existing State obligations under other human rights instruments.¹⁷

The commitment to implement the *Declaration* was reaffirmed by States and the General Assembly in the consensus Outcome Document of the 2014 World Conference on Indigenous Peoples.¹⁸ In particular, States confirmed their “solemn commitment to respect, promote and advance and in no way diminish the rights of indigenous peoples and to uphold the principles of the Declaration.”¹⁹

2. *Declaration* has diverse legal effects

On 29 June 2006, when the draft Declaration was approved by the Human Rights Council, Canada declared: "For clarity, we ... underline our understanding that this Declaration has no legal effect in Canada and does not represent customary international law."²⁰

In the following years, such kinds of statements would become Canada's mantra in its efforts to oppose and devalue the Declaration – both before and after an amended version was adopted by the General Assembly.²¹

Such statements are incorrect. For example, in the 1987 *Reference re Public Service Employee Relations Act (Alta.)*, Chief Justice Dickson emphasized the interpretive value of international declarations:

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.²²

Although not the same as treaties or conventions, the *Declaration* does have diverse legal effects. These are evident from the diverse provisions that reflect treaty-based law and customary international law.²³ Such provisions include fundamental principles,²⁴ rights and obligations relating to non-discrimination, self-determination, self-government, cultural integrity and property.²⁵ They also include the rights to life, freedom from torture, freedom from genocide, and reparation and redress.²⁶

In *Hamilton Health Sciences Corp. v. D.H.*, the *UN Declaration* was positively considered when the Ontario Court of Justice decided that “In law as well as in practice, ... the Haudenosaunee have both an aboriginal right to use their own traditional medicines and health practices, and the same right as other people in Ontario to use the medicines and health practices available to those people.”²⁷ The Haudenosaunee, government of Ontario and the Court agreed that both these rights fulfill article 24 of the *UN Declaration*.²⁸

In *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, the Federal Court of Canada ruled : "International instruments such as the UNDRIP [UN Declaration on the Rights of Indigenous Peoples] and the *Convention on the Rights of the Child* may also inform the contextual approach to statutory interpretation ..."²⁹

Canada sought to devalue the *Declaration* in this case relating to alleged discrimination in federal funding for child welfare services on First Nations reserves. However, the government also referred to "non-binding international law, e.g. the United Nations Declaration on the Rights of Indigenous Peoples ..., General Comments and Concluding Observations of international human rights treaty bodies" and confirmed their relevance in interpreting domestic legislation:

Non-binding international law may provide legal context that is of assistance in interpreting domestic legislation. As the Tribunal noted, relying on the Federal Court of Appeal in *Rahman*, the Court may assign greater or lesser the weight depending on the circumstances.³⁰

In February 2012, Canada defended its human rights record before the Committee on the Elimination of Racial Discrimination (CERD) in Geneva. The Canadian government conceded that the *UN Declaration* could be used to interpret domestic laws – including Canada's Constitution:

On 12 November 2010, her Government had issued a statement endorsing the United Nations Declaration on the Rights of Indigenous Peoples. The Declaration was a non-legally-binding document that did not reflect customary international law. While it had no direct legal effect in Canada, Canadian courts could consult international law sources when interpreting Canadian laws, including the Constitution.³¹

Thus, the Canadian government acknowledges that the *UN Declaration* – as well as General Comments and Concluding Observations of international treaty bodies – can have a diverse range of legal effects within Canada.

The Canadian government continues to declare that the *Declaration* does not include customary international law. Special Rapporteur James Anaya concluded that such position is "manifestly untenable":

... the Government's statement that the Declaration's provisions "do not reflect customary international law" is misplaced and overly broad. ... It is one thing to argue that not all of the Declaration's provisions reflect customary international law, which may be a reasonable position. It is quite another thing to sustain that none of them does, a manifestly untenable position.³²

Since the 2006 federal election, the Canadian government repeatedly adopted regressive interpretations of the Declaration, in the absence of consultation and accommodation with Indigenous peoples. In 2012, the Committee on the Elimination of Racial Discrimination urged Canada to take steps, in consultation with Indigenous peoples, to better realize their economic, social and cultural rights. The Committee added:

in consultation with indigenous peoples, consider elaborating and adopting a national plan of action in order to implement the United Nations Declaration on the rights of indigenous peoples.³³

In contrast, others are taking a principled approach to ensure compliance with and implementation of the *Declaration*. In Bolivia, the *Declaration* was adopted as a national law and incorporated into the

new Constitution".³⁴ In Greenland, its enhanced self-government arrangement with Denmark is described as "de facto implementation of the Declaration".³⁵

In May 2008, the UN Permanent Forum on Indigenous Issues affirmed that the *Declaration* "will be its legal framework" and will therefore ensure that this human rights instrument is integrated in all aspects of its work.³⁶ The Food and Agriculture Organization has declared that its "responsibility to observe and implement UNDRIP is clearly stated in Article 41".³⁷

In its 2014 *Social and Environmental Standards*, the UN Development Programme (UNDP) indicated that it "will not participate in a Project that violates the human rights of indigenous peoples as affirmed by ... the United Nations Declaration on the Rights of Indigenous Peoples".³⁸ "This requirement is consistent with UNDP's obligations as per Article 42 of UNDRIP."³⁹

After in-depth assessment, the International Law Association concluded in 2010 that the *UN Declaration* is "a declaration deserving of utmost respect".⁴⁰ This position is consistent with a 1962 opinion from the UN Office of Legal Affairs that provides: "in United Nations practice, a 'declaration' is a solemn instrument resorted to only in very rare cases relating to matters of major and lasting importance where maximum compliance is expected".⁴¹

Similarly, James Anaya has underlined: "implementation of the Declaration should be regarded as political, moral and, yes, legal imperative without qualification."⁴² The Truth and Reconciliation Commission has called upon "federal, provincial, territorial, and municipal governments to fully adopt and implement the *United Nations Declaration on the Rights of Indigenous Peoples* as the framework for reconciliation."⁴³

Conclusions

States, including Canada, cannot avoid Indigenous peoples' human rights and related State obligations in the *UN Declaration*, by attempting to diminish its legal significance. While a great deal of work remains to be done, the *Declaration* is attracting increased focus and support in terms of its implementation at all levels.

The *Declaration* is a blueprint for achieving justice, reconciliation and renewed hope. States, in conjunction with Indigenous peoples, must ensure full and effective implementation of this human rights instrument – both domestically and internationally.

Endnotes

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

² General Assembly, *Evaluation of the progress made in the achievement of the goal and objectives of the Second International Decade of the World's Indigenous People: Report of the Secretary-General*, U.N. Doc. A/67/273 (8 August 2012), at para. 6.

³ General Assembly, *Situation of human rights and fundamental freedoms of indigenous people: Note by the Secretary-General*, Interim report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/65/264 (9 August 2010), para. 58: “the Declaration does not affirm or create special rights that are unique to indigenous peoples in a fundamental sense, but rather it elaborates upon fundamental human rights of universal application in the specific cultural, historical, social and economic circumstances of indigenous peoples.”

⁴ *UN Declaration*, articles 7 and 43.

⁵ The Waitangi Tribunal was established in 1975 by the Treaty of Waitangi Act 1975. The Tribunal is a permanent commission of inquiry charged with making recommendations on claims brought by Māori relating to actions or omissions of the Crown that potentially breach the promises made in the Treaty of Waitangi.

⁶ *Ko Aotearoa Tēnei: A Report into Claims Concerning New Zealand Law and Policy Affecting Māori Culture and Identity*, Te Taumata Tuarua, Volume 2, WAI 262, Waitangi Tribunal Report 2011, https://forms.justice.govt.nz/search/Documents/WT/wt_DOC_68356606/KoAotearoaTeneiTT2Vol2W.pdf, at 672.

⁷ Australian Human Rights Commission, “Information concerning Australia and the Convention on the Rights of the Child”, Submission to the Committee on the Rights of the Child, August 2011, http://www.humanrights.gov.au/information-concerning-australia-and-convention-rights-child-0#s3_2, Recommendation 4.

The government of Australia confirmed: “All legislation proposals in Australia are scrutinised by a parliamentary committee to ensure their consistency with human rights, and the Declaration is considered in this context.” See Australia, Statement, Expert Mechanism on the Rights of Indigenous Peoples, Agenda item 6: United Nations Declaration on the Rights of Indigenous Peoples, July 2013, <http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASH01b0/cbdb4f0e.dir/EM13dea143.pdf>.

⁸ Norway, “Statement (Agenda Item 4)” (Delivered to the Expert Mechanism on the Rights of Indigenous Peoples, 2d Sess, Geneva, 12 August 2009) (copy on file with author).

⁹ *UN Declaration*, preambular para. 7.

¹⁰ Human Rights Council, *Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Addendum: The situation of indigenous peoples in Canada*, UN Doc. A/HRC/27/52/Add.2 (4 July 2014), Annex, para. 82 (Conclusions and recommendations).

¹¹ Aboriginal Affairs and Northern Development Canada, “Canada’s Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples”, 12 November 2010, <http://www.aadnc-aandc.gc.ca/eng/1309374239861>.

¹² “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), “International Partnerships”.

¹³ Government of Canada, *A Canada for All: Canada’s Action Plan Against Racism* (Ottawa: Department of Canadian Heritage, 2005), at 37

¹⁴ *UN Declaration*, articles 38 and 40.

¹⁵ *Ibid.*, article 42.

¹⁶ Alexandra Xanthaki, “Indigenous Rights in International Law Over the Last 10 Years and Future Developments”, (2009) 10 *Melbourne J. Int’l L.* 27 at 36. [emphasis added]

See also Norway, Statement, UN Declaration on the Rights of Indigenous Peoples, 5 years, Permanent Forum on Indigenous Issues, 17 May 2012, <http://www.docip.org/gsd/collect/cendocdo/index/assoc/HASHee74/b33db27f.dir/pf12morten330.pdf>: “The Government of Norway participated actively in the work on the Declaration since it started almost three decades ago. Our

goal was to arrive at a Declaration that could strengthen the protection of all the world's indigenous peoples. The Declaration contextualizes all existing human rights for indigenous peoples ..." [emphasis added]

¹⁷ 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/64/338 (4 September 2009), para. 69 (Conclusions and recommendations).

¹⁸ General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, UN Doc. A/RES/69/2 (22 September 2014) (adopted without a vote). Although Canada subsequently submitted a statement of their position, this does not affect the consensus status of the Outcome Document.

¹⁹ *Ibid.*, para. 4.

²⁰ Canada, "Statement by His Excellency Paul Meyer, Ambassador and Head of Delegation of Canada, to the Working Group on the Draft Declaration on the Rights of Indigenous Peoples, to the 1st Session of the Human Rights Council", Geneva (29 June 2006), http://www.canadainternational.gc.ca/prmny-mponu/canada-un-canada_onu/statements-declarations/human_rights-droits_personne/7294.aspx?lang=eng&view=d.

²¹ See also 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: "The representative of Canada requested that it be reflected in the report that his delegation objected to the use of the United Nations Declaration on the Rights of Indigenous Peoples as an international standard. The Declaration was not a legally binding instrument, had no legal effect in Canada, and its provisions did not represent customary international law."

²² *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 S.C.R. 313, at 348. [emphasis added] This same passage has been cited with approval in subsequent cases: see *McIvor v. Canada (Registrar, Indian and Northern Affairs)*, [2007] 3 C.N.L.R. 72 (B.C.S.C.), para.184; and *United States of America v. Burns*, [2001] 1 S.C.R. 283, para.80.

²³ Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed. (New York: Cambridge University Press, 2013), at 9: "Treaties and customs are the main sources of international law. Customary law is made up of two elements: (1) evidence of a substantial uniformity of practice by a substantial number of states; and (2) *opinio juris* – a general recognition by states that the practice is settled enough to amount to a binding obligation in international law."

In regard to the *UN Declaration* and customary international law, see Paul Joffe, "*UN Declaration on the Rights of Indigenous Peoples: Canadian Government Positions Incompatible with Genuine Reconciliation*", (2010) 26 N.J.C.L. 121, <http://quakerservice.ca/wp-content/uploads/2011/05/NJCLPJArticleUNDeclaration2010.pdf>, at 205-207.

²⁴ International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010), at 51: "... it is not important to investigate whether the relevant rules of customary international law actually correspond, in their precise content, to the provision of [the *UN Declaration*] in their actual formulation. By its own nature a declaration of principles, even when its content partially reproduces general international law, has in fact also a propulsive force, aimed at favouring further evolution of its subject matter for the future."

²⁵ Human Rights Council, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010), UN Doc. A/HRC/15/37/Add.1 (15 September 2010), para. 112; and International Law Association, *supra* note 24 at 43-44 and 51.

In regard to non-discrimination, see *UN Declaration*, preambular paras. 5, 9, 18 and 22 and arts. 1, 2, 8(2)(e), 9, 14(2), 15(2), 16(1), 17(3), 2(1), 24(1), 29(1), and 46(2), (3); for self-determination and self-government, see PP 1, 16 and 17 and arts. 3 and 4; and for cultural integrity, see arts. 3, 4, 8, 9, 11–16, 25, 31–34, 36, 37, 38, 40 and 41. The provisions on lands, territories and resources are also of central importance to culture. In regard to property, see *UN Declaration*, arts. 11, 25-28 and 30.

²⁶ International Law Association, *supra* note 24 at 16-17, 51 and 52. In regard to torture, genocide and right to life, see *UN Declaration*, art. 7; and reparation and redress, see arts. 11(2), 28 and 40.

²⁷ *Hamilton Health Sciences Corp. v. D.H.*, 2015 ONCJ 229 (Ont. Ct of J), para. 83b.

²⁸ *Ibid.* See also *UN Declaration*, article 24: “1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices . . . Indigenous individuals also have the right to access, without any discrimination, to all social and health services.”

²⁹ *First Nations Child and Family Caring Society of Canada v. Canada (Attorney General)*, 2012 FC 445, para. 353.

³⁰ *First Nations Child and Family Caring Society et al. v. Canada (Attorney General)*, "Memorandum of Fact and Law of the Respondent, the Attorney General of Canada", Respondent's Record, vol. 5, Federal Court of Canada, Dockets T-578-11, T-630-11, T-638-11, 17 November 2011, para. 71.

³¹ Committee on the Elimination of Racial Discrimination, "Consideration of reports, comments and information submitted by States parties under article 9 of the Convention (continued): Nineteenth and twentieth periodic reports of Canada (continued)", Summary record of 1242nd meeting on 23 February 2012, UN Doc. CERD/C/SR.2142 (2 March 2012), para. 39. [emphasis added]

³² Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Cases examined by the Special Rapporteur (June 2009 – July 2010)*, UN Doc. A/HRC/15/37/Add.1 (15 September 2010) (Advance Version), para. 112.

³³ 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/19-20 (9 March 2012) (advance unedited version), para. 19.

³⁴ Permanent Forum on Indigenous Issues, *Information received from Governments: Bolivia*, E/CN.19/2009/4/Add.2 (24 February 2009), para. 57.

³⁵ Greenland (Delegation of Denmark), “Statement by Mr. Kuupik Kleist, Premier of Greenland” (Delivered to the Expert Mechanism on the Rights of Indigenous Peoples, 2d Sess., Geneva, 11 August 2009) at 2.

³⁶ Permanent Forum on Indigenous Issues, *Report on the seventh session (21 April - 2 May 2008)*, UN ESCOR, 2008, Supp. No. 23, UN Doc. E/2008/43, E/C.19/2008/13 at para.132. The seven substantive mandated areas of the Permanent Forum are “economic and social development, environment, health, education, culture, human rights and the implementation of Declaration”.

³⁷ Food and Agriculture Organization, *FAO Policy on Indigenous and Tribal Peoples* (Rome, Italy: FAO, 2010), at 2-3. Art. 41 of the *UN Declaration* affirms: “The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration . . .”

³⁸ United Nations Development Programme, *UNDP Social and Environmental Standards*, 14 July 2014, <http://www.undp.org/content/dam/undp/library/corporate/Social-and-Environmental-Policies-and-Procedures/UNDP%20Social%20and%20Environmental%20Standards-14%20July%202014.pdf>, “Standard 6: Indigenous Peoples”, at 33, para. 4 (Respect for domestic and international law).

³⁹ *Ibid.*, note 68. [emphasis added] Art. 42 of the *Declaration* affirms that specialized agencies shall “promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

⁴⁰ International Law Association, *supra* note 24 at 5, where the following rationale is added: "This is confirmed by the words used in the first preambular paragraph of the Declaration, according to which, in adopting it, the General Assembly was “[g]uided by the purposes and principles of the Charter of the United Nations, and good faith in the *fulfilment of the obligations assumed by States in accordance with the Charter*”; this text clearly implies that respect of the UNDRIP represents an essential prerequisite in order for States to comply with some of the obligations provided for by the UN Charter." [underline added]

See also Mauro Barelli, “The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples”, (2009) 58 ICLQ 957, at 960: “... recognizing the growing importance of non-binding instruments in the international legal system ... [and] in the light of the context in which it has been established and its very normative content, the Declaration has important legal effects and generates reasonable expectations of complying behaviour.”

⁴¹ Economic and Social Council, *Report of the Commission on Human Rights* (E/3616/Rev. 1), para. 105, 18th session, 19 March – 14 April 1962. [emphasis added]

⁴² General Assembly, *Rights of indigenous peoples: Note by the Secretary-General*, UN Doc. A/67/301 (14 August 2013) (report of the Special Rapporteur on the rights of indigenous peoples, James Anaya), para. 67.

⁴³ Truth and Reconciliation Commission of Canada, *Truth and Reconciliation Commission of Canada: Calls to Action*, 2015, http://www.trc.ca/websites/trcinstitution/File/2015/Findings/Calls_to_Action_English2.pdf, at 4, para. 43.