

Global Implementation of the *UN Declaration on the Rights of Indigenous Peoples* – and Canada’s Increasing Isolation

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This analysis is largely adapted from various joint submissions of Indigenous peoples and human rights organizations, which directly involved the author.

1. September 13, 2009 is the second anniversary of the historic adoption of the *United Nations Declaration on the Rights of Indigenous Peoples*² by the General Assembly. It is timely to highlight the growing significance and implementation of this crucial human rights instrument. In this context, Canada’s ongoing opposing role is also described.
2. On September 13, 2007, UN member States voted overwhelmingly in favour of the *UN Declaration*. The vote was 144-4. Only Canada, Australia, New Zealand and the United States voted against.
3. In April 2009, the Labour government in Australia announced its endorsement of the *Declaration*.³ In the spring of 2009, New Zealand and the United States indicated that they are in the process of reconsidering their opposing positions. Thus, Canada is increasingly isolated on the world stage.

Increasing significance and application of the *Declaration*

4. The *UN Declaration* is the most comprehensive, universal international human rights instrument explicitly addressing the rights of Indigenous peoples. It elaborates on the economic, social, cultural, political, spiritual and environmental rights of Indigenous peoples.
5. The *Declaration* does not create new rights.⁴ It elaborates on Indigenous peoples’ inherent rights, which throughout history have not been respected.⁵ As concluded by Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya:

[The *Declaration*] 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.⁶

6. The *Declaration* has universal application to over 370 million Indigenous people in over 70 countries. Indigenous peoples are among the most disadvantaged peoples in the world. The widespread and persistent human rights violations that they continue to suffer require urgent attention.
7. The *Declaration* provides a principled and normative legal framework for achieving justice and reconciliation between Indigenous and non-Indigenous peoples. UN Secretary-General Ban Ki-moon has emphasized:

The Declaration is a visionary step towards addressing the human rights of indigenous peoples. It sets out a framework on which States can build or rebuild their relationships with indigenous peoples. The result of more than two decades of negotiations, it provides a momentous opportunity for States and indigenous peoples to strengthen their relationships, promote reconciliation and ensure that the past is not repeated.⁷

8. Indigenous peoples' collective rights are human rights, as affirmed in the *Declaration* and other international and regional instruments.⁸ In its Agenda and Framework for the Programme of Work, the Human Rights Council has permanently included the "rights of peoples" under Item 3 "Promotion and protection of all human rights ..."⁹ For decades, the established practice is to address Indigenous peoples' collective rights within international and regional human rights systems.
9. Like other human rights instruments, the *Declaration* is necessarily drafted in broad terms. Its provisions can accommodate the different circumstances relating to Indigenous peoples – both now and in the future. This wide-ranging perspective enhances the effectiveness of the *Declaration*. At the regional level, a similar view has been expressed by the African Commission on Human and Peoples' Rights:

Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective.¹⁰

10. International treaty monitoring bodies are referring to the *Declaration* and using it to interpret the rights of Indigenous peoples and individuals and related State obligations. This practice underlines the significance of the *Declaration* and its implementation at all levels – international, regional and national.

... the Committee [on the Rights of the Child] 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.¹¹

11. Even if a State voted against the adoption of the *Declaration* at the General Assembly, international treaty monitoring bodies are free to recommend that the *Declaration* "be used as a guide to interpret the State party's obligations" under human rights treaties.¹²
12. In terms of implementing the *UN Declaration*, the Office of the High Commissioner for Human Rights (OHCHR), specialized agencies and mandate-holders of special procedures are committed to making important contributions at various levels. The High Commissioner for Human Rights has underlined:

I look forward to further steps towards universal acceptance of this significant human rights instrument. ... My Office is committed to be a frontline advocate of universal acceptance and implementation of the Declaration ... Indeed, these rights [of indigenous peoples] are, and will remain, a priority area for OHCHR.¹³

13. Thirty-one UN specialized agencies¹⁴ are represented in the Inter-Agency Support Group on Indigenous Issues (IASG). The IASG has emphasized that the adoption of the *Declaration*

constitutes a crucial opportunity ... according to Article 42 of the Declaration, to promote respect for and full application of its provisions and follow-up its effectiveness. 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.¹⁵

14. With regard to the special procedures of the Human Rights Council, a November 2008 report states: "Mandate-holders agreed that the effective implementation of the Declaration constituted a major challenge ahead, and decided to strengthen their efforts in that regard".¹⁶ In this context, it was also agreed 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.¹⁷

15. In May 2008, the UN Permanent Forum on Indigenous Issues affirmed that the *Declaration* "will be its legal framework" and will therefore ensure that the *Declaration* is integrated in all aspects of its work.¹⁸

Regional and national implementation

16. Regional human rights instruments should complement and reinforce the universal standards in the *UN Declaration*. As affirmed in the 1993 *Vienna Declaration*: "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."¹⁹

17. Within the Organization of American States (OAS), the UN Declaration is being used as "the baseline for negotiations and ... a minimum standard" for the draft American Declaration on the Rights of Indigenous Peoples.²⁰

18. The African Commission on Human and Peoples' Rights has stated that it is "confident 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."²¹ Some aspects of the Commission's "Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and

Peoples' Rights" are reflective of the *UN Declaration*. In regard to Indigenous peoples' rights to lands and natural resources, specific reference is made to the *Declaration*.²²

19. The Association of Southeast Asian Nations (ASEAN) has adopted the terms of reference for a new ASEAN Intergovernmental Commission for Human Rights (AICHR).²³ While no specific reference is made to the *UN Declaration*, the guiding principles for the AICHR include "upholding the Charter of the United Nations and international law ... subscribed to by ASEAN Member States". Thus, as part of international law, the *Declaration* appears to be included. As proposed by the UN Permanent Forum on Indigenous Issues, there should be explicit consideration of the *Declaration*, Indigenous peoples and their human rights issues.²⁴
20. In the Americas, the Inter-American Court of Human Rights has relied in part on the *UN Declaration* in determining unanimously that the Saramaka people have "the right to give or withhold their free, informed and prior consent, with regards to development or investment projects that may affect their territory".²⁵
21. In Bolivia, the *Declaration* was adopted at the national level as Law No. 3760 of 7 November 2007 and incorporated into the new Constitution promulgated on 7 February 2009. Bolivia emphasizes that it "has elevated the obligation to respect the rights of indigenous peoples to constitutional status, thereby becoming the first country in the world to implement this international instrument".²⁶
22. In the Democratic Republic of the Congo, the government has endorsed the *Declaration*. In addition, the "Constitution has reaffirmed in that regard the attachment of the Democratic Republic of the Congo to human rights and fundamental freedoms such as those proclaimed by the international legal instruments to which it has acceded."²⁷
23. In the Arctic, Greenland achieved significantly enhanced self-government on June 21, 2009 and celebrated its new partnership with Denmark.²⁸ As described by the Premier of Greenland Kuupik Kleist, "this new development in Greenland and in the relationship between Denmark and Greenland should be seen as a de facto implementation of the Declaration and, in this regard, hopefully an inspiration to others".²⁹
24. In August 2009, Norway 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".³⁰
25. In Belize, the Supreme Court of Belize relied on the *UN Declaration* and other aspects of international and domestic law in upholding the land and resource rights of the Maya people.³¹
26. In April 2009, Colombia announced its endorsement of the *Declaration*.³² Colombia had previously abstained in the General Assembly vote on this human rights instrument.
27. Implementation of the *UN Declaration* is being further enhanced by the translation of this instrument into different Indigenous and other languages.³³ Such actions promote human

rights learning and education and can be highly beneficial for Indigenous communities in developing a human rights-based approach.

Canada's disregard for international and Canadian law

28. The advances to date in implementing the *UN Declaration* are highly significant, although much remains to be done. Yet the current government of Canada continues to vigorously oppose the *Declaration*. As illustrated below, the government's actions violate the rule of law both in Canada and internationally.
29. Canada has a legal duty to uphold the purposes and principles of the *UN Charter*, which include: "To achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction ..." ³⁴ Canada also has a duty to "take joint and separate action in co-operation with the [United Nations] for the achievement of the purposes set forth in Article 55", ³⁵ i.e. to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction". ³⁶
30. In seeking election to the Human Rights Council in June 2006, Canada freely accepted to "uphold the highest standards in the promotion and protection of human rights" and "cooperate with the Council" – as required of all Council members. ³⁷ Canada repeatedly highlighted this commitment at the Council's inaugural session. ³⁸ Therefore, during its three-year term on the Council, Canada's conduct must be evaluated on the basis of this legal obligation both internationally and at home.
31. The work of the Human Rights Council is "guided by the principles of universality, impartiality, objectivity and non-selectivity, constructive international dialogue and cooperation, with a view to enhancing the promotion and protection of all human rights". ³⁹ Double standards or politicization should be carefully avoided. ⁴⁰
32. Yet Canada has been selective and partial in what human rights it chooses to respect and protect. In relation to Indigenous peoples, Canada has impeded international and regional cooperation ⁴¹ and failed to promote universal respect for human rights *for all*. ⁴²
33. The current government has opposed explicit affirmation that Indigenous peoples' collective rights are human rights. ⁴³ It also refuses to acknowledge that the *UN Declaration* is an international *human rights* instrument. ⁴⁴ These positions are incompatible with those of the Canadian Human Rights Commission ⁴⁵ and which has publicly stated: "The Commission will look to the Declaration for inspiration in our own work." ⁴⁶
34. During its three-year term, the Canadian government pursued the lowest standards of any Council member within the Western European group of States. In 2007, Canada was the sole country on the 47-member Human Rights Council to vote against the *Declaration* at the General Assembly.
35. In contrast to the overwhelming support within the international community, the Canadian government has characterized the *Declaration* as "very radical". ⁴⁷ It publicly indicated that there were only collective rights in this new instrument and that there was no balancing of

individual and collective rights.⁴⁸ The government added that the rights of non-native Canadians would have been threatened had the government not opposed the *Declaration*⁴⁹ and that “the document is unworkable in a Western democracy under a constitutional government”.⁵⁰

36. Such extreme statements are simply false.⁵¹ They serve to generate fear among the Canadian public, as well as opposition to the *Declaration* and discrimination against Indigenous peoples’ human rights. In reality, the *Declaration* is crafted to ensure the survival, dignity, security and well-being of the world’s Indigenous peoples.⁵²
37. Canada argues that the *Declaration* is inconsistent with the Constitution and *Canadian Charter of Rights and Freedoms*. Yet every provision of the *Declaration* must be “interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith”.⁵³ These are core principles and values in international law and in Canada’s Constitution, including the *Canadian Charter*.
38. Canada has raised concerns regarding five hundred treaties that have been signed over the past 250 years with Indigenous peoples. It has publicly stated: “The government does not support the [UN] declaration because that declaration jeopardizes those treaties, the enforceability and the meaning of them.”⁵⁴ The government’s statements are contradicted by the *Declaration* itself.⁵⁵ In addition, the treaty rights of Indigenous peoples are protected by Canada’s Constitution and cannot be “jeopardized” by any international human rights instrument.
39. At the Human Rights Council⁵⁶ and the General Assembly,⁵⁷ Canada has declared that the *UN Declaration* “has no legal effect in Canada, and its provisions do not represent customary international law”. These statements are erroneous and contrary to Canadian and international law. While the *Declaration* is generally a non-binding instrument, it has legal effect in Canada.⁵⁸ In many respects, it is declaratory of existing customary international law.⁵⁹
40. Canadian government claims rely on extreme interpretations of individual provisions in isolation from the necessary context of the *Declaration* as a whole and without regard for the body of international human rights law to which it belongs.⁶⁰ In the close to two years since the adoption of the *Declaration*, none of the imagined negative consequences have materialized.
41. Like other human rights instruments of a similar nature, the *Declaration* can only complement, and not override, existing human rights protections. The necessity of a balanced interpretation and application of the *Declaration* is made explicit. Every provision must be “interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith” (art. 46(3)). The rights of all interested parties must always be fully and fairly considered.
42. In April 2008 a Motion was adopted by the House of Commons in Canada’s Parliament – calling for the Parliament and government of Canada to “fully implement” the standards in

the *Declaration*. Regretfully, the current minority government ignored this Motion thereby denying the will of the majority of parliamentarians.

43. The Canadian government has opposed the *Declaration* in various international forums. It has encouraged other States to not support the *Declaration*. In taking its opposing positions, Canada has ignored its obligations under s. 35 of the *Constitution Act, 1982*, both in substantive and procedural terms.⁶¹ It has failed to consult and accommodate Indigenous peoples and uphold the honour of the Crown.

The duty to consult 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. This in turn may lead to a duty to change government plans or policy to accommodate Aboriginal concerns. Responsiveness is a key requirement of both consultation and accommodation.⁶²

44. The Canadian government has encouraged States that are supportive of the *Declaration* to go on record stating concerns or conditions for its implementation. The government has then divisively used these statements to question support for the *Declaration*.
45. At the world climate talks in Poland in December 2008, Canada's Environment Minister announced at a press conference that the *UN Declaration* "has nothing whatsoever to do with climate change."⁶³ Such statements unfairly politicize Indigenous peoples' human rights and undermine global attempts to respond effectively to climate change.
46. 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".⁶⁴
47. In addition, an Open Letter signed by more than 100 legal scholars and experts in May 2008 underlines the far-reaching impacts of Canada's "misleading 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.⁶⁵

Undermining the international human rights system

48. The prejudicial strategies and positions of the government go well beyond Indigenous peoples. They serve to undermine the essential principle of international cooperation and the international human rights system as a whole.
49. The Canadian government erroneously claims that, in view of its opposing vote, the *Declaration* does not apply in Canada. This appears to be the first time that Canada has vigorously opposed a human rights instrument adopted by the General Assembly. In its December 2007 report, Amnesty International cautions that Canada's position "attempts to set a very dangerous precedent for UN human rights protection". 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*. ... It is impossible to recall a similar example of Canada taking such a *harmful position* on the basic principles of global human rights protection.⁶⁶

50. A further cause for serious concern pertains to Canada's positions and actions that in effect challenge the universality of Indigenous peoples' human rights.
51. At the Economic and Social Council session in July 2008, Canada indicated that the term "implement" in regard to the *UN Declaration* refers to "those States that have chosen to support it".⁶⁷ According to Canada, when the UN Permanent Forum on Indigenous Issues is required to implement the *Declaration*, it cannot do so in relation to States that voted against this instrument.
52. Canada's position challenges the universality⁶⁸ of the *Declaration* as a human rights instrument,⁶⁹ which explicitly indicates that it applies to all Indigenous peoples and individuals worldwide.⁷⁰ Canada also seeks to limit unjustly the mandate of the Permanent Forum in a manner that would contradict the global context of the *Declaration*.⁷¹
53. A further challenge had previously been attempted in August 2007. An amendment was proposed unsuccessfully by Canada, New Zealand, Colombia and the Russian Federation in relation to article 46(3) of the *Declaration* that would have required all its provisions to be interpreted in accordance with "constitutional frameworks".⁷²
54. The proposed amendment on "constitutional frameworks" was not disclosed to or discussed with Indigenous peoples prior to its submission to the President of the General Assembly. Nor was such an amendment ever tabled during the two decades of discussions in the UN Working Groups that drafted and considered the earlier texts of the *Declaration*.
55. During the standard-setting process, a version similar to article 46(3) of the *Declaration* had been initially drafted and proposed by the former government of Canada in collaboration with Indigenous peoples. Canada had actively encouraged other States to support this provision. Yet the current government of Canada continues to refuse to accept article 46(3).
56. To require the provisions of the *Declaration* to be interpreted in accordance with the "constitutional frameworks" of each State could serve to legitimize any existing injustices and discrimination in national constitutions. Treaty monitoring bodies and special rapporteurs could be hampered from recommending amendments to constitutions, so as to recognize or safeguard the human rights of Indigenous peoples.
57. No such limitation or qualification is found in the *Universal Declaration on Human Rights* or the two international human rights Covenants. To impose such a requirement on the rights of Indigenous peoples would run counter to the principle of "equal rights and self-determination of peoples" in the *Charter of the United Nations*. It would also constitute a discriminatory double standard.

58. The interpretation of Indigenous peoples' human rights in accordance with "constitutional frameworks" could severely undermine the principle of universality. Indigenous peoples in States with national constitutions that deny Indigenous rights could be denied rights that exist for Indigenous peoples in other countries.

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. ... [I]t is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and freedoms.⁷³

Conclusions

59. Indigenous peoples' human rights and related issues continue to be mainstreamed throughout the UN system. Implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* must remain a central objective. Many States are actively engaging in a constructive and dynamic manner.
60. The process of implementing the *Declaration* is in its initial stages and there remain formidable challenges to overcome. In the different regions of the world, Indigenous peoples continue to suffer severe poverty, dispossession of lands and resources, marginalization, discrimination and other widespread and persistent human rights violations.
61. In opposing the *UN Declaration*, Canada is increasingly isolated on the world's stage. The actions of the Canadian government's actions are not consistent with the purposes and principles of the *Charter of the United Nations*, run counter to the principles of international cooperation and solidarity, and serve to undermine the international system as a whole.
62. In regard to Canada – there is virtually no advantage to retaining regressive or prejudicial positions. Its international reputation and credibility will likely continue to suffer.⁷⁴ In regard to international human rights, the current minority government is significantly altering the positive role that Canada has previously played.
63. In regard to the *UN Declaration*, there is no turning back. The *Declaration* is a living instrument that is broadly supported and has universal application. It provides a crucial context and framework towards ensuring justice, as well as the dignity, security and well-being of Indigenous peoples. Its human rights-based approach is both beneficial and necessary at the international, regional and domestic levels.
64. Even as Canada opposes the *Declaration*, implementation is taking place domestically, with the leadership of Indigenous peoples and in partnership with civil society. The *Declaration* is becoming an integral part of human rights education and is used in presentations and materials shared across the country. Indigenous peoples are emphasizing the *Declaration's* standards in their discourse with government and corporations. Academic institutions are including the *Declaration* in curricula, and trade unions are educating their members.

¹ 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, in formulating a draft American Declaration on the Rights of Indigenous Peoples.

² GA Res. 61/295 (Annex), UN GAOR, 61st Sess., Supp. No. 49, Vol. III, UN Doc. A/61/49 (2008) 15.

³ 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.

⁴ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9 (11 August 2008), para. 40: “The Declaration does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.”

⁵ *UN Declaration*, seventh preambular para.: “Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.

⁶ Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, S. James Anaya*, UN Doc. A/HRC/9/9 (11 August 2008) at para. 85 (Conclusions).

⁷ 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).

⁸ See, e.g., *UN Declaration*, article 1: “Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.”

⁹ Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, Annex (18 June 2007), adopted without a vote and approved by the General Assembly

¹⁰ African Commission on Human and Peoples’ Rights, *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v Nigeria*, Comm. No. 155/96, 15th Activity Report 2001-02, 31 at para. 68.

¹¹ 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), para. 82. See also Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: Nicaragua*, UN Doc. E/C.12/NIC/CO/4 (28 November 2008), para. 35.

¹² Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, CERD/C/USA/CO/6 (9 May 2008) at 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.”

See also Permanent Forum on Indigenous Issues, *Report on the eighth session (18 - 29 May 2009)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2009/43, E/C.19/2009/14, Annex (General comments to the follow-up to the recommendations of the Permanent Forum on Indigenous Issues on implementation of the United Nations Declaration on the Rights of Indigenous Peoples and on dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples and other special rapporteurs - “Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples”), para. 8.

The Declaration is a human rights standard elaborated upon the fundamental rights of universal application and set in the cultural, economic, political and social context of indigenous peoples. It should be applied on this basis regardless of how each State voted in the General Assembly or their subsequent position.

¹³ United Nations High Commissioner for Human Rights “Opening Remarks Ms. Navanethem Pillay, United Nations High Commissioner for Human Rights to the 2nd session of the Expert Mechanism on the Rights of Indigenous Peoples”, United Nations, Geneva (10 August 2009), online: <<http://www.unhcr.ch/hurricane/hurricane.nsf/view01/0A1A8D39C55CE3F9C125760E00304246?opendocument>>.

¹⁴ As of 2008, the IASG includes 31 members. These are: UN Department of Economic and Social Affairs (DESA); UN Department of Public Information (DPI); Secretariat for the Convention on Biological Diversity (SCBD); Food and Agriculture Organisation of the United Nations (FAO); International Fund for Agricultural Development (IFAD); International Labour Organisation (ILO); International Organization for Migration (IOM); United Nations Office of the Coordination of Humanitarian Affairs (OCHA); Office of the United Nations High Commissioner for Human Rights (OHCHR); United Nations Programme on HIV/AIDS (UNAIDS); United Nations Conference on Trade and Development (UNCTAD); United Nations Development Program (UNDP, including Regional Initiative on Indigenous Peoples' Rights and Development in the Asia Pacific); United Nations Environment Programme (UNEP); United Nations Educational Scientific and Cultural Organisation (UNESCO); United Nations Framework Convention on Climate Change (UNFCCC); United Nations Population Fund (UNFPA); United Nations Human Settlements Programme (UN-HABITAT, including Indigenous Peoples' Right to Adequate Housing: A Global Overview); United Nations Children's Fund (UNICEF); United Nations Development Fund for Women (UNIFEM); United Nations Industrial Development Organisation (UNIDO); United Nations Institute for Training and Research (UNITAR); World Intellectual Property Organization (WIPO); World Health Organization (WHO); World Bank; Inter-American Development Bank (IADB); European Union; Fondo Indígena; Economic Commission for Latin America and the Caribbean (ECLAC); Commonwealth Secretariat; United Nations University, Institute of Advanced Studies; United Nations Non-Governmental Liaison Service (NGLS).

¹⁵ 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.

¹⁶ 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.

¹⁷ *Ibid.*

¹⁸ 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”.

¹⁹ United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 37. See also UN General Assembly, *International Covenants on Human Rights*, Res. 62/147, 18 December 2007 (adopted without vote), preamble: “Recognizing the importance of regional human rights instruments and monitoring mechanisms in complementing the universal system of promotion and protection of human rights”.

²⁰ 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), 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.

²¹ African Commission on Human and Peoples' Rights, "Communique on the United Nations Declaration on the Rights of Indigenous Peoples", Brazzaville, Republic of Congo (28 November 2007).

²² African Commission on Human and Peoples' Rights, "Draft Principles and Guidelines on Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights", no date, note 102 (referring to *UN Declaration*) art. 26), online at: http://www.achpr.org/english/other/Draft_guideline_ESCR/Draft_Pcpl%20&%20Guidelines.pdf.

²³ Association of Southeast Asian Nations (ASEAN), "Terms of Reference of ASEAN Intergovernmental Commission on Human Rights", adopted by ASEAN Foreign Ministers 20 July 2009, Phuket, Thailand, online: <http://www.aseansec.org/DOC-TOR-AHRB.pdf>.

Although it is a positive step to create the first regional human rights body in Asia, the terms of reference are in need of major improvements. Otherwise, crucial goals of human rights recognition, protection and enforcement may not be achieved. See, e.g., "UN Human Rights Chief welcomes important step towards establishment of ASEAN Commission on Human Rights", United Nations Press Release, online: <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/9D27DBCDD08C3C06C12575FB003502C5?opendocument>. See also Asian Forum for Human Rights and Democracy, fortnightly e-newsletter, "The adopted terms of reference of ASEAN human rights body disappoint civil society", Issue 94, 31 July 2009.

²⁴ Permanent Forum on Indigenous Issues, *Report on the eighth session (18 - 29 May 2009)*, Economic and Social Council, Official Records, Supplement No. 23, United Nations, New York, E/2009/43, E/C.19/2009/14, para. 99.

²⁵ *Case of the Saramaka People v. Suriname, (Preliminary Objections, Merits, Reparations, and Costs)*, I/A Court H.R., (Judgment) 28 November 2007, Series C No. 172, para. 131 (reference to *UN Declaration*) and para. 214 (8).

²⁶ Permanent Forum on Indigenous Issues, *Information received from Governments: Bolivia*, E/CN.19/2009/4/Add.2 (24 February 2009), para. 57.

²⁷ Permanent Forum on Indigenous Issues, *Information received from Governments: Democratic Republic of the Congo*, UN Doc. E/C.19/2009/4/Add.3 (27 February 2009), para. 10.

²⁸ *Act on Greenland Self-Government*, online: http://uk.nanoq.gl/sitecore/content/Websites/uk,-d,-nanoq/Emner/Government/~/_media/F74BAB3359074B29AAB8C1E12AA1ECFE.ashx. This new Act recognizes Greenlanders as a people under international law (preamble) and Greenlandic as the official language (s. 20). The Act also provides for Greenland's ownership and control of all natural resources (ss. 2-4 and 7).

²⁹ 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.

³⁰ 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).

³¹ *Cal v. Attorney General of Belize and Minister of Natural Resources and Environment; Coy v. Attorney General of Belize and Minister of Natural Resources and Environment* (18 October 2007) Claims No. 171 & 172 (Consolidated), (Supreme Court of Belize), paras. 118-135.

³² 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>.

³³ 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): "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."

For versions of the *Declaration* in the six official UN languages and other languages, see online: Permanent Forum on Indigenous Issues <<http://www.un.org/esa/socdev/unpfi/en/declaration.html>>.

³⁴ *Charter of the United Nations*, Art. 1(3). See also *UN Declaration*, first preambular para.

³⁵ *UN Charter*, Art. 56.

³⁶ See also *Ibid.*, Art. 2(2): “All Members ... shall fulfill in good faith the obligations assumed by them in accordance with the present Charter”.

³⁷ UN General Assembly, *Human Rights Council*, A/RES/60/251 (15 March 2006), para. 9 (duty to uphold highest standards and cooperate with Council). See also Human Rights Council, “The Secretary-General [Kofi Annan] Address to the Human Rights Council” (19 June 2006): “...the General Assembly has required [States seeking election to the Council] to uphold the highest standards in the promotion and protection of human rights”.

³⁸ Canada, “Statement by the Honourable Peter MacKay, Minister for Foreign Affairs Canada to the 1st Session of the Human Rights Council”, Geneva (19 June 2006): “The members of the Council have committed themselves to uphold the highest standards of human rights [and] cooperate with the Council”. Similarly, see 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.

³⁹ *Ibid.*, para. 4. These same principles are integral elements in the Council’s work: see also Human Rights Council, *Institution-building of the United Nations Human Rights Council*, Res. 5/1, 18 June 2007, Annex, V (Agenda and Framework for the Programme of Work), A (Principles).

⁴⁰ UN General Assembly, *Human Rights Council*, *supra*, preamble: “*Recognizing ... the importance of ensuring universality, objectivity and non-selectivity in the consideration of human rights issues, and the elimination of double standards and politicization ...*”.

See also “Durban Review Outcome Document”, United Nations, Geneva (2009), para. 73, online: <http://www.un.org/durbanreview2009/pdf/Durban_Review_outcome_document_En.pdf>: “*Welcomes the adoption of the UN Declaration on the rights of indigenous peoples which has a positive impact on the protection of victims and, in this context, urges States to take all necessary measures to implement the rights of indigenous peoples in accordance with international human rights instruments without discrimination*”.

⁴¹ *Cf.* Permanent Mission of Canada to the United Nations, “Canada’s Commitments and Pledges”, Human Rights Council, New York (10 April 2006): “Canada pledges: ... to give effect to the Council’s *mandate to promote and protect human rights*, including ... by contributing to its work on norm development, and by encouraging cooperation and dialogue”. [emphasis in original]

⁴² 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*, A/60/270, 18 August 2005 (adopted without vote by General Assembly, 16 December 2005), para. 9:

... the goal for the Decade established by the General Assembly, namely strengthening international cooperation for the solution of problems faced by indigenous people in the areas of culture, education, health, human rights, the environment and social and economic development.

⁴³ The Canadian government expressed such opposition at the OAS negotiations in Washington, D.C. on a draft American Declaration on the Rights of Indigenous Peoples.

⁴⁴ In contrast, see, *e.g.*, the list of international human rights instruments of the Office of the High Commissioner for Human Rights, where the *UN Declaration on the Rights of Indigenous Peoples* is included along with other human rights declarations, online: CHCR <<http://www2.ohchr.org/english/law/>>.

⁴⁵ 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.”

⁴⁶ 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>.

⁴⁷ Minister of Indian Affairs and Northern Development, Jim Prentice, in an interview with Mike Duffy, CTV (20 June 2006).

⁴⁸ Minister of Indian Affairs and Northern Development, Chuck Strahl, quoted in S. Edwards, “Tories defend ‘no’ in native rights vote”, *The [Montreal] Gazette* (14 September 2007):

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.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ There are 17 provisions in the *Declaration* that address individual rights: preambular paras. 4 and 22 and Arts. 1, 2, 6, 7, 8, 9, 14, 17, 21, 22, 24, 33, 40, 44 and 46. The *Declaration* contains some of the most comprehensive balancing provisions that exist in any international human rights instrument. See, e.g., Art. 46.

⁵² *UN Declaration*, especially arts. 7 and 43.

⁵³ *UN Declaration*, Art. 46, para. 3. See also Art. 46, para. 2: “In the exercise of the rights enunciated in the ... Declaration, human rights and fundamental freedoms of all shall be respected.”

⁵⁴ *House of Commons Debates*, No. 083 (21 November 2006) at 5147 (Hon. Jim Prentice, Minister of Indian Affairs and Northern Development).

⁵⁵ The provisions in the *UN Declaration* serve to honour, protect and enforce treaties with Indigenous peoples. For example, the preamble recognizes “the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties”.

See also Art. 37 (1): “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”; and (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”.

⁵⁶ 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).

⁵⁷ 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).

⁵⁸ Canada’s highest court has repeatedly ruled that international declarations, conventions, etc. may be relied upon to interpret human rights in Canada. See, e.g., *Reference re Public Service Employee Relations Act (Alberta)*, [1987] 1 Supreme Court Reports 313, at p. 348:

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 [Canadian] Charter's provisions. [emphasis added]

⁵⁹ Examples of existing customary international law include, *inter alia*: general principle of international law of *pacta sunt servanda* ("treaties must be kept"); prohibition against racial discrimination; right to self-determination; right to one's own means of subsistence; right not to be subjected to genocide; *UN Charter* obligation of States to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all"; and requirement of good faith in the fulfillment of the obligations assumed by States in accordance with the *Charter*. The former High Commissioner for Human Rights, among others, has highlighted that the rule banning gender discrimination is also now customary international law.

⁶⁰ UN Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its second session, Geneva, 10-14 August 2009*, UN Doc. A/HRC/12/32 (8 September 2009) (advanced unedited version), para. 78 (Expert John Henriksen): "... individual provisions cannot be interpreted nor implemented in isolation as the articles of the Declaration are interconnected, and connected to other international human rights instruments."

⁶¹ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 S.C.R. 388, 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." [emphasis added]

⁶² *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] 3 Supreme Court Reports 550, para. 25 [emphasis added].

⁶³ Bill Curry and Martin Mittelstaedt, "Ottawa's stand at talks hurting native rights, chiefs say", *Globe and Mail* (12 December 2008) A10. Canada's view is inconsistent with world opinion: see, e.g., 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."

⁶⁴ Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Canada*, CERD/C/CAN/CO/18 (25 May 2007), para. 27.

⁶⁵ "UN Declaration on the Rights of Indigenous Peoples: Canada Needs to Implement This New Human Rights Instrument", Open Letter (1 May 2008), available at <http://cfsc.quaker.ca/pages/documents/UNDecl-ExpertsignonstatementMay1.pdf>.

⁶⁶ 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 7-8 [emphasis added].

⁶⁷ 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, July 24, 2008.

⁶⁸ Permanent Forum on Indigenous Issues, *Information received from the United Nations system and other intergovernmental organizations: Office of the High Commissioner for Human Rights*, E/C.19/2008/4/Add.14 (14 February 2008), para. 25: "The OHCHR considers that the adoption of the Declaration on the Rights of Indigenous Peoples offers an opportunity to renew efforts to improve the situation of indigenous peoples worldwide, *establishing for the first time universal standards* that can guide public policy." [emphasis added]

⁶⁹ *UN Declaration*, Art. 1: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law."

⁷⁰ *UN Declaration*, Art. 43: “The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”; and Art. 44: “All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals”.

⁷¹ *UN Declaration*, Art. 42: “The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.”

⁷² The amendment was part of a larger package of proposed amendment: see 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”.

⁷³ United Nations World Conference on Human Rights, *Vienna Declaration and Programme of Action*, adopted June 25, 1993, U.N. Doc. A/CONF.157/24 (Part I) at 20 (1993), (1993) 32 I.L.M. 1661, para. 5.

⁷⁴ See, e.g., Robin Bajer, “Canada loses face internationally in voting against indigenous rights”, *Lawyers Weekly* (19 September 2008) 12; and Rachel Brett, “Righting Historic Wrongs: First Session of the UN Human Rights Council (19-30 June 2006)” (July 2006) at 4, online: Quaker United Nations Office, <<http://www.quono.org/geneva/pdf/humanrights/RightingHistoricWrongs200606.pdf>>: “*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”.