Advancing Indigenous Peoples' Human Rights: New Developments in the Americas

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Introduction

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the UN General Assembly on 13 September 2007.[1] Since mid-December 2010, the *UN Declaration* has been a consensus international human rights instrument.[2] No country in the world formally opposes it. The General Assembly reaffirmed the *UN Declaration* by consensus in 2014 and 2015.[3]

In regard to the *UN Declaration*, a "system-wide action plan"[4] has also been devised within the UN with international and national dimensions. The action plan has the "ultimate goal of implementing, with the effective participation of indigenous peoples, the Declaration on the Rights of Indigenous Peoples at all levels."[5]

In September 2016, the Human Rights Council amended the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), so that it "shall provide the Human Rights Council with expertise and advice on the rights of indigenous peoples as set out in the United Nations Declaration".[6] Among its significantly expanded powers,[7] EMRIP "may seek and receive information from all relevant sources as necessary to fulfil its mandate".[8] This specific power will have special meaning in the Americas, in light of the recent adoption of a human rights instrument at the regional level.

The *American Declaration on the Rights of Indigenous Peoples* was adopted by consensus by the Organization of American States (OAS) General Assembly on 15 June 2016.[9] This is a significant development, with potentially far-reaching positive implications for Indigenous peoples in the Americas.

Indigenous peoples in the Americas now have two declarations that specifically affirm and elaborate upon their human rights and related State obligations. The *American Declaration on the Rights of Indigenous Peoples* includes some provisions that fall below the *UN Declaration* and others that go beyond. In addition, both Declarations include provisions that the other does not have.

A key question is: "What is the minimum standard in the *American Declaration* and in the *UN Declaration*?" The short answer is as follows:

> In any specific situation, the minimum standard in the *American Declaration* is the one that is *higher* in these two human rights instruments.

> Although the *American Declaration* did not exist at the time of the adoption of the *UN Declaration*, the minimum standard in the *UN Declaration* is – as of 15 June 2016 – the one that is *higher* in these two instruments.

An analysis to support the above conclusions is provided below.

In analyzing the *American Declaration* or the *UN Declaration*, no specific provision should be interpreted in isolation. Rather each provision should be interpreted in the context of the whole instrument and other regional and international human rights law.

Within the OAS, both regional and international human rights law may be relied upon. The Inter-American Court of Human Rights has determined that the body of "international human rights law comprises a set of international instruments of varied content and juridical effects (treaties, conventions, *resolutions and declarations*)."[10] Moreover, an international instrument "has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation"[11] and not at the time it was adopted. This is especially important for international human rights instruments, where an "evolutive interpretation" is taken.[12]

The Inter-American Commission on Human Rights has adopted this broad approach in interpreting the *American Declaration on the Rights and Duties of Man*.[13] This latter instrument is a "source of international obligations" on Canada, United States and all other OAS member States, regardless of whether they have ratified the *American Convention on Human Rights*.[14] It is likely that the *American Declaration on the Rights of Indigenous Peoples* and the *UN Declaration* will be used to interpret the wide range of regional human rights instruments within the OAS.

1. American Declaration on the Rights of Indigenous Peoples – A brief analysis

Article XLI of the *American Declaration* provides:

> The rights recognized in this Declaration *and the United Nations Declaration on the Rights of Indigenous Peoples* constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the Americas.

By way of comparison, article 43 of the *UN Declaration* affirms: "The rights recognized herein constitute the minimum standards for the survival, dignity, and well-being of the indigenous peoples of the world."

If read alone, article XLI of the *American Declaration* could appear to be ambiguous. It is not clear whether it would be the higher or lower standard in these two instruments that would apply as the minimum standard in the *American Declaration*. However, when article XLI is read together with other provisions of the *American Declaration* and the *UN Declaration*, it is clear that the higher of the two standards would apply in any given situation.

See especially *American Declaration*, article XL: "Nothing in this declaration shall be construed as diminishing or extinguishing rights that indigenous peoples now have or may acquire in the future." Thus, in any particular situation, if the *UN Declaration* has a higher standard than that in the *American Declaration*, the standard in the *UN Declaration* would apply.

In this context, see also *American Declaration*, article V: "Indigenous peoples and persons have the right to the full enjoyment of all human rights and fundamental freedoms, as recognized in the Charter of the United Nations, the Charter of the Organization of American States and international human rights law." This would include the right of Indigenous peoples and individuals in the Americas to the "full enjoyment of all human rights" affirmed in the *UN Declaration*.

See also *American Declaration*, article XXXV: "Nothing in this Declaration may be interpreted so as to limit, restrict, or deny human rights in any way, or so as to authorize any action that is not in keeping with international human rights law." Again, the term "international human rights law" would include the *UN Declaration*.

The *American Declaration*, article XXXVI stipulates: "…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." Therefore, article XXXVI further reinforces the need to respect the human rights in the *UN Declaration* when interpreting the *American Declaration on the Rights of Indigenous Peoples*.

2. UN Declaration on the Rights of Indigenous Peoples – A brief analysis

As highlighted above, the *American Declaration on the Rights of Indigenous Peoples* was adopted by consensus by the OAS General Assembly on 15 June 2016. As a result of this achievement, there may be instances in which specific provisions in the *UN Declaration* should no longer be considered "minimum standards" because the *American Declaration* has established a higher standard.

Article 45 of the *UN Declaration* affirms: "Nothing in this Declaration may be construed as diminishing or extinguishing the rights that indigenous peoples have now *or may acquire in the future*." While the *American Declaration* reaffirms some rights of Indigenous peoples in the Americas in exactly the same wording as in the *UN Declaration*, other rights are elaborated differently. Should such rights include a higher standard than what is in the *UN Declaration*, they would constitute new minimum standards in both the *UN Declaration* and the *American Declaration*.

In this context, consider also *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." This would include the right of Indigenous peoples and individuals in the Americas to the "full enjoyment of all human rights" affirmed in the *American Declaration on the Rights of Indigenous Peoples*.

See also *UN Declaration*, article 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." Therefore, article 46(3) further reinforces the need to respect Indigenous peoples' human rights in the *American Declaration* when interpreting the *UN Declaration*.

3. Additional uses of both Declarations

In some instances, the rights on a particular issue may be affirmed in the two Declarations in significant but different ways.

For example, in regard to environmental rights, the *UN Declaration* affirms in article 29(1): "Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources." By way of comparison, the *American Declaration*, article XIX, para. 1 affirms: "Indigenous peoples have the right to live in harmony with nature and to a healthy, safe, and sustainable environment, essential conditions for the full enjoyment of the right to life, to their spirituality, worldview and to collective well-being." In such cases, both articles can be used together in a mutually reinforcing manner.

In other cases, rights may be affirmed in one of the Declarations but not in the other. For example, article XVIII, para. 3 of the *American Declaration* affirms: "States shall take measures to prevent and prohibit indigenous peoples and individuals from being subject to research programs, biological or medical experimentation, as well as sterilization without their prior, free, and informed consent. Likewise, indigenous peoples and persons have the right, as appropriate, to access to their data, medical records, and documentation of research conducted by individuals and public and private institutions." There is no such corresponding article in the *UN Declaration*.

Another example relates to forcible removals of Indigenous peoples in article 10 of the *UN Declaration*: "Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return."

Forcible removals or relocations are not addressed in the *American Declaration on the Rights of Indigenous Peoples*. This does not mean that such removals are permitted. In accordance with article XLI of the *American Declaration*, article 10 of the *UN Declaration* can be invoked as a minimum standard within the OAS in relation to forcible removals or relocations.

In regard to lands, territories and resources, the *American Declaration* includes a provision that is not in the *UN Declaration*. Article XXV, para. 5 provides:

> Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of

> their lands, territories, and resources in accordance with the legal system of each State and the relevant international instruments. The states shall establish the special regimes appropriate for such recognition, and for their effective demarcation or titling.

The phrase "in accordance with the legal system of each State" must mean that legal recognition of Indigenous peoples' lands, territories and resources will be achieved through the mechanism of the legal system of each state. However, the standard of protection cannot fall below that required by the *UN Declaration* and *American Declaration* regardless of the specific laws of any state. In this context, para. 5 adds that States will establish "special regimes" not only for such recognition, but also for "their effective demarcation or titling".

Thus, para. 5 serves to reinforce the obligation of States in article XXV, para. 4 to "give legal recognition and protection to these lands, territories and resources." Para. 4 adds that such recognition shall be conducted with "due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

The obligation of States in article XXV, para. 4 is *identical* to that in article 26, para. 3 of the *UN Declaration*. Therefore, such obligation in the *UN Declaration* cannot be diminished by para. 5. Article XL of the *American Declaration* stipulates that nothing in this declaration shall be construed as "diminishing or extinguishing rights that indigenous peoples *now have* or may acquire in the future".

4. Effect of Statements by United States, Canada and Colombia

At the time of the adoption of the *American Declaration on the Rights of Indigenous Peoples* by the OAS General Assembly, three States made statements that they requested be included as footnotes[15] in the final text. All three statements include positive and supportive content in relation to Indigenous peoples.

At the same time, there are certain other aspects worth examining in each statement. It is important to determine if they enable any of the States concerned to avoid, in some way, the standards affirmed in the *American Declaration*.

It is important to note that the *American Declaration on the Rights of Indigenous Peoples* was adopted by consensus pursuant to a resolution[16] of the OAS General Assembly. In regard to such resolutions, article 81 of the Rules of Procedure of the General Assembly enables member States to make a statement and have it recorded in the minutes for such session.[17] Apparently, it has become a regular practice that States also request that their statements be added in footnotes to the operative text.

However, the right to include such statements in footnotes in the *American Declaration* does not mean that whatever any State may declare in its statement is legally valid. The legal implications of the statements by United States, Canada and Colombia will each be examined below. The analysis concludes that nothing in the statements of these three States could be validly invoked to

avoid or reduce the standards in the *American Declaration*, *UN Declaration* or other international law.

At the same time, it is worth noting that these three States were among the co-sponsors of a UN Human Rights Council resolution on "Human rights and indigenous peoples" that was adopted by consensus in September 2016.[18] The preamble reaffirms support for the *UN Declaration* and recognizes "current efforts towards the promotion, protection and fulfilment of the rights of indigenous peoples, including the adoption of the American Declaration on the Rights of Indigenous Peoples".

In examining the statements of the three states, there are additional considerations. The Human Rights Council has repeatedly reaffirmed that "regional arrangements play an important role in promoting and protecting human rights and should reinforce universal human rights standards, as contained in international human rights instruments".[19]

In 2008, shortly before being named as UN Special Rapporteur on the rights of Indigenous peoples, James Anaya emphasized to the OAS Working Group: "The American declaration should build on the body of norms provided in the UN [Declaration] and certainly not articulate a lower standard. … To do so would render the American declaration juridically and politically flawed".[20]

4.1 United States of America

In its statement in **footnote 1**, the government of the United States included the following:

> The United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding and therefore does not create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law.

The above quote from the United States statement lacks clarity, accuracy, and legal validity. In particular, the United States claims to have persistently objected to the text of the *American Declaration*. However, valid legal objection would not have been possible for the following three reasons.

First, there is no evidence of United States' *persistent* objection to the text of this American Declaration. In the January 2008 Report of the Chair of the Working Group, it is reported: "The delegations of Canada and the United States … indicated that they *could not accept the UN Declaration text as the starting point or minimum outcome for these negotiations*. The delegation of the United States reminded the participants of their General Reservation".[21]

However, during the first nine meetings of the Working Group, the United States had actively participated and agreed to some provisions in the draft text. Further, on 16 December 2010, the United States reversed its objection to the *UN Declaration* and formally endorsed it.

A number of provisions in the *American Declaration* are identical to those in the *UN Declaration on the Rights of Indigenous Peoples*. In light of the December 2010 endorsement of the *UN Declaration* by the United States, it could not validly object to the same provisions being included in the draft American Declaration text.

Moreover, in its statement, the United States emphasized its intent to continue its "proactive efforts" with States and Indigenous peoples towards achieving the ends of the UN Declaration and fulfilling the commitments in the World Conference on Indigenous Peoples outcome document.[22] All of the above actions, when taken together, are inconsistent with persistent objection to the *American Declaration*.

Second, there are a significant number of other provisions in the *American Declaration* that are not identical but *similar* to provisions in the *UN Declaration*. In some instances, such similarities to provisions that the United States has already endorsed may be sufficient to preclude the United States from claiming persistent objection.

Third, there are various rights, principles and obligations that were considered to have the status of customary international law[23] *prior* to their inclusion in the *UN Declaration* and the *American Declaration*. In such cases, the United States cannot invoke any persistent objector rule if it had not done so from the start of such custom.[24]

Examples of customary international law[25] in the *UN Declaration* include *inter alia*: the right to life,[26] the principle of non-discrimination;[27] the general principle of international law[28] of *pacta sunt servanda* ("treaties must be kept");[29] the prohibition against racial discrimination;[30] the right to self-determination;[31] the right to one's own means of subsistence;[32] prohibition against genocide;[33] the right to enjoy one's own culture, religion and language;[34] and the *UN Charter* obligation of States to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all".[35]

Virtually all of these examples of customary international law are also in the *American Declaration on the Rights of Indigenous Peoples*.

In the future, human rights bodies of the Inter-American and United Nations system will determine the extent to which the *American Declaration* influences the interpretation of Indigenous peoples' rights and related State obligations in international law. This will be accomplished through contextual analyses that examine the particular facts and law in each case.

4.2 Canada

In its statement in **footnote 2**, the government of Canada reiterated its "commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, co-operation and partnership." The statement added: "Canada is now fully engaged, in full partnership with Indigenous peoples in Canada, to move forward with the implementation of the UN Declaration".

Such commitments and actions are consistent with Prime Minister Justin Trudeau's instructions to the Minister of Indigenous Affairs Carolyn Bennett as a top priority to "[u]ndertake … a review of laws, policies, and operational practices to ensure that the Crown is fully executing its consultation and accommodation obligations, in accordance with its constitutional *and international human rights obligations*".[36]

In May 2016, the Indigenous Affairs minister emphasized to the international community "on behalf of Canada … we are now a full supporter of the Declaration without qualification."[37] In July 2016, the Minister of Justice and Attorney General of Canada declared that the government supports all articles of the *UN Declaration* "without reservation."[38]

In its statement in footnote 2 in the *American Declaration*, Canada indicated: "As Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of this Declaration. Canada is committed to continue working with our partners in the OAS on advancing Indigenous issues across the Americas." This statement does not diminish in any way Canada's human rights obligations relating to the *American Declaration*.

In light of the positive positions of the current government, it is not surprising that Canada chose to join other States at the OAS General Assembly and adopt the *American Declaration* without a vote.

4.3 Colombia

In regard to its statement in **footnote 3**, the government of Colombia indicated that it "breaks with consensus" as regards article XXIII, para. 2 of the *American Declaration on the Rights of Indigenous Peoples*. Article XXIII, para. 2 affirms:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

The government's rationale may be summarized as follows:

- Colombian law defines such communities' right of prior consultation in accordance with ILO Convention No. 169[39]

- Colombian Constitutional Court has ruled that the consultation process must be pursued "with the aim of reaching an agreement or securing the consent of the indigenous communities regarding the proposed legislative measures"

- "ethnic communities" do not have a "veto" over measures affecting them directly; instead, it means that following a disagreement "formulas for consensus-building or agreement with the community" must be presented

- ILO Committee of Experts has established that "prior consultation" does not imply the right to veto state decisions, but is rather a suitable mechanism for indigenous and tribal peoples to enjoy the right of expression and of influencing the decision-making process.

For the following reasons, the government of Colombia's reasoning is seriously flawed:

- Article XXIII, para. 2 of the *American Declaration* is identical to article 19 of the *UN Declaration*, which was adopted by consensus in 2007 by the General Assembly. Colombia abstained[40] from voting at that time. In 2009, Colombia unilaterally declared its support for the *UN Declaration*.[41] Colombia cannot validly "break consensus" on Article XXIII, para. 2, when the same provision had earlier been approved by consensus in the *UN Declaration*.

- The terms in international declarations and treaties "have an autonomous meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law".[42] Thus, Colombia cannot simply rely upon its domestic interpretation of consultation in order to object to consent, even if Colombia takes into account ILO Convention No. 169.

- Article 35 of the ILO Convention No. 169 stipulates that application of its provisions "shall not adversely affect rights and benefits of the peoples concerned pursuant to other … international instruments". Such instruments include the *American Declaration on the Rights of Indigenous Peoples* and the *UN Declaration*, as well as the two international human rights Covenants.

- As enshrined in the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*, Colombia has affirmative obligations to "promote the realization of the right of self-determination, and … respect that right, in conformity with the provisions of the Charter of the United Nations."[43] This right of self-determination in the two *Covenants* has been repeatedly applied to Indigenous peoples globally by the UN Human Rights Committee[44] and the Committee on Economic, Social and Cultural Rights.[45]

- ILO Convention No. 169 does not address the right of self-determination. As explained by the Chair of the revision process that led to the adoption of this Convention, "self-determination" was "outside the competence of the ILO. In his opinion, *no position for or against self-determination was or could be expressed* in the Convention, nor could any restrictions be expressed in the context of international law."[46]

- Therefore, such issues were left by the ILO for the United Nations to decide. In addition to UN treaty bodies applying the right of self-determination in the two international

human rights Covenants to Indigenous peoples, this right has also been affirmed by the UN General Assembly and member States in the *UN Declaration*.[47]

- Convention No. 169 cannot be interpreted in isolation from the *UN Declaration* and other international instruments. As emphasized by the ILO: "Differences in legal status of UNDRIP and Convention No. 169 should play no role in the practical work of the ILO and other international agencies to promote the human rights of indigenous peoples … The provisions of Convention No. 169 and the Declaration are compatible and mutually reinforcing."[48]

- It is worth emphasizing here that international law affirms the right of self-determination, which includes "consent" as an integral aspect.[49] The right of self-determination is not only considered to be customary international law, but may now also be a peremptory norm or *jus cogens*.[50]

In regard to its statement in **footnote 4**, the government of Colombia indicated that it "breaks with consensus" as regards article XXIX, para. 4 that affirms:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

The government's rationale may be summarized as follows:

- recognition of the Indigenous peoples' collective rights is regulated by legal and administrative provisions, in line with principles such as the social and ecological function of property and the state ownership of the subsoil and nonrenewable natural resources

- in those territories, Indigenous peoples exercise their own political, social, and judicial organization. By constitutional mandate, their authorities are recognized as public state authorities with special status and, as regards judicial matters, recognition is given to the special Indigenous jurisdiction

- Colombia has been a leader in enforcing the rules governing prior consultation set out in Convention No. 169 of the International Labour Organization (ILO)

- *American Declaration*'s approach to prior consent could amount to a possible veto on the exploitation of natural resources found in Indigenous territories. In the absence of an agreement, this could bring processes of general interest to a halt and thus unacceptable to Colombia

- the constitutions of many states, including Colombia, stipulate that the subsoil and nonrenewable natural resources are the property of the State to preserve and ensure their public usefulness to the benefit of the entire nation. For that reason, the provisions contained in this article are contrary to the domestic legal order of Colombia, based on the national interest.

For the following reasons, the government of Colombia's reasoning is again seriously defective:

- In the response to footnote 3 (*supra*), there is already an analysis of Colombia's inaccurate interpretation and application of ILO Convention No. 169; and the failure of Colombia to respect its obligations in favour of promoting and respecting Indigenous peoples' right of self-determination, including consent

- Such consent is not the same as a veto. "Veto" implies complete and arbitrary power, regardless of the facts and law in any given case. The term is not used in the *American Declaration* or *UN Declaration*. In the context of resource development on Indigenous peoples' lands and territories, "consent" is an important safeguard against widespread abuses and is a human right.[51]

- Article XXIX, para. 4 of the *American Declaration* is identical to article 32 of the *UN Declaration*. For reasons indicated in the analysis on footnote 3, Colombia cannot validly "break consensus" on Article XXIX, para. 4, when the same provision had been approved earlier by consensus in the *UN Declaration*

- Colombia indicated that, according to its Constitution, the subsoil and nonrenewable natural resources are the property of the State. This does not mean that Indigenous peoples' human rights can be ignored or selectively applied

- In 2004, the UN Committee on the Elimination of Racial Discrimination indicated to Suriname: "While noting the principle set forth in … the Constitution that natural resources are the property of the nation and must be used to promote economic, social and cultural development, the Committee points out that this principle must be exercised consistently with the rights of indigenous and tribal peoples."[52]

- It is often not clear how States can validly claim jurisdiction and rights, in regard to Indigenous peoples' lands, territories and resources. As affirmed in the preamble of the *UN Declaration*, doctrines of superiority, such as "discovery" and *terra nullius*, are "racist, scientifically false, legally invalid, morally condemnable and socially unjust".[53] Although there is no equivalent provision in the *American Declaration*, this provision can be invoked as a minimum standard in accordance with article XLI.

- In regard to non-discrimination, culture, property and other human rights, article 29(d) of the *American Convention on Human Rights*[54] provides: "No provision of this Convention shall be interpreted as … d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man *and other international acts of the same nature* may have." Thus, in regard to Colombia and other States that have ratified the

> *American Convention*, no provision in the *Convention* can be interpreted in a manner that "excludes or limits the effect" that the *UN Declaration* or the *American Declaration on the Rights of Indigenous Peoples* may have.

In regard to its statement in **footnote 5**, the government of Colombia indicated that it "breaks with consensus" as regards article XXX, para. 5 of the *American Declaration* that affirms:

> 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.

The government's rationale may be summarized as follows:

- according to the Constitution of Colombia, the security forces are obliged to be present in any part of the nation's territory to provide and uphold protection and respect for all inhabitants' lives, honor, and property, both individually and collectively

- protection of the rights and integrity of indigenous communities depends largely on the security of their territories

- *American Declaration on the Rights of Indigenous Peoples* would be in breach of the principle of need and effectiveness of the security forces, hindering the performance of their institutional mission, which renders it unacceptable to Colombia.

For the following reasons, the government of Colombia's reasoning is flawed:

- Article XXX, para. 5 of the *American Declaration* is identical to article 30(1) of the *UN Declaration*. For reasons indicated in the analysis on footnote 3, Colombia cannot validly "break consensus" on article XXX, para. 5, when the same provision had been approved earlier by consensus in the *UN Declaration*.

- in the response to footnote 4 (*supra*), reasons have already been provided as to why Colombia cannot rely upon its Constitution in opposing Indigenous peoples' human rights. This would include the right of Indigenous peoples to give or withhold consent.

- in footnote 4, Colombia indicated: "By constitutional mandate, [Indigenous] authorities are recognized as public state authorities with special status and, as regards judicial matters, recognition is given to the special Indigenous jurisdiction." Yet despite such special jurisdiction, Colombia opposes Indigenous peoples' right to give or withhold consent in regard to military activities on their lands and territories.

- in view of the grave record of extrajudicial killings,[55] rapes and other sexual violence,[56] and forced displacements[57] by Colombia's military, it is especially important that Indigenous peoples can assess proposed military activities in their lands or territories

> prior to any consent. As underlined by former Special Rapporteur James Anaya, "the mere presence of members of the Security Forces within indigenous communities, at the very least, frequently puts at risk the communities that the Security Forces are trying to protect".[58]

It is worth noting that the government of Colombia has also included three "**Interpretative Notes**", referring to a specified list of provisions in the *American Declaration on the Rights of Indigenous Peoples*. The purpose of such Notes is to provide Colombia's interpretation of such provisions in the *American Declaration*. In regard to one of these Notes, Colombia justifies its positions as follows:

> … the Colombian State expressly declares that the determination and regulation of indigenous peoples' sacred sites and objects is to be governed by the developments attained at the national level. This is because there is no internationally accepted definition and since neither Convention 169 of the International Labour Organization (ILO) nor the United Nations Declaration on the Rights of Indigenous Peoples make reference to or define those terms.

Colombia's position is defective for the following reasons:

- As indicated in the response to footnote 3, the terms in international declarations and treaties have an "autonomous" meaning, for which reason they cannot be made equivalent to the meaning given to them in domestic law

- the *UN Declaration* does not explicitly refer to "sacred sites" or "sacred objects". However, the *UN Declaration* refers to diverse terms and phrases that can encompass sacred sites and objects. Examples include: "the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies" (art. 11(1)); "cultural, religious, intellectual, religious and spiritual property" (art. 11(2)), "spiritual and religious traditions, customs and ceremonies" and "the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains" (art. 12(1))

- article 46(3) of the *UN Declaration* affirms that all its provisions "shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". Article 46(2) of the *Declaration* adds that the exercise of the rights in this *Declaration* "shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations"[59]

- human rights instruments are generally drafted in broad terms, so as to accommodate a wide range of situations both foreseen and unforeseen. This does not mean that Colombia

or other States can determine the meaning of such terms in the *American Declaration* by adding interpretative notes.[60] International or regional bodies interpreting such instruments are not bound by such notes

- in interpreting the *UN Declaration* or the *American Declaration*, a contextualized interpretation relating to sacred sites or objects may well take into consideration the domestic situation or context in the State concerned. However, this does not mean that a particular State can determine the nature of future interpretations of the *American Declaration* by adding interpretative notes. Moreover, sacred aspects of such sites or objects may be strictly confidential and therefore determined solely by the Indigenous people concerned.[61]

Conclusions

As illustrated in this paper, the diverse connections between the *UN Declaration on the Rights of Indigenous Peoples* and the *American Declaration on the Rights of Indigenous Peoples* ensure a dynamic synergy or interaction that strengthens the interpretations of both instruments. In any given situation, it is the higher standard in these two instruments that is the minimum standard to be applied.

In some instances, the rights on a particular issue are affirmed in the two Declarations in significant but different ways. In such cases, it can be beneficial to refer to both the *UN Declaration* and the *American Declaration* so as to reinforce the interpretation of the Indigenous rights or related State obligations.

In other situations, some States or other third parties may choose to rely upon a relevant provision in the *UN Declaration* or *American Declaration* because it may contain a lower standard than the other. Therefore, it is essential to remain vigilant and acquire a sound knowledge and familiarity of both instruments so that the legal arguments in favour of Indigenous peoples' rights may be maximized.

At the time of the OAS General Assembly adoption of the *American Declaration* by consensus, the United States of America and Canada each included a statement as a footnote in the final text. Colombia included a statement in three different footnotes. All three countries included some positive content in their respective statements, in favour of Indigenous peoples' rights.

While Canada's statement was innocuous, the United States argued that it had persistently objected to the whole text of the *American Declaration*. If so, this might have suggested to some observers that the United States was not legally affected by its contents. This paper concludes that the arguments put forward by the United States clearly do not have merit.

Colombia's statement in each of its three footnotes addressed provisions that included "free, prior and informed consent" or "consent" of Indigenous peoples. For diverse reasons, this paper concludes that the statements attached by Colombia are seriously flawed.

All States can and should play a constructive and influential role in the future, in collaboration and partnership with Indigenous peoples. The situation of Indigenous peoples in the Americas and all other regions of the world requires urgent action to redress severe and widespread abuses of their human rights.

Currently, all Indigenous peoples in North, South and Central America and the Caribbean can benefit directly from both the *UN Declaration* and *American Declaration*. The same is true of the indigenous peoples in the Pacific islands of Hawai'i and Rapa Nui (Easter Island) annexed by the United States and Chile. The African Commission on Human and Peoples' Rights has already relied significantly on the progressive jurisprudence from the Inter-American system.[62] This may well increase with the recent adoption of the *American Declaration*, which is inseparably linked to the *UN Declaration* in terms of minimum standards for both instruments.

Although the *American Declaration* is a regional instrument, it is likely to expand its global influence. Its minimum standards and those of the *UN Declaration* are permanently linked in advancing Indigenous peoples' human rights.

In light of all such interrelationships, human rights education on both the *American Declaration* and *UN Declaration* is and will continue to be essential on an ongoing basis.

Annex: Statements of United States of America, Canada and Colombia

The following statements were included as footnotes to the text of the *American Declaration on the Rights of Indigenous Peoples*.

Further, Colombia added an Annex 1 (*infra*), which includes three Notes of Interpretation.

1. Government of United States of America

Footnote 1. The United States remains committed to addressing the urgent issues of concern to indigenous peoples across the Americas, including combating societal discrimination against indigenous peoples and individuals, increasing indigenous participation in national political processes, addressing lack of infrastructure and poor living conditions in indigenous areas, combating violence against indigenous women and girls, promoting the repatriation of ancestral remains and ceremonial objects, and collaborating on issues of land rights and self-governance, among many other issues. The multitude of ongoing initiatives with respect to these topics provide avenues for addressing some of the consequences of past actions. The United States has, however, persistently objected to the text of this American Declaration, which is not itself legally binding and therefore does not create new law, and is not a statement of Organization of American States (OAS) Member States' obligations under treaty or customary international law.

The United States reiterates its longstanding belief that implementation of the United Nations Declaration on the Rights of Indigenous Peoples ("UN Declaration") should remain the focus of the OAS and its Member States. OAS Member States joined other UN Member States in renewing their political commitments with respect to the UN Declaration at the World Conference on Indigenous Peoples in September 2014. The important and challenging initiatives underway at the global level to realize the respective commitments in the UN Declaration and the outcome document of the World Conference are appropriately the focus of the attention and resources of States, indigenous peoples, civil society, and international organizations, including in the Americas. In this regard, the United States intends to continue its diligent and proactive efforts, which it has undertaken in close collaboration with indigenous peoples in the United States and many of its fellow OAS Member States, to promote achievement of the ends of the UN Declaration, and to promote fulfillment of the commitments in the World Conference outcome document. Of final note, the United States reiterates its solidarity with the concerns expressed by indigenous peoples concerning their lack of full and effective participation in these negotiations.

2. Government of Canada

Footnote 2. Canada reiterates its commitment to a renewed relationship with its Indigenous peoples, based on recognition of rights, respect, co-operation and partnership. Canada is now fully engaged, in full partnership with Indigenous peoples in Canada, to move forward with the

implementation of the UN Declaration on the Rights of Indigenous Peoples in accordance with Canada's Constitution. As Canada has not participated substantively in recent years in negotiations on the American Declaration on the Rights of Indigenous Peoples, it is not able at this time to take a position on the proposed text of this Declaration. Canada is committed to continue working with our partners in the OAS on advancing Indigenous issues across the Americas.

3. Government of Colombia

Footnote 3. The State of Colombia **breaks with consensus** as regards Article XXIII, paragraph 2, of the OAS Declaration on Indigenous Peoples, which deals with consultations for obtaining indigenous communities' prior, free, and informed consent before adopting and enforcing legislative or administrative measures that could affect them, in order to secure their free, prior, and informed consent.

This is because Colombian law defines such communities' right of prior consultation in accordance with ILO Convention No. 169. Thus, the Colombian Constitutional Court has ruled that the consultation process must be pursued "with the aim of reaching an agreement or securing the consent of the indigenous communities regarding the proposed legislative measures." It must be noted that this does not translate into the ethnic communities having the power of veto over measures affecting them directly whereby such measures cannot proceed without their consent; instead, it means that following a disagreement "formulas for consensus-building or agreement with the community" must be presented.

Moreover, the Committee of Experts of the International Labour Organization (ILO) has established that prior consultation does not imply the right to veto state decisions, but is rather a suitable mechanism for indigenous and tribal peoples to enjoy the right of expression and of influencing the decision-making process.

Accordingly, and in the understanding that this Declaration's approach to prior consent is different and could amount to a possible veto, in the absence of an agreement, which could bring processes of general interest to a halt, the contents of this article are unacceptable to Colombia.

Footnote 4. The State of Colombia **breaks with consensus** as regards Article XXIX, paragraph 4, of the OAS Declaration on Indigenous Peoples, which deals with consultations for obtaining indigenous communities' prior, free, and informed consent before approving projects that could affect their lands or territories and other resources.

This is because although the Colombian State has included in its legal order a wide range of rights intended to recognize, guarantee, and uphold the constitutional rights and principles of pluralism and ethnic and cultural diversity in the nation within the framework of the Constitution, the recognition of the collective rights of indigenous peoples is regulated by legal and administrative provisions, in line with the objectives of the State and with principles such as

the social and ecological function of property and the state ownership of the subsoil and nonrenewable natural resources.

Accordingly, in those territories indigenous peoples exercise their own political, social, and judicial organization. By constitutional mandate, their authorities are recognized as public state authorities with special status and, as regards judicial matters, recognition is given to the special indigenous jurisdiction, which represents notable progress compared to other countries of the region.

In the international context, Colombia has been a leader in enforcing the rules governing prior consultation set out in Convention No. 169 of the International Labour Organization (ILO), to which our State is a party.

In the understanding that this Declaration's approach to prior consent is different and could amount to a possible veto on the exploitation of natural resources found in indigenous territories, in the absence of an agreement, which could bring processes of general interest to a halt, the contents of this article are unacceptable to Colombia.

In addition, it is important to note that the constitutions of many states, including Colombia, stipulate that the subsoil and nonrenewable natural resources are the property of the State to preserve and ensure their public usefulness to the benefit of the entire nation. For that reason, the provisions contained in this article are contrary to the domestic legal order of Colombia, based on the national interest.

Footnote 5. The State of Colombia **breaks with consensus** as regards Article XXX, paragraph 5, of the OAS Declaration on Indigenous Peoples, since according to the mandate contained in the Constitution of Colombia, the security forces are obliged to be present in any part of the nation's territory to provide and uphold protection and respect for all inhabitants' lives, honor, and property, both individually and collectively. The protection of the rights and integrity of indigenous communities depends largely on the security of their territories.

Thus, in Colombia the security forces have been given instructions to observe the obligation of protecting indigenous peoples. Accordingly, the provision of the OAS Declaration on Indigenous Peoples under examination would be in breach of the principle of need and effectiveness of the security forces, hindering the performance of their institutional mission, which renders it unacceptable to Colombia.

ANNEX I

NOTES OF INTERPRETATION FROM THE DELEGATION OF COLOMBIA

INTERPRETATIVE NOTE No. 1
OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE VIII OF THE OAS DECLARATION ON INDIGENOUS PEOPLES:

As regards Article VIII, on the right to belong to indigenous peoples, Colombia expressly declares that the right to belong to one or more indigenous peoples is to be governed by the autonomy of each indigenous people.

This is pursuant to Article 8.2 of ILO Convention 169: "These peoples shall have the right to retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle."

It is important to specify that when a person shares different indigenous origins—in other words, when his or her mother belongs to one ethnic group and his or her father belongs to another (to give just one example)—his or her belonging to one or another of those indigenous peoples may only be defined according to the traditions involved. In other words, to determine an individual's belonging to a given indigenous people, the cultural patterns that determine family ties, authority, and ethnic attachment must be examined on a case-by-case basis.

A case of contact between two matrilineal traditions is not the same as a contact between a matrilineal tradition and a patrilineal one. Similarly, the jurisdiction within which the individual lives, the obligations arising from the regime of rights contained in that jurisdiction, and the socio-geographical context in which he or she specifically carries out his or her everyday cultural and political activities must be established.

The paragraph to which this note refers is transcribed below:

ARTICLE VIII
RIGHT TO BELONG TO THE INDIGENOUS PEOPLES

"Indigenous persons and communities have the right to belong to one or more indigenous peoples, in accordance with the identity, traditions, customs, and systems of belonging of each people. No discrimination of any kind may arise from the exercise of such a right."

INTERPRETATIVE NOTE No. 2

OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE XIII, PARAGRAPH 2, ARTICLE XVI, PARAGRAPH 3, ARTICLE XX, PARAGRAPH 2, AND ARTICLE XXXI, PARAGRAPH 1, OF THE OAS DECLARATION ON INDIGENOUS PEOPLES.

As regards the idea of sacred sites and objects referred to in Article XIII, paragraph 2, Article XVI, paragraph 3, Article XX, paragraph 2, and Article XXXI, paragraph 1, of the OAS Declaration on Indigenous Peoples, the Colombian State expressly declares that the determination and regulation of indigenous peoples' sacred sites and objects is to be governed by the developments attained at the national level. This is because there is no internationally accepted definition and since neither Convention 169 of the International Labour Organization (ILO) nor the United Nations Declaration on the Rights of Indigenous Peoples make reference to or define those terms.

On this matter, Colombia has been making progress with the regulation of that issue, and that progress has involved and will continue to involve the participation of the indigenous peoples and it will continue to advance toward that goal in accordance with the Colombian legal order and, when appropriate, with the applicable international instruments.

The paragraphs to which this note refers are transcribed below:

ARTICLE XIII
RIGHT TO CULTURAL IDENTITY AND INTEGRITY

2. "States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs."

ARTICLE XVI
INDIGENOUS SPIRITUALITY

3. "Indigenous Peoples have the right to preserve, protect, and access their sacred sites, including their burial grounds; to use and control their sacred objects relics, and to recover their human remains." (Approved on April 24, 2015 – Seventeenth Meeting of Negotiations in the Quest for Points of Consensus.)

ARTICLE XX
RIGHTS OF ASSOCIATION, ASSEMBLY, AND FREEDOM OF EXPRESSION AND THOUGHT

2. "Indigenous peoples have the right to assemble on their sacred and ceremonial sites and areas. For this purpose they shall have free access and use to these sites and areas." (Approved on January 18, 2011 – Thirteenth Meeting of Negotiations in the Quest for Points of Consensus.)

ARTICLE XXXI

1. "The states shall ensure the full enjoyment of the civil, political, economic, social, and cultural rights of indigenous peoples, as well as their right to maintain their cultural identity, spiritual and religious traditions, worldview, values and the protection of their religious and cultural sites, and human rights contained in this Declaration."

INTERPRETATIVE NOTE No. 3
OF THE STATE OF COLOMBIA WITH RESPECT TO ARTICLE XIII, PARAGRAPH 2, OF THE OAS DECLARATION ON INDIGENOUS PEOPLES:

The State of Colombia expressly declares that of indigenous peoples' right to promote and develop all their communication systems and media is subject to the requirements and procedures established in the current domestic regulations.

The paragraph to which this note refers is transcribed below:

ARTICLE XIV
SYSTEMS OF KNOWLEDGE, LANGUAGE AND COMMUNICATION

3. "Indigenous peoples have the right to promote and develop all their systems and media of communication, including their own radio and television programs, and to have equal access to all other means of communication and information. The states shall take measures to promote the broadcast of radio and television programs in indigenous languages, particularly in areas with an indigenous presence. The states shall support and facilitate the creation of indigenous radio and television stations, as well as other means of information and communication."

Endnotes

[1] *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res. 61/295 (13 September 2007), Annex.

[2] On December 16, 2010, the United States was the last State to change its opposing vote by announcing its support for the *UN Declaration*.

[3] 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), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2, para. 3: "We reaffirm our support for the United Nations Declaration on the Rights of Indigenous Peoples". Following the adoption by consensus of the Outcome document, Canada indicated that it would issue a written statement on this instrument. Such statement has no legal effect on the consensus adoption. If Canada had wished to formally object, it would have had to call for a vote and then voted against the Outcome document.

See also General Assembly, *Rights of indigenous peoples*, UN Doc. A/RES/70/232 (23 December 2015) (without a vote), preamble: "*Reaffirming* the United Nations Declaration on the Rights of Indigenous Peoples, which addresses their individual and collective rights".

[4] General Assembly, *Outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples*, note 3 *supra*, para. 31: "We request the Secretary-General, in consultation and cooperation with indigenous peoples, the Inter-Agency Support Group on Indigenous Peoples'

Issues and Member States, to begin the development, within existing resources, of a system-wide action plan to ensure a coherent approach to achieving the ends of the Declaration".

[5] Permanent Forum on Indigenous Issues, "System-wide action plan for ensuring a coherent approach to achieving the ends of the United Nations Declaration on the Rights of Indigenous Peoples", UN Doc. E/C.19/2016/5 (19 February 2016), para. 4.

[6] Human Rights Council, *Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/RES/33/25 (30 September 2016) (adopted without a vote), para. 1.

[77] *Ibid.*, paras. 2-4, 8-11, and 14-16.

[8] *Ibid.*, para. 9. Also, the preamble highlights "the work being undertaken on indigenous issues by other bodies in the United Nations system and regional human rights systems".

[9] *American Declaration on the Rights of Indigenous Peoples*, Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly, 46th sess., Santo Domingo, Dominican Republic, 15 June 2016.

[10] I/A Court H.R., Advisory Opinion OC-16/99, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Ser. A Nº 16 (1999), para. 115. [emphasis added]

See also I/A Court H.R., Advisory Opinion OC-1/82 *"Other Treaties" Subject to the Consultative Jurisdiction of the Court (Art. 64 American Convention on Human Rights),* September 24, 1982, Series A No. 1, para. 43: "The need of the *regional system to be complemented by the universal* finds expression in the practice of the Inter-American Commission on Human Rights and is entirely consistent with the object and purpose of the Convention, the American Declaration and the Statute of the Commission." [emphasis added]

[11] *Ibid.* [*The Right to Information on Consular Assistance*], para. 113, citing *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, I.C.J. Reports 1971; p. 16 *ad* 31).

[12] *Ibid.*, para. 114.

[13] See *Domingues v. United States,* Report No. 62/02, Inter-Am. Cm. H.R. (2002), para. 45: "Developments in the corpus of international human rights law relevant to interpreting and applying the American Declaration may in turn be drawn from various sources of international law, including the provisions of other international and regional human rights instruments and customary international law, including those customary norms considered to form a part of *jus cogens*."

American Declaration on the Rights and Duties of Man, O.A.S. Res. XXX, adopted by the Ninth International Conference of American States (1948), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L/V/I.4 Rev.9 at 17 (31 January 2003).

[14] *Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*, Advisory Opinion OC-10/89 of July 14, 1989, Inter-Am. Ct.H.R., Series A No. 10 (1989), para. 42: "The General Assembly of the Organization has also repeatedly recognized that the American Declaration is a source of international obligations for the member states of the OAS." See also para. 45: "For the member states of the Organization, the Declaration is the text that defines the human rights referred to in the Charter [of the OAS]."

I/A Comm. H.R., *Mario Alfredo Lares-Reyes v. United States*, Petition 12.379, Report Nº 19/02, February 27, 2002, para. 46: "the American Declaration of the Rights and Duties of Man is a source of international obligation for the United States and other OAS member states that are not parties to the American Convention on Human Rights. These obligations are considered to flow both from the human rights obligations of member states under the OAS

Charter, which member states have agreed are contained in and defined by the American Declaration, as well as from the customary legal status of the rights protected under many of the Declaration's core provisions".

I/A Comm. H.R., *Jessica Lenahan (Gonzales) et al. v. United States*, Case 12.626, Report Nº 80/11, July 21, 2011, para. 117: "As a source of legal obligation, States must implement the rights established in the American Declaration in practice within their jurisdiction."

[15] In regard to such statements in the *American Declaration*, see footnote 1 (United States of America); footnote 2 (Canada), and footnotes 3, 4 and 5 (Colombia).

[16] Res. AG/doc.5537, adopted without vote by Organization of American States, General Assembly.

[17] "Rules of Procedure of the General Assembly", in *Amendments to the Rules of Procedure of the General Assembly*, OEA/Ser.P, AG/RES. 1737, 5 June 2000, Annex, Article 81 (Reservations and statements): "Any delegation that wishes to make a reservation or statement with respect to a treaty or convention, or *a statement regarding a resolution of the General Assembly*, shall communicate the text thereof to the Secretariat, so that the latter may distribute it to the delegations no later than at the plenary session at which the instrument in question is to be voted upon. Such reservations and statements shall appear along with the treaty or convention or, in the case of a resolution, in the corresponding minutes." [emphasis added]

[18] Human Rights Council, *Human rights and indigenous peoples*, UN Doc. A/HRC/RES/33/13 (29 September 2016) (adopted without a vote).

[19] See, *e.g.*, Human Rights Council, *Regional arrangements for the promotion and protection of human rights*, UN Doc. A/HRC/RES/30/3 (1 October 2015) (without a vote), preamble.

[20] S. James Anaya, Presentation, April 14, 2008, in Organization of American States (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, 14 May 2008, Appendix III, 23 at 26.

[21] 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. [emphasis added]

See also "General Reservation taken by the United States at the 10th Meeting of the Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples in La Paz, Bolivia": "The United States Government noted at the beginning of this session that it took a general reservation to all of the text under discussion during the 10th Meeting of the Working Group, and that it would not join in any text that might be approved or otherwise appear in the Chair's rolling text from this 10th meeting of the Working Group."

[22] Statement of the United States of America: "… the United States intends to continue its diligent and proactive efforts, which it has undertaken in close collaboration with indigenous peoples in the United States and many of its fellow OAS Member States, to promote achievement of the ends of the UN Declaration, and to promote fulfillment of the commitments in the World Conference outcome document."

See also 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), http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/2.

[23] Anthony Aust, *Modern Treaty Law and Practice*, 3rd ed. (New York: Cambridge University Press, 2013), at 9: "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."

[24] Malcolm Shaw, *International Law*, 7th ed. (Cambridge: Cambridge University Press, 2014), at 65: "customary rules are binding upon all states except for such states as have dissented from the start of that custom." See also John H. Currie, Craig Forcese, Joanna Harrington & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory*, 2nd ed. (Toronto: Irwin Law, 2014), at 137: "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 since the emergence of that rule. The effect of this is to escape the binding effect of the rule."

Not all writers agree with the legal existence or effects of the persistent objector rule. See, *e.g.*, Antonio Cassese, *International Law*, 2nd ed. (Oxford/N.Y.: Oxford University Press, 2005), at 162-163; Holning Lau, "Rethinking the Persistent Objector Doctrine in International Human Rights Law", (2005) 6 Chicago J. Int'l L. 495, at 501; and Jonathan Charney, "The Persistent Objector Rule and the Development of Customary International Law" (1985) 56 B.Y.I.L. 1 at 16.

[25] 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. 62: "even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law."

[26] I/A Comm. H.R., *Mario Alfredo Lares-Reyes v. United States*, Petition 12.379, Report Nº 19/02, February 27, 2002, para. 23. In regard to the right to life, see *UN Declaration*, art. 7(1)

[27] Malcolm Shaw, *International Law*, 7th ed. (Cambridge: Cambridge University Press, 2014), at 201.

[28] Anthony 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."

[29] James Crawford, *Brownlie's Principles of Public International Law*, 8th ed. (Oxford: Oxford University Press, 2012), at 449-450: One of the central canons of the customary international law of treaties is the rule of *pacta sunt servanda*, that is, the notion that states must comply with their obligations in good faith." The relevant provisions in the *UN Declaration* are preambular paras. 8 and 14 and art. 37.

[30] Malcolm Shaw, *International Law*, *supra* note 27, at 208; Antonio Cassese, *International Law*, *supra* note 24, at 393-394. In regard to the principle of non-discrimination and pprohibition 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).

[31] Robert McCorquodale, *Self-Determination: A Human Rights Approach*, (1994) 43 Int'l & Comp. 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*, [1998] 2 S.C.R. 217, 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." Antonio Cassese, *International Law*, *supra* note 24, at 189, n. 3: "general principles of international law … [are] those principles which can be inferred or extracted by way of induction and generalization from conventional and customary rules of international law."

[32] 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) and (2).

[33] Antonio Cassese, *International Law*, *supra* note 24, at 394. The relevant provision in the *UN Declaration* is art. 7.

[34] Human Rights Committee, *General Comment 24 (52), General comment on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, 52nd Sess., U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994), para. 8. In regard to cultural, religious/spiritual and language rights in the *UN Declaration*, see, *inter alia*, preambular para. 4; and arts. 3, 5, 8, 11-16, 25, 31, 32, and 36.

[35] *UN Charter*, art. 1(3); see also arts. 55 c and 56. The relevant provisions in the *UN Declaration* are: PP 1 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), 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."

[36] Office of the Prime Minister (Rt. Hon. Justin Trudeau), "Minister of Indigenous and Northern Affairs Mandate Letter", November 2015, http://pm.gc.ca/eng/minister-indigenous-and-northern-affairs-mandate-letter. [emphasis added]

[37] Minister of Indigenous and Northern Affairs (Carolyn Bennett), "Speech delivered at the United Nations Permanent Forum on Indigenous Issues, New York, May 10", May 10, 2016, http://news.gc.ca/web/article-en.do?nid=1064009&tp=970&_ga=1.84170458.291599297.1462200129.

[38] Kristy Kirkup, "Government supports UN indigenous declaration: Wilson-Raybould", *Globe and Mail* (20 July 2016), http://www.theglobeandmail.com/news/national/government-supports-indigenous-declaration-without-reservation-wilson-raybould/article31007436/?reqid=ef9769c0-cd9d-4dfc-ae74-5f62998e19d2.

[39] The full citation is *Indigenous and Tribal Peoples Convention, 1989* (No. 169), International Labour Organization, adopted Geneva, 76th ILC session 27 June 1989 (entered into force 5 September 1991)

[40] United Nations, *Rules of Procedure of the General Assembly* (New York, 2008), Rule 86: "For the purposes of these rules, the phrase "members present and voting" means members casting an affirmative or negative vote. Members which abstain from voting are considered as not voting."

[41] On 21 April 2009, the announcement was made by the Deputy Minister of Multilateral Affairs, Adriana Mejia Hernandez, as National Government spokeswoman, speaking in the context of the Durban Review Conference, taking place in Geneva (Switzerland). See Gobierno de Colombia, Bogotá, 21 abril 2009, http://historico.presidencia.gov.co/sp/2009/abril/21/10212009_i.html (official Spanish version).

[42] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, I/A Court H.R. (Ser. C No. 79) Judgment (31 August 2001), para. 146; I/A Comm. H.R., *Maya Indigenous Communities of the Toledo District*, Belize, Case No. 12.053, Report No. 96/03, 24 October 2003, para. 171; *Van Duzen* v. *Canada* (No. 50/1979), U.N. Doc. CCPR/C/15/D/50/1979, U.N. Doc. CCPR/3/Add.1, Vol. II, p. 402, U.N. Doc. CCPR/C/OP/1, p. 118, para. 10.2; I/A Comm'n H.R., Report No. 74/03, Admissibility, Petition 790/01 *Grand Chief Michael Mitchell* (Canada), October 22, 2003, para. 37.

[43] *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), of 16 December 1966, entry into force 23 March 1976 in accordance with Article 49 and *International Covenant on Economic, Social and Cultural Rights*, G.A. Res. 2200A (XXI) of 16 December 1966, entry into force 3 January 1976 in accordance with Article 27, identical article 1(3). Colombia ratified or acceded to both Covenants in 1969.

[44] See, *e.g.*, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/79/Add.105 (7 April 1999), para. 8; *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; *Concluding observations of the Human Rights Committee: Chile*, U.N. Doc. CCPR/C/CHL/CO/5 (18 May 2007) at para. 19; *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; *Concluding observations of the Human Rights Committee: Brazil*, UN Doc. CCPR/C/BRA/CO/2 (1 December 2005), para. 6; *Concluding observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37.

[45] See, *e.g.*, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, UN Doc. E/C.12/NZL/CO/3 (31 May 2012), para. 11; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Argentina*, UN Doc. E/C.12/ARG/CO/3 (14 December 2011), para. 9; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Sri Lanka*, UN Doc. E/C.12/1/LKA/CO/2-4 (9 December 2010), para. 11; *Concluding observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc. E/C.12/COL/CO/5 (7 June 2010), paras. 9-10; *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; *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.

[46] International Labour Organization, *Report of the Committee on Convention No. 107*, International Labour Conference, Provisional Record, 76th Session, Geneva, 1989, No. 25, para. 42. [emphasis added]

[47] In addition to art. 3 of the *UN Declaration*, see preambular para. 17: "nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law".

[48] International Labour Organization, "ILO standards and the UN Declaration on the Rights of Indigenous Peoples: Information note for ILO staff and partners", http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_100792.pdf, at 2.

[49] Human Rights Council, *Final report of the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (17 August 2011), Annex - Expert Mechanism Advice No. 2 (2011), para. 20: "... the right to free, prior and informed consent is embedded in the right to self-determination. ... [T]he right of free, prior and informed consent needs to be understood in the context of indigenous peoples' right to self-determination because it is *an integral element of that right*." [emphasis added]

[50] *Vienna Convention on the Law of Treaties*, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, 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." Karl Doehring, "Self-Determination" in Bruno 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."

[51] See, *e.g.* 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. 98 (Conclusions): "In accordance with the Canadian constitution and relevant international human rights standards, *as a general rule* resource extraction should not occur on lands subject to aboriginal claims without adequate consultations with and the free, prior and informed consent of the indigenous peoples concerned." [emphasis added]. Such processes of consultations and consent are markedly different from an arbitrary veto.

[52] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Suriname*, CERD/C/64/CO/9, 28 April 2004, para. 11. See also Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Botswana*, CERD/C/BWA/CO/16, 4 April 2006, para. 8: "The Committee reiterates its concern that some exceptions to the prohibition of discrimination provided under section 15 of the Constitution cannot be justified under the Convention [on the Elimination of All Forms of Discrimination]."

[53] *International Convention on the Elimination of All Forms of Racial Discrimination*, 660 U.N.T.S. 195, adopted by UN General Assembly on December 21, 1965, and entered into force on January 4, 1969, preamble: "any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere".

[54] *American Convention on Human Rights*, O.A.S.Treaty Series No. 36, 1144 U.N.T.S. 144 entered into force 18 July 1978.

[55] See, *e.g.*, "Colombia takes steps on killings but security forces still culpable – UN expert", UN News Centre, 27 May 2010, http://www.un.org/apps/news/story.asp?NewsID=34826&Cr=alston&Cr1#.V_vaQ7nD8uQ: "My investigations found that members of Colombia's security forces committed a significant number of unlawful killings in a pattern that was repeated around the country" [quote from Philip Alston, UN Special Rapporteur on extrajudicial, summary or arbitrary executions].

Human Rights Watch, *World Report 2016: Events of 2015*, at 190: "as of May 2015, the Attorney General's Office was investigating more than 3,700 unlawful killings allegedly committed by state agents between 2002 and 2008, and had obtained convictions for over 800 of them. Authorities have failed to prosecute senior army officers involved in the killings and instead have promoted many of them through the military ranks."

See also Amnesty International, "The Struggle for Survival and Dignity: Human Rights Abuses Against Indigenous Peoples in Colombia", February 2010, at 2: "For over 40 years there have been numerous and persistent reports documenting the direct responsibility of the security forces in grave human rights violations and their collusion with paramilitary groups. These abuses continue today. Of particular concern in recent years has been the extrajudicial execution of hundreds of civilians by the security forces." Such security forces include the military.

[56] Amnesty International, *Colombia: Hidden from justice. Impunity for conflict-related sexual violence*, October 2012, at 14: "Issued in April 2008, Constitutional Court decision 092 (Auto 092) made an explicit link between displacement and sexual violence. It concluded that the conflict and displacement had had a disproportionate impact on women and highlighted how some victims faced multiple forms of discrimination – as women and girls, as victims of displacement, and as members of Afro-descendent or Indigenous communities." At 15, a number of sexual violence cases have been attributed to members of the security and intelligence services.

[57] Human Rights Council, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya: Addendum: The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur*, UN Doc. A/HRC/15/37/Add.3 (25 May 2010), para. 29: "The forced displacement of indigenous peoples threatens their cultural and physical survival, as the Constitutional Court has pointed out … The public authorities are not prepared to respond adequately to the humanitarian needs of the victims and, in particular, the women and children. Of grave concern is the acute impact of forced displacement on indigenous women, who … are among those who have been affected most severely by the crimes, injustices and inequities that accompany armed violence and forced displacement."

[58] *Ibid.*, para. 28.

[59] Identical provisions to article 46(2) and (3) are included in the *American Declaration on the Rights of Indigenous Peoples*, article XXXVI.

[60] See also *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, I/A Court H.R. Series A No. 18 (17 September 2003): "no State is authorized to use its domestic law to interpret the human

rights resulting from a source of international law, when this will diminish the degree to which such rights are recognized."

[61] See also *UN Declaration*, art. 34: "Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, *in accordance with international human rights standards*." [emphasis added] Such standards would include the right of Indigenous peoples to self-determination.

[62] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council* v *Kenya*, African Commission on Human and Peoples' Rights, Communication No. 276/2003, Twenty-Seventh Activity Report, 2009, Annex 5, paras. 158-162; 185; 190; 192-198; 216-217; 256-266; and 284-294.