

INTRODUCTION

Thank you Madam Chair and I congratulate you on your election.

This report was written in response to a recommendation from [Indigenous peoples].

The recommendation was specifically calibrated toward the implementation of the provisions in the United Nations Declaration on the Rights of Indigenous Peoples pertaining to lands, territories and resources.

REFLECTION ON WHY

It would be useful to reflect here on why it is that some indigenous peoples may be agitating for a more dedicated mechanism aimed at monitoring implementation of the Declaration.

We have used the term **OPTIONAL PROTOCOL** to depict a supplementary agreement that is voluntary. The idea militating in favor of an Optional Protocol may be accommodated in another form.

It is only natural - predictable - that since the adoption by the General Assembly of the Declaration that there has been ongoing discussion about implementation by states; more specifically the requirement for a mechanism by which to monitor the implementation of the UNDRIP and its interpretation in international law.

This was partly informed by Article 42 of the UNDRIP which provides that:

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.

Following discussions on Article 42 at the United Nations Permanent Forum on Indigenous Issues (UNPFII) in 2009, the UNPFII hosted an Expert Group Meeting on the role of the PFII in the implementation of the UNDRIP by virtue of Article 42.¹

In recent times there has been increased cooperation and coordination between the UNPFII, the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and this coordination has brought to bear the unique nature of each of the three mandates.

¹ Report of the international expert group meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of article 42 of the United Nations Declaration on the Rights of Indigenous Peoples E/C.19/2009/2.

Each of these mechanisms contribute significantly to the implementation of the UNDRIP although not in a wholly coordinated way.

In addition, each of these bodies and their Secretariats have significant workloads and commitments and therefore could not function as an oversight body to the implementation of the UNDRIP.

ALTA AND LIMA DECLARATION

The recently concluded Alta Declaration and the Lima Declaration recommend a mechanism to review, monitor and report on the UNDRIP. The Alta Declaration recommended:

the creation of a new UN body with a mandate to promote, protect, monitor, review and report on the implementation of the rights of Indigenous Peoples, including but not limited to those affirmed in the Declaration, and that such a body be established with the full, equal and effective participation of Indigenous Peoples.²

WHAT THE SPECIAL RAPPORTEUR HAS FOUND

Perhaps the most acute reason for the increased attention being given to the establishment of a mechanism is in the work of the UN Special Rapporteur, who through his mandate, has conducted many country visits.

Despite the expressions of commitment to the UNDRIP worldwide, the Special Rapporteur has observed

“a lack of knowledge and understanding about the Declaration, the values it represents or the deep-seated issues confronting the indigenous peoples that it addresses”.³

According to Anaya a “still pending crucial task” is raising awareness about the Declaration among Government actors, the United Nations system, indigenous peoples themselves, and, more generally, society.⁴

It will remain difficult for the goals of the Declaration to be achieved amid competing political, economic and social forces unless the authorities and non-indigenous sectors of the societies within which indigenous peoples live come to share in awareness and conviction about those goals.

² para [1], Theme 2: UN system action for the implementation of the rights of Indigenous Peoples, World Conference on Indigenous Peoples 10 – 12 June 2013, Alta Outcome document.

³ Rights of indigenous peoples Note by the Secretary-General A/68/317.

⁴ Rights of indigenous peoples Note by the Secretary-General A/68/317.

The Special Rapporteur's concern about the insufficient knowledge and use of the UNDRIP by member states and civil society has played out in the Universal Periodic Review.

He has characterized this dynamic as well as lack of recognition of the "significant normative weight" of the Declaration and its "foundations in equality and human rights" as "factors that debilitate commitment to and action by States."

The lack of knowledge and expertise globally on the UNDRIP is concerning to the UNPFII.

The failure of some member states to take seriously the goals and rights contained within the UNDRIP is deleterious to Indigenous peoples' rights and well-being.

One way of addressing the paucity of knowledge and the lack of consistency in its implementation is to establish a mechanism to protect, review, monitor, and report on the UNDRIP.

OPTIONAL PROTOCOL

This mechanism can be empowered through the development of an agreement called an 'Optional Protocol'.

There is a lack of literature on the technical aspects of an Optional Protocol.

There exists no literature that militates against our advocacy for an Optional Protocol to the UNDRIP.

OBSERVATIONS ON YESTERDAY

Some of yesterday's argument support the advocacy for such a mechanism.

The UNDRIP article 3 and 4 and the article 46 shines a light on the dangers of competing interpretations of the UNDRIP.

Article 46 is not the starting point of the UNDRIP. All international law is subject to all international law. Article 46 was not needed in the UNDRIP. Because Indigenous peoples bring into question the legitimacy of the state system then it was a compromise.

But the fact that indigenous peoples themselves can interpret self-determination according to state notions of self-determination.

Many of the acts we are referring to are state acts - state legislation, state policy, ... self-determination is much more than what the states wants it to be.

If calibrate our expectations according to what it is that the state will accept is a fundamental misreading of the Declaration and a fundamental misunderstanding of the advocacy over three decades leading to the Declaration.

CONCLUSION

The final comment we would say is to urge people to: **READ THE REPORT**. Both Dalee and I are international lawyers and have canvassed the literature extensively on this issue. We have made suggestions on what this will look like. We would like feedback on what that might look like and areas for further development.

1. read the study before commenting; the paper raises a constellation of issues pertaining to the establishment of an Optional Protocol;
2. the Special Rapporteur, the UNPFII and EMPRIIP have very defined and specific mandates and they do not facilitate the role of this job for the reasons ventilated in our report. Print the mandates and read them, such a mechanism would not duplicate these mandates.
3. The advocacy for improved oversight of the implementation of human rights obligations is an unassailable argument. The objections to the establishment of such a mechanism is - like all things in working group elaborating the draft DRIP - political not legal; The Vienna Convention on the Law of Treaties tells us that Article 46 was unnecessary in the text of the UNDRIP: these are political objections but not legal objections; and that applies to the idea of an Optional Protocol.