1-1-1991

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Recommended Citation

Laura Stomski, *The Development of Minimum Standards for the Protection and Promotion of Rights for Indigenous Peoples*, 16 AM. INDIAN L. REV. 575 (1991),
<https://digitalcommons.law.ou.edu/ailr/vol16/iss2/8>

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THE DEVELOPMENT OF MINIMUM STANDARDS FOR THE PROTECTION AND PROMOTION OF RIGHTS FOR INDIGENOUS PEOPLES

Laura Stomski*

In Brazil, the government condones the killing of Indians by miners in the Yanomamo region. The same government treats the Kayapo Indians as a threat to national security for their opposition to the government's proposal to build a dam on their land.¹ In El Salvador, the government does not even recognize the existence of their indigenous population, despite the fact that a substantial portion of the population considers themselves indigenous.² Although these descriptions may sound like something out of a history book, they describe the present situation facing not only indigenous peoples in South and Central America, but throughout the world.

Once free in their practice of self-government, traditional forms of livelihood, use of land, language, education, and religion, indigenous peoples find themselves the subjects of discrimination on a worldwide scale. Few dominant governments are willing to recognize and protect the cultural distinctions in indigenous cultures. Government aid to these peoples more commonly takes the form of encouraging the minority to become part of the dominant culture. Thus, the government endangers the qualities which distinguish indigenous peoples and their culture may be lost.

An international effort is underway to establish a universal declaration of rights of indigenous peoples. Proponents hope that a declaration will establish basic minimum rights that every state will guarantee its indigenous populations. This note focuses on the Working Group on Indigenous Populations (Working Group), a body organized under the United Nations (UN). The

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* Appellate Litigator, U.S. Department of Labor, Office of the Solicitor, Employee Benefits Division, Washington, D.C. J.D., 1990, McGeorge School of Law, Sacramento, Calif.; B.A., 1987, University of Massachusetts, Amherst.

Second place award, 1989-90 *American Indian Law Review* Writing Competition.

1. Murphey-Lewis, *Indians in Brazil: The Struggle Intensifies*, 13 *CULTURAL SURVIVAL Q.* 2 (1989).

2. Chapin, *The 500,000 Invisible Indians of El Salvador*, 13 *CULTURAL SURVIVAL Q.* 11 (1989).

Working Group has undertaken the task of preparing a declaration of rights.

Section one of this note discusses the formation of the Working Group, its mandate, and its procedures. Section two then analyzes the most recent version of the draft declaration submitted to members of the Working Group and participants of the 1989 United Nations session. Comments and recommendations made to the Working Group, both from governments and non-governmental organizations, are examined in section three. Finally, this note assesses the likelihood that the declaration will receive international recognition.

I. The Formation of the Working Group

The Working Group first met in 1982 on the recommendation of the United Nations Economic and Social Council's (UNESCO) Sub-Commission on the Prevention of Discrimination and Protection of Minorities (the Sub-Commission). Study of the specialized problems facing indigenous peoples, however, began much earlier than the 1982 meeting. The United Nations General Assembly first acknowledged the unique problems facing indigenous peoples as early as 1949, when the General Assembly called for the establishment of a sub-commission to study the conditions of indigenous Americans. The study was to document the development of indigenous Americans with the hope that a more effective use of America's resources would benefit the world. Faced with opposition by the United States' government, who felt the documentation invaded their sovereignty, the United Nations terminated the study and suspended that earlier Sub-Commission.³

Again, in 1957, the rights of indigenous populations received attention. The issue arose in the context of labor discrimination in Latin America.⁴ The International Labor Organization (ILO) adopted Convention 107, which remains the only human rights accord specifically addressing indigenous peoples. The Convention obligates the states to develop a plan for the integration of their indigenous populations.⁵ In other words, the Convention, and the standards that emanate from it, are based on the principle that governments should encourage indigenous peoples to assimilate and become part of the dominant culture. The ILO

3. Barsh, *Current Developments — Indigenous Peoples: An Emerging Object of International Law*, 80 AM. J. INT'L L. 370 (1986).

4. *Id.*

5. *Id.*

attempted to revise Convention 107 through the adoption of Convention 169. This new convention purports to abandon the promotion of assimilation in favor of recognition of the right of indigenous peoples to exist as distinct peoples in the societies in which they live.⁶

In 1971 the Sub-Commission appointed Jose R. Martinez Cobo as Special Rapporteur to study the problem of discrimination against indigenous populations. The Sub-Commission directed Cobo to "make a comprehensive study . . . and suggest the necessary national and international measures for eliminating such discrimination."⁷ Cobo made periodic reports to the Sub-Commission, although the United Nations did not publish his final report until 1983.⁸ The Cobo Report detailed conditions of discrimination facing indigenous peoples and led the Sub-Commission to form the Working Group.

The Sub-Commission established the Working Group to gather data and serve as a forum for complaints of discrimination against indigenous peoples. The Working Group's mandate is found in several places. Cobo describes the mandate in his final report, as does the well-known scholar, Professor Russel Barsh, who has participated in the Working Group sessions and has published a series of annual reports and articles following each session.⁹ A recent survey of Indian law by the *Harvard Civil Liberties — Civil Rights Law Review* also describes the Working Group and its mandate. The mandate of the Working Group outlines two functions:

1. [T]o review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations . . . to analyze such materials, and submit its conclusions to the Sub-Commission, and 2. to give special attention to the evolution of standards concerning the rights of indigenous populations, taking into account of both the similarities and differences in the situations and

6. 7 U.N. ESCOR CN.4 (Agenda Items 4 & 5, addendum part 2) at 3, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.2 (1989).

7. J. COBO, STUDYING THE PROBLEM OF DISCRIMINATION AGAINST INDIGENOUS POPULATIONS at 1, UN Sales No. E.86.XIV.3 (1987).

8. *Id.*

9. Kornowitz, Lichtman, McSloy & Olsen, *Toward Consent and Cooperation: Reconsidering the Status of Indian Nations*, 22 HARV. C.R.-C.L. L. REV. 507, 614 (1987) [hereinafter *Indian Nations*]; Barsh, *supra* note 3, at 372; J. COBO, *supra* note 7, at 23.

aspirations of indigenous populations throughout the world.¹⁰

By 1984, the Sub-Commission directed the Working Group to focus its attention on the development of minimum standards to be guaranteed to all indigenous peoples. These minimum standards would form a declaration.¹¹ In addition, the Sub-Commission directed the Working Group to use the Cobo Report in drafting the declaration.¹²

While it is hoped that the United Nations General Assembly will eventually adopt the Working Group's declaration, and that nations recognize the declaration as customary international law, one cannot help but wonder why existing human rights laws are inadequate to protect against the discrimination of indigenous populations. The simple answer is that human rights laws protect individuals, rather than groups. Indigenous peoples believe their rights are collective, emanating from the fact that they are members of groups, rather than individuals. Rights which governments traditionally recognize as group rights go virtually unnoticed in existing human rights law. One such example is the right of protection from the seizure of land. The state typically seizes land either for the expansion of its population or for the exploitation of the land's natural resources.¹³ The expropriation of land by states is probably the greatest problem common to indigenous peoples. While some countries provide a remedy for the taking of land in the form of just compensation, this remedy is inadequate for a group. Just compensation is a suitable remedy for an individual who could use the funds to purchase another piece of property. A group, on the other hand, would have a difficult time purchasing land which would enable it to continue to live together as a community. This example of the failure of human rights law to protect indigenous peoples' land demonstrates the need for special protection in international law for indigenous peoples.

II. *Organization and Procedures of the Working Group*

In order to understand the provisions of the declaration and evaluate its chances of receiving acceptance, it is first necessary

10. *Indian Nations*, *supra* note 9, at 614; *Barsh*, *supra* note 3, at 372; J. COBO, *supra* note 7, at 23.

11. *Barsh*, *supra* note 3, at 371.

12. *Id.*

13. E. LUTZ, H. HANNUM & K. BURKE, *NEW DIRECTIONS IN HUMAN RIGHTS*, 17 (1989) (available at the Indian Law Resource Center, Washington, D.C.).

to consider the organization and procedures of the Working Group and its function in the United Nations process. The Working Group is comprised of five members. The Sub-Commission appoints these five members, one from each geographic region.¹⁴ According to a participant in the drafting process, Indian Law Resource Center (ILRC) attorney Curtis Berkey, members of the Working Group serve as human rights experts, rather than as representatives of a state or country.¹⁵ A member of the Working Group is selected as Chairman-Special Rapporteur, whose duties include revising the draft declaration to reflect comments and suggestions, receiving data from governments and non-governmental organizations, providing members of the Working Group with information submitted for the Group's consideration, preparing the report following the Working Group's sessions, and representing the Working Group at other international forums. Erica-Irene Daes currently serves as Special Rapporteur for the Working Group.¹⁶

Liberal procedures adopted by the Working Group at its first session allow the group to fulfill its data gathering function. Under these procedures, any person or group may speak or submit information to the Working Group for its consideration.¹⁷ At the first session, the Working Group permitted oral and written statements from any indigenous group who sought to participate.¹⁸ The group distributes its draft of the declaration to governments and non-governmental organizations (NGOs).¹⁹ The NGOs and participating governments submit specific comments and recommendations to the Working Group. Comments may describe programs implemented by the offering government which could provide the solution to discrimination against indigenous rights, if implemented on an international scale. Criticisms of specific provisions and suggested wordings are also made. In addition, representatives of governments and NGOs attend the annual one-week session of the Working Group and participate in the drafting process.

14. 41 U.N. ESCOR CN.4 (Agenda Item 13) at 4, U.N. Doc. E/CN.4/Sub.2/1989/33 (1989) [hereinafter *Draft Declaration*].

15. Interview with Curtis Berkey, Attorney at the Indian Law Resource Center, Washington, D.C. (Sept., 1989) [hereinafter Berkey Interview].

16. *Id.*

17. *Indian Nations*, *supra* note 9, at 615.

18. Hannum, *New Developments in Indigenous Rights*, 28 VA. J. INT'L L. 649, 660 (1988).

19. A private organization representing the interests and advocating on behalf of a particular group. NGOs discussed here include the ILRC, the World Council of Indigenous Peoples, and the Inuit Circumpolar Conference.

The process of drafting a declaration can be slow, especially since the Working Group considers anyone's suggestions. This proves particularly difficult when participants cannot agree on something as basic as a definition of indigenous people. For example, the Cobo Report defines "indigenous people" as people who have a history that predates colonial society and consider themselves distinct from the culture that now dominates the territory. On the other hand, indigenous peoples prefer a definition that includes group characteristics. Indigenous peoples consider a more appropriate definition to include people who hold themselves out as members of specific groups who are accepted by the population as a member of those groups.²⁰

Once the Working Group adopts a declaration, the process has just begun. The Working Group is at the bottom of the UN hierarchy. As a result, the declaration approved by the Working Group must be submitted to the Sub-Commission. At this point the Sub-Commission, composed of thirty-five human rights experts, may rewrite or revise the declaration before granting its approval. This process could take several years. Even after approval, the Sub-Commission must then submit the declaration to the Human Rights Commission, which also has the authority to amend the document, as does UNESCO, and finally the General Assembly.²¹ Curtis Berkey suggests that the Working Group will soon begin to focus some of its attention on lobbying members of the Sub-Commission for their approval of the Group's work.

Obviously, it will be some time before a declaration is presented to the General Assembly. At that time the final product may not even resemble the declaration adopted by the Working Group, because the process may have reduced the rights of indigenous peoples in order to pacify individual governments and gain their approval.

III. The Draft Declaration

This section describes specific provisions of the draft declaration. Emphasis is placed on the provisions outlining fundamental rights, cultural rights, property rights, and the right of self-determination for indigenous peoples. Additional provisions, including the preamble, are discussed, as well as comments made to the Working Group identifying the disputed areas and exploring disputed provisions.

The preamble of the draft declaration, addressed to the General Assembly, begins with a basic recognition of the special

20. Barsh, *supra* note 3, at 374.

21. Berkey Interview, *supra* note 15.

needs of indigenous peoples. The preamble requests the General Assembly “[r]ecogniz[e] the specific need to promote and protect those rights and characteristics which stem from indigenous history, philosophy of life traditions, culture and legal, social and economic structures, especially as these are tied to the land which the groups have traditionally occupied.”²² This statement recognizes indigenous peoples as distinct groups of peoples who are both entitled to, and in need of, special legislation for the protection and promotion of their cultures.

The preamble also includes a declaration of support for the self-determination of indigenous peoples. The Working Group demonstrates its support for self-determination by stating it believes “that indigenous peoples should be free to manage their own affairs to the greatest possible extent, while enjoying equal rights with other citizens in the political, economic and social life of States.”²³ This notion of self-determination for indigenous peoples is very controversial; not surprisingly, governments reject self-determination, while indigenous groups endorse it.

The preamble concludes with a call for states to “effectively implement all international human rights instruments as they apply to indigenous peoples.”²⁴ Only through the implementation of these standards by state legislation can indigenous peoples be guaranteed basic rights. The preamble, in its recognition of the distinct needs of indigenous peoples, calls upon states to abide by the minimum standards set forth in the declaration. Comments on the preamble have been mixed. Some comments have rejected the basic principle of recognizing indigenous peoples as a distinct segment of the population, while other comments have reflected the concern that the declaration does not go far enough.²⁵

In its general comments on the preamble, Venezuela rejected any recognition of the right of individuals to be different from the general society. According to the Venezuelans, such a distinction would be incompatible with the obligation of states to insure that all individuals are equal. The Venezuelan comments stated: “One fails to see how a State could create a variety of regimes, different for each particular person or group, when the aim of every community organized as a State is precisely to

22. *Draft Declaration*, *supra* note 14, at 4.

23. *Id.* at 5.

24. *Id.*

25. U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1 at 17 (1989).

ensure that all persons will be on an equal footing before the law."²⁶ The Venezuelan comments reflect governmental concerns over whether the declaration will obligate them to grant their indigenous populations special status should the declaration become part of international law. As the situations in Brazil and El Salvador show, the Working Group's efforts are necessary, as many governments fail to ensure equal protection for their indigenous populations.

The Soviet Union has suggested that the preamble specifically renounce the concept of assimilation.²⁷ Assimilation has been used by many countries to promote the abandonment of cultural distinctions of indigenous peoples. Without distinguishing characteristics, indigenous peoples could more easily infiltrate society, no longer needing special attention. As previously mentioned, ILO Convention 107 contained a specific endorsement of the principle of assimilation.²⁸ This endorsement is the primary reason why the convention fails to protect the rights of indigenous peoples.

The converse to the concept of assimilation is the recognition that people have fundamental differences, whether they speak different languages, practice different religions, or more generally, come from a different culture. To address the fact that vast differences exist between different groups of indigenous peoples, the ILRC has suggested the preamble declare that the minimum standards contained in the declaration be granted to all indigenous peoples. According to the ILRC, "It is essential that this declaration be understood to be a universal declaration of standards which apply to all indigenous peoples regardless of their specific characteristics and circumstances."²⁹ The ILRC believed it is important for the declaration to state that it contains minimum standards for all indigenous peoples. The ILRC was concerned with states exercising their discretion in granting rights according to the particular history of the indigenous population. Following the preamble, the body of the declaration contains the substantive standards.

Part I of the declaration begins with guarantees of funda-

26. 41 U.N. ESCOR CN.4 (Agenda Item 13, addendum part 1) at 17, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1 (1989) [hereinafter *Compilation of Observations*].

27. 7 U.N. ESCOR CN.4 (Agenda Items 4 & 5, addendum part 1) at 6, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/2/Add.1 (1989) [hereinafter *Information From Governments*].

28. See *supra* note 6.

29. INDIAN LAW RESOURCE CENTER, COMMENTS AND RECOMMENDATIONS CONCERNING UNIVERSAL DECLARATION ON INDIGENOUS RIGHTS 4 (March 14, 1989) [hereinafter *COMMENTS*] (available at the Indian Law Resource Center, Washington, D.C.).

mental rights. The guarantees include "the right to full and effective enjoyment of all fundamental rights and freedoms," established in the United Nations Charter and other international human rights agreements, and the right to be free of discrimination.³⁰ Given the fact that basic fundamental rights are universally recognized, both under domestic law and by international principles, this section of the declaration has met little opposition.

Part II of the declaration contains specific provisions on cultural rights. This section recognizes the "collective right to exist as distinct peoples," and develop their distinct cultures.³¹ Provisions in Part II protect indigenous peoples from "any act which has the aim or effect of depriving them of their ethnic characteristics or cultural identity."³² The section also recognizes the right of indigenous peoples to practice their own religions, as well as the right to all forms of education.³³

For the most part, there has been little opposition to the provisions in Part II. For example, Australia has announced its support for the provision on educational rights. The country cited provisions it enacted for the education of its aboriginal people as a model for other countries. Australia established schools in areas populated by the Aborigines which allow the community to determine the curriculum.³⁴ The Soviet Union, in its display of support for these declarations of cultural rights, stated that this section should include a provision for access to the mass media. The Soviet Union contended that with access to the media, indigenous peoples will be better able to raise awareness of their situation and their particularized problems.³⁵

The cultural rights provision which has caused the most controversy is paragraph nine, addressing language of indigenous peoples. This paragraph provides indigenous peoples with "[t]he right to develop and promote their own languages, including an own literary language, and to use them for administrative, juridical, cultural and other purposes."³⁶ Governments, concerned over what the implication of such a provision would mean for their administration of governmental functions, have rejected the language provision.

30. *Draft Declaration*, *supra* note 14, at 5.

31. *Id.* at 6.

32. *Id.*

33. *Id.*

34. *Compilation of Observations*, *supra* note 26, at 19.

35. *Information from Governments*, *supra* note 27, at 7.

36. *Draft Declaration*, *supra* note 14, at 6.

For example, the Canadian government noted that over fifty aboriginal languages exist in Canada, many of which have no written form.³⁷ In response to the concern raised by Canada, Finland stated that in its country, the Sami are provided with interpreters for administrative and legal proceedings.³⁸ Sweden also offered a solution. The Swedes suggested that governments preclude indigenous persons capable of communicating in the national language from using interpreters.³⁹ The Swedish system restricts the use of interpreters to the limited circumstances where a person is unable to communicate. Thus, it appears that disagreement over the language provision may be easily remedied with viable solutions offered by both Finland and Sweden.

The next section of the declaration, Part III, describes property rights of indigenous peoples. This section undoubtedly contains some of the most important provisions of this document. The provisions on property rights confirm the right of ownership of lands and resources located on the lands traditionally occupied by indigenous peoples. Some general comments on the declaration's pronouncement of property rights help to illustrate the tensions which exist in this area.

Venezuela said it cannot support Part III of the declaration because it recognizes special protections for indigenous peoples' rights to land and resources. Venezuela argued the provision conflicts with their country's constitutional guarantee of the right of ownership to land, subject to state taxes and any other restrictions which the state deems necessary for the benefit of its citizens.⁴⁰ In contrast, the World Council of Indigenous Peoples, which submitted its own draft declaration to the Working Group for consideration, suggested the Working Group add a statement specifically addressing property rights in the preamble, in addition to the provisions contained in the declaration. The provision offered by the World Council reads: "Indigenous peoples have been denied . . . fundamental freedoms . . . through the taking of land and other resources resulting in much social maladies including poverty, deprivation, genocide and ethnocide."⁴¹ Analysis of this section on property rights shows certain

37. *Compilation of Observations, supra* note 26, at 19.

38. *Id.* at 20.

39. *Id.*

40. *Id.* at 25.

41. 7 U.N. ESCOR CN.4 (Agenda Items 4 & 5) at 7, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/5 (1989).

disputed areas the Working Group will need to address in order to win acceptance for the declaration.

Part III begins with the recognition of the "right of collective and individual ownership, possession and use of lands or resources which they have traditionally occupied or used."⁴² The section provides that these lands may not be taken away from indigenous peoples "without their free and informed consent."⁴³

In comments on these provisions, the Soviet Union criticized the broad language the declaration uses to describe ownership and possession of land. The Soviets are concerned that governments will use indigenous peoples' rights to land to discriminate against other groups. This discrimination could occur if the section on property rights conflicts with established practices for expropriating land with the consent of the dominant population.⁴⁴ In contrast, the ILRC said it believes that the Working Group should expand property rights to explicitly include sub-surface resources.⁴⁵ The Indigenous Peoples' Preparatory Meeting, held just prior to the Working Group's session, also adopted this view.⁴⁶ One additional suggestion, concurring with the property rights stated in the declaration, comes from the Inuit Circumpolar Conference. The Conference stressed that the use of the word "territories" should be used in addition to land.⁴⁷ The Conference believes that the use of the word "territory" would clarify the meaning of the provision and protect against interpretations that would allow occupancy of land, but preclude use.⁴⁸

The right to just compensation also is declared a property right in Part III of the declaration. The declaration provides for the right to reclaim land, "and where that is not possible to seek just and fair compensation."⁴⁹ When the parties agree, compensation may be in the form of land or resources equal to land or resources previously possessed by indigenous peoples.⁵⁰

The Inuit Circumpolar Conference asserted that compensation should include damages, both for the collective and the individ-

42. *Draft Declaration*, *supra* note 14, at 6.

43. *Id.*

44. *Information from Governments*, *supra* note 27, at 7.

45. *COMMENTS*, *supra* note 29, at 10.

46. *INDIGENOUS PEOPLES' PREPARATORY MEETING*, at 1 (July 24, 1989) (available at the Indian Law Resource Center, Washington, D.C.).

47. *Compilation of Observations*, *supra* note 26, at 7.

48. *Id.* at 27.

49. *Draft Declaration*, *supra* note 14, at 7.

50. *Id.*

ual,⁵¹ whereas Australia flatly rejected the idea of compensation.⁵² The Australians stated that they would be unwilling to provide just compensation for resources removed from land. However, Australia would support the development of social and economic programs, which Australia believes would have the same effect as compensation.⁵³

Paragraph sixteen contains environmental protections recognizing the right of indigenous peoples to protect the environment from "conduct which may result in the destruction, deterioration or pollution of their traditional habitat."⁵⁴ The Inuit Circumpolar Conference argued that these protections are inadequate and proposed that the Working Group add the following statement to the declaration: "Indigenous peoples have the right to a safe and healthy environment States have the duty to protect and preserve the environmental integrity of the territories and resources of these peoples, including taking measures to prevent all forms of trans-boundary or other pollution."⁵⁵

In the final provision of the property rights section, the declaration imposes a duty on states to seek consent of indigenous peoples before undertaking any actions that could effect natural resources. The stated purpose is to ensure the success of projects, while reducing the possibility of adverse impact on indigenous peoples.⁵⁶ An expansive reading of this section would grant indigenous peoples veto power over state projects, a limitation which governments will surely adamantly oppose. Australia, for example, interprets this paragraph as requiring a state to consult inhabitants before engaging in mining or other exploratory activities.⁵⁷

The provisions contained in Part IV of the declaration are not described in detail here. Part IV provides the right of indigenous peoples to preserve their own economic systems. Additionally, indigenous peoples have the right to administer all social and economic programs affecting their communities.⁵⁸

Part V is of equal importance to Part III's provisions for property rights, because Part V describes standards for the self-determination of indigenous peoples. As the proclamation of

51. *Compilation of Observations*, *supra* note 26, at 27.

52. *Information from Governments*, *supra* note 27, at 3.

53. *Id.* at 24.

54. *Draft Declaration*, *supra* note 14, at 7.

55. *Compilation of Observations*, *supra* note 26, at 27.

56. *Draft Declaration*, *supra* note 14, at 7.

57. *Compilation of Observations*, *supra* note 26, at 24.

58. *Draft Declaration*, *supra* note 14, at 7.

self-determination for indigenous peoples is important, particular attention should be given to this section of the declaration. As with the declaration in its entirety, this section will be affirmed without substantial reservation only where the language adopted by the Working Group is acceptable to all those participating in the drafting.

The declaration's right of self-determination recognizes that indigenous peoples have equal rights of all citizens, including the right to participate in the state legislative process and the implementation of all national and international matters affecting indigenous peoples.⁵⁹ Part V establishes indigenous peoples' right to develop autonomous institutions and to "determine the responsibilities of individuals to their own community."⁶⁰ Participants generally have been supportive of the declaration's statements of these rights. UNESCO's support for indigenous peoples' participation in the states' decision-making process is found in UNESCO's recommendation that the "right to participate in political, social and economic affairs of their State" be presented throughout the declaration.⁶¹

Most attention has focused on paragraph twenty-three, which establishes the collective right to autonomy.⁶² Several countries are concerned with the vagueness of the term "autonomy" and have requested that the term be defined. Finland asserted the declaration of autonomy to be impractical. In Finland, all citizens have the right to self-determination, making it impossible to grant some citizens, as members of a specific ethnic group, different autonomous rights.⁶³ Romania argued that the generalization of autonomous rights established in the declaration is incompatible with the universal character of the declaration. The Romanians pointed out that a collective right to autonomy is incongruous with the constitutional framework of many countries.⁶⁴ As an alternative, Romania suggested that the Working Group use the "right of indigenous populations to participate in the organization and management of education, culture, health, social welfare and local economic activities" in place of collective autonomy.⁶⁵

59. *Information from Governments*, *supra* note 27, at 28.

60. *Draft Declaration*, *supra* note 14, at 8.

61. *Compilation of Observations*, *supra* note 26, at 32.

62. *Draft Declaration*, *supra* note 14, at 8.

63. *Compilation of Observations*, *supra* note 26, at 31.

64. *Information from Governments*, *supra* note 27, at 8-9.

65. *Id.* at 31.

The obvious disapproval of governments to the establishment of the right to collective autonomy could endanger the success of the section on self-determination, especially considering that indigenous groups may be unwilling to settle for anything less. The ILRC, in recognizing the disagreement in this area, has suggested that the Working Group revise the language to achieve acceptance. The ILRC has suggested the Working Group use the following language to resolve the dispute in this area:

The right to self-determination, including at minimum the collective right to autonomy in matters relating to their own affairs, including education, information, culture, religion, health, housing, social welfare, civil and criminal jurisdiction, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.⁶⁶

This restatement of autonomy clearly defines the principle's parameters. Internal functions, as well as external functions affecting indigenous peoples, are within the scope of autonomy. If this refined definition meets the approval of governments who found the simple statement of collective autonomy ambiguous, it is also likely to satisfy indigenous groups, and an effective compromise can be reached in this most important section.

The concluding sections of the declaration contain provisions for dispute resolution in Part VI, and a statement of the purposes of the declaration. The declaration concludes with a simple statement: "These rights constitute the minimum standards for the survival and well being of the indigenous peoples of the world."⁶⁷ The final provision declares that states may not use the rights announced in this declaration to the detriment of indigenous peoples.⁶⁸

IV. Future Prospects for the Working Group and the Declaration

Following the 1989 session, the Working Group was expedited to integrate input received into the draft declaration and to submit a revised version to participants in the drafting process.

66. COMMENTS, *supra* note 29, at 8.

67. *Draft Declaration*, *supra* note 14, at 8.

68. *Id.*

The Sub-Commission directed Chairman-Rapporteur Erica-Irene Daes to prepare a second revised draft of the declaration considering comments and suggestions made to the Working Group.⁶⁹ The revised declaration was projected to be made available prior to the 1990 session, with the expectation that again, participants will debate the merits of specific elements of the declaration.

Those provisions that have received support, for instance the section ensuring fundamental rights, was expected to undergo little change. The 1990 session was anticipated to focus on disputed sections granting self-determination and promoting indigenous languages. In theory, only the five members of the Working Group must agree on the language of the declaration. In practice, however, the Working Group attempts to address disagreements between participants. It would have been unwise for the Working Group to ignore these disagreements and submit the declaration in its present form for approval. This would only increase the probability of revision because disagreements are likely to reemerge as the Working Group submits the declaration to other UN bodies. Where agreement can be reached among the diverse participants in the drafting process, the likelihood of revisions as the declaration makes its way up the UN ladder is reduced.

Other issues raised in the Working Group sessions had gone unnoticed in the text of the declaration. These issues include the indigenous peoples' right to the return of human remains⁷⁰ and the right of indigenous peoples to jurisdiction over persons within their territories.⁷¹ The Working Group should address these issues and other issues raised which are not accounted for in the declaration. Additionally, the Working Group should determine the feasibility of their addition to the declaration. This would also protect against the possibility of revision and save time if the issues are raised before another UN body during the ratification process.

It is recognized that the UN needs to take measures in addition to the preparation of the declaration. As mentioned, the Working Group was to devote some of its attention to winning the support of members of the Sub-Commission. Awareness of discrimination against and rights of indigenous peoples is needed.

69. *Draft Declaration*, *supra* note 14, at 3.

70. INDIGENOUS PEOPLES' PREPARATORY MEETING, *supra* note 46, at 1.

71. 7 U.N. ESCOR CN.4 (Agenda Items 4 & 5) at 5, U.N. Doc. E/CN.4/Sub.2/AC.4/1989/5 (1989).

Cultural events and exhibits were to be held next year in Geneva during the Working Group's session.⁷² In addition, the Sub-Commission has passed a recommendation that the General Assembly declare 1993 the International Year for Indigenous Rights.⁷³ Once people understand the nature of issues affecting indigenous peoples, there is a greater possibility that the declaration will receive universal support.

Even a person who supports provisions protecting indigenous peoples from future discrimination is faced with a moral dilemma: Should the state be obligated to provide social services for a specific group of indigenous people to be administered by themselves? Should the state be required to provide just compensation for violations that may have been committed hundreds of years ago? Where discriminatory behavior presently exists, is the declaration — even assuming it is passed by the General Assembly in its present form — the proper vehicle for the protection of rights of indigenous peoples?

Where discriminatory practices exist, the answer to these questions is yes; something must be done to protect and promote the rights of indigenous peoples. The Working Group's draft declaration shows that something is being done. Indigenous groups and representatives of governments gather in a single forum to devote their attention to indigenous issues. The Working Group has definitely raised awareness among the participants of the Working Group's sessions. Within a few years, the Working Group will complete its task and submit the declaration to the Sub-Commission. One cannot help but be disillusioned by the UN process and the hurdles the declaration must overcome before it can reach the General Assembly. When the document eventually does reach the General Assembly, what is the likelihood that the document will resemble the declaration submitted by the Working Group, the group most informed as to the specific problems facing indigenous peoples? The ultimate or final issue is whether states will implement these indigenous rights in their legislation.

In areas that the rights encompassed in the declaration describe principles already recognized by existing human rights standards, the likelihood of universal acceptance appears great. Where the declaration attempts to take one step further in its promotion

72. Interview with Robert T. Coulter, Director of the Indian Law Resource Center, Washington, D.C. (September 1989).

73. U.N. Doc. E/CN.4/Sub. 2/1989/L.46 at 2 (1989).

of indigenous rights, acceptance is not as certain. The UN must attempt to establish an awareness of specific issues and an understanding of indigenous peoples and their cultures. Only when society has this awareness and understanding can a universal declaration of rights for indigenous peoples hope to be achieved.

APPENDIX

II. FIRST REVISED PART OF THE DRAFT UNIVERSAL DECLARATION ON RIGHTS OF INDIGENOUS PEOPLES

The General Assembly,

Considering indigenous peoples *born free and equal* in dignity and rights in accordance with existing international standards while recognizing the right of all individuals and groups to be different, to consider themselves different and to be regarded as such,

Considering that all peoples and human groups have contributed to the progress of civilizations and cultures which constitute the common heritage of humankind,

Recognizing the specific need to promote and protect those rights and characteristics which stem from indigenous history, philosophy of life, traditions, *culture* and *legal, social and economic* structures, especially as these are tied to the lands which the groups have traditionally occupied,

Concerned that many indigenous peoples have been unable to enjoy and assert their inalienable human rights and fundamental freedoms, frequently resulting in insufficient land and resources, poverty and deprivation, which in turn may lead *them to voice their grievances and to organize themselves in order to bring an end to all forms of discrimination and oppression which they face,*

Convinced that all doctrines and practices of racial, ethnic or cultural superiority are legally wrong, morally condemnable and socially unjust,

Reaffirming that indigenous peoples in the exercise of their rights should be free from adverse distinction or discrimination of any kind,

Endorsing calls for the consolidation and strengthening of indigenous societies and their cultures and traditions through development based on their own needs and value systems and comprehensive participation in and consultation about all other relevant development efforts,

Emphasizing the need for special attention to the rights and skills of indigenous women and children,

Believing that indigenous peoples should be free to manage their own affairs to the greatest possible extent, while enjoying equal rights with other citizens in the political, economic and social life of States,

Bearing in mind that nothing in this declaration may be used as a justification for denying to any people, which otherwise

satisfies the criteria generally established by human rights instruments and international law, its right to self-determination,

Calling on States to comply with and effectively implement all international human rights instruments as they apply to indigenous peoples,

Acknowledging the need for minimum standards taking account of the diverse realities of indigenous peoples in all parts of the world,

Solemnly proclaims the following declaration on rights of indigenous peoples and calls upon all States to take prompt and effective measures to implement the declaration in conjunction with the indigenous peoples.

PART I

1. The right to the full and effective enjoyment of all fundamental rights and freedoms, as well as the observance of the corresponding responsibilities, which are universally recognized in the Charter of the United Nations and in existing international human rights instruments.

2. The right to be free and equal to all other human beings in dignity and rights and to be free from adverse distinction or discrimination of any kind.

PART II

3. The [collective] right to exist *as distinct peoples* and to be protected against genocide, as well as the [individual] rights to life, physical integrity, liberty and security of person.

4. The [collective] right to maintain and develop their ethnic and cultural characteristics and distinct identity, including the right of peoples and individuals to call themselves by their proper names.

5. The *individual and* collective right to protection against ethnocide. This protection shall include, in particular, prevention of any act which has the aim or effect of depriving them of their ethnic characteristics or *cultural* identity, of any form of forced assimilation or integration, of imposition of foreign lifestyles and of any propaganda derogating their dignity and diversity.

6. The right to preserve their cultural identity and traditions and to pursue their own cultural development. The rights to the manifestations of their cultures, including archaeological sites, artifacts, designs, technology and works of art, lie with the indigenous peoples or their members.

7. The right to require that States grant — within the resources available — the necessary assistance for the maintenance of their identity and their development.

8. The right to manifest, teach, practice and observe their own religious traditions and ceremonies, and to maintain, protect and have access to sacred sites and burial-grounds for these purposes.

9. *The right to develop and promote their own languages, including an own literary language, and to use them for administrative, juridical, cultural and other purposes.*

10. The right to all forms of education, including in particular the right of children to have access to education in their own languages, and to establish, structure, and conduct and control their own educational systems and institutions.

11. The right to promote intercultural information and education, recognizing the dignity and diversity of their cultures, and the duty of States to take the necessary measures, among other sections of the national community, with the object of eliminating prejudices and of fostering understanding and good relations.

PART III

12. The right of *collective and individual* ownership, possession and use of the lands or resources which they have traditionally occupied or used. The lands may only be taken away from them with their free and informed consent as witnessed by a treaty or agreement.

13. The right to recognition of their own land-tenure systems for the protection and promotion of the use, enjoyment and occupancy of the land.

14. The right to special measures to ensure their ownership and control over surface and substance of resources pertaining to the territories they have traditionally occupied or otherwise used including flora and fauna, waters and ice sea.

15. The right to reclaim land and surface resources or where this is not possible, to seek just and fair compensation for the same, when the property has been taken away from them without consent, in particular, if such deprivation has been based on theories such as those related to discovery, *terra nullius*, waste lands or idle lands. Compensation, if the parties agree, may take the form of land or resources of quality and legal status at least equal to that of the property previously owned by them.

16. The right to protection of their environment and in particular against any action or course of conduct which may result

in the destruction, deterioration or pollution of their traditional habitat, land, air, water, sea ice, wildlife or other resources without free and informed consent of the indigenous peoples affected. The right to just and fair compensation for any such action or course of conduct.

17. *The right to require that States consult with indigenous peoples and with both domestic and transnational corporations prior to the commencement of any large-scale projects, particularly natural resource projects or exploitation of mineral or other subsoil resources in order to enhance the projects' benefits and to mitigate any adverse economic, social, environmental and cultural effect. Just and fair compensation shall be provided for any such activity or adverse consequence undertaken.*

PART IV

18. The right to maintain and develop within their areas of lands or territories their traditional economic structures and ways of life, to be secure in the traditional economic structures and ways of life, to be secure in the enjoyment of their own traditional means of subsistence, and to engage freely in their traditional and other economic activities, including hunting, fresh- and salt-water fishing, herding, gathering, lumbering and cultivation, without adverse discrimination. In no case may an indigenous people be deprived of its means of subsistence. The right to just and fair compensation if they have been so deprived.

19. The right to special State measures for the immediate, effective and continuing improvement of their social and economic conditions, with their consent, that reflect their own priorities.

20. The right to determine, plan and implement all health, housing and other social and economic programs affecting them, and as far as possible to develop, plan and implement such programs through their own institutions.

PART V

21. The right to participate on *an equal footing with all the other citizens and without adverse discrimination* in the political, economic and social life of the State and to have their specific character duly reflected in the legal system and in political and socio-economic institutions, including in particular proper regard to and recognition of indigenous laws and customs.

22. The right to participate fully at the State level, through representatives chosen by themselves, in decision-making about

and implementation of all national and international matters which may affect their life and destiny.

23. The [collective] right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions.

24. The right to decide upon the structures of their autonomous institutions, to select the membership of such institutions, and to determine the membership of the indigenous people concerned for these purposes.

25. The right to determine the responsibilities of individuals to their own community, consistent with universally recognized human rights and fundamental freedoms.

26. The right to *maintain and develop* traditional contacts and cooperation, including cultural and social exchanges and trade, with their own kith and kin across State boundaries and *the obligation of the State to adopt measures to facilitate such contacts.*

27. *The right to claim that States honor treaties and other agreements concluded with indigenous peoples.*

PART VI

28. The individual and collective right to access to and prompt decision by mutually acceptable and fair procedures for resolving conflicts or disputes *and any infringement, public or private,* between States and indigenous peoples, groups or individuals. These procedures should include, as appropriate, negotiations, mediation, *arbitration,* national courts and international and regional human rights review and complaints mechanisms.

PART VII

29. *These rights constitute the minimum standards for the survival and the well-being of the indigenous peoples of the world.*

30. *Nothing in this Declaration may be interpreted as implying for any State, group or individual any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.*