UN Declaration on the Rights of Indigenous Peoples

Self-Determination and Territorial Integrity

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International law makes clear that **all peoples** have the right of self-determination.[2] This is affirmed in the *UN Declaration on the Rights of Indigenous Peoples* ("*UN Declaration*"). International treaty bodies have repeatedly concluded this.

There has been some suggestion that the principle of territorial integrity has been expanded in article 46(1) so as to undermine Indigenous peoples' rights. Others claim that the right of self-determination in article 3 of the *UN Declaration* is not the same right as the one in international law. Such positions are not accurate. The principle of territorial integrity already exists in international law and cannot be validly expanded upon by the *UN Declaration*.

The following analysis concludes that the international law principle of "equal rights and self-determination of peoples" applies to Indigenous peoples globally – as does the right of self-determination in international law. States that fail to fully recognize this principle and right cannot invoke the principle of territorial integrity. There cannot be any discriminatory qualifications or conditions.

UN Declaration affirms the full right of self-determination without any discriminatory qualification or conditions

1. The *UN Declaration on the Rights of Indigenous Peoples* does not create new rights or diminish existing rights.[3] Preambular para. 7 affirms that the rights of Indigenous peoples are "inherent" or pre-existing. The *Declaration* elaborates on these inherent rights in Indigenous peoples' contexts.

2. During the years that the *UN Declaration* was negotiated, Indigenous peoples' representatives from around the world strived to ensure that this new human rights instrument would affirm their right of self-determination, as it **already existed** in international law. No discriminatory double standard would be tolerated.

3. The *UN Declaration* consistently refers to Indigenous peoples as "peoples". Article 3 of the *UN Declaration*, which affirms Indigenous peoples' right of self-determination, is considered the foundational[4] provision in this international human rights instrument.

4. UN treaty bodies have repeatedly confirmed that the collective human right of self-determination in identical article 1 of the *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights* applies to Indigenous peoples in the different regions of the world.[5]

5. No lesser right of self-determination can be interpreted in the *UN Declaration*. Art. 45 stipulates: "Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future."

6. Art. 1 of the *UN Declaration* affirms: "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights … as recognized in the Charter of the United Nations … and international human rights law."

7. Art. 2 affirms: "Indigenous peoples … are free and equal to all other peoples … and have the right to be free from any kind of discrimination". Such equality includes the right of all Indigenous peoples "to be different, to consider themselves different, and to be respected as such".[6]

8. In international law, the right of self-determination and prohibition against racial discrimination are peremptory[7] norms. Such norms have the highest status of legal protection. In addition, the right of self-determination serves as a safeguard for Indigenous peoples' other human rights.[8]

9. In exercising the right of self-determination, article 4 of the *UN Declaration* affirms Indigenous peoples have the "right to autonomy and self-government in matters relating to their internal and local affairs". For many of the reasons cited above, this cannot mean that Indigenous self-determination can only be exercised within the parameters of article 4.

10. Further, Indigenous peoples are **both international and domestic actors**. Article 36(1) of the *UN Declaration* affirms that Indigenous peoples have the right to "maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples" across international and other borders.

11. Art. 36(2) of the *UN Declaration* adds: "States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right." A similar obligation of States is affirmed in the *Indigenous and Tribal Peoples Convention, 1989*.[9]

12. Similar provisions to arts. 36(1) and (2) of the *UN Declaration* are also affirmed in the *American Declaration on the Rights of Indigenous Peoples*.[10]

13. The *UN Declaration* underlines that the rights affirmed in Treaties, agreements and other constructive arrangements between States and indigenous peoples "are, in some situations, matters of international concern, interest, responsibility and character".[11]

14. The *American Declaration* affirms: "When disputes cannot be resolved between the parties in relation to such treaties, agreements and other constructive arrangements, these shall be submitted to competent bodies, including regional and international bodies, by the States or indigenous peoples concerned."[12]

15. Virtually every issue relating to Indigenous peoples is addressed in some way at the international level. These issues include, *inter alia*, human rights, food security and food

sovereignty, biodiversity, climate change and intellectual property. Increasingly, Indigenous peoples represent themselves in international forums.

16. Indigenous peoples have described the scope of their right of self-determination in positive and collaborative terms:

> In an era of globalization, Indigenous peoples are necessarily expanding the exercise of our self-determination beyond State borders. We are substantially expanding our role in standard-setting and other international forums. We are utilizing international complaints processes. We are engaging in international relations with a wide range of State governments and Indigenous peoples. Regardless of transnational boundaries, we are using and managing our lands, territories and resources. These are positive contributions to the international community, as well as to our own nations and people. These are also essential manifestations of our external right of self-determination.[13]

Principle of territorial integrity

17. Article 46 (1) of the *UN Declaration* addresses the principle of territorial integrity of States such as Canada. The principle already existed in international law at the time of the adoption of the *Declaration* and States could have invoked the principle regardless of whether it was referenced in the *Declaration*. It is important not to overstate the principle's scope or significance.

18. In international law, the principle of territorial integrity is a State-to-State obligation. This is confirmed in the *Charter of the United Nations*,[14] where art. 2(4) refers explicitly to Member States:

> The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles. … 4. <u>All Members</u> shall refrain in their international relations from the threat or use of force against the <u>territorial integrity or political independence of any state</u>, or in any other manner inconsistent with the Purposes of the United Nations."

19. For example, the principle of territorial integrity may be invoked as a defence against efforts by one State to promote the breaking up of another state. It is not an obligation imposed directly on any peoples or persons.

20. The principle of territorial integrity is not absolute and cannot be interpreted as such in the *UN Declaration*.

21. International law balances the principle of territorial integrity with the right of self-determination. As indicated in the 1971 *Declaration on Friendly Relations*, States can only invoke territorial integrity if they are "conducting themselves in compliance with the <u>principle of equal rights and self-determination of peoples</u>".[15]

22. While the principle is respected among States, territorial integrity still allows for changes in borders and re-ordering of sovereignties in the context of decolonization.[16] The principle of equal rights and self-determination of peoples is always a key factor.[17]

23. No provision of the *UN Declaration*, including art. 46(1), can or should be read in isolation. Rather, each provision should be read in the context of the whole instrument and other international human rights law.[18] In particular, it is helpful to examine the whole of art. 46, which includes two other subsections.

24. Art. 46(2) affirms: "In the exercise of the rights enunciated in the present Declaration, human rights … of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. **Any such limitations shall be non-discriminatory** …"

25. Art. 46(3) affirms that every provision in the *UN Declaration* shall be interpreted in accordance with the "principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith".

26. A discriminatory interpretation of art. 46(1) would be inconsistent with art. 46(2) and (3).

27. In addition, preambular para. 17 affirms "nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law".

Ambiguity in article 46(1)

28. Article 46(1) of the *UN Declaration on the Rights of Indigenous Peoples* includes the principle of territorial integrity in an ambiguous manner, by adding the words "people, group or person".

> Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

29. If the effect of art. 46(1) would be to alter the principle of "equal rights and self-determination of peoples", as it currently applies to Indigenous peoples in international law, States could not assert the principle of territorial integrity.[19] States would be violating the UN Charter.

30. Preambular para. 1 affirms that, in adopting the *UN Declaration*, the General Assembly is "*Guided* by the purposes and principles of the Charter of the United Nations". The Charter's purposes and principles include the principle of "equal rights and self-determination of peoples".[20]

31. Despite the ambiguity in art. 46(1), it remains clear, as outlined above, that the use of the principle of territorial integrity to deny Indigenous peoples the right to own and exercise jurisdiction over their lands and territories would be contrary to the *Declaration* as a whole.

32. It would also be erroneous to conclude that art. 46(1) adversely affects Indigenous peoples' Treaties. In this regard, art. 37(2) of the *UN Declaration* stipulates: "Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements."

33. Further, article 37(1) of the *UN Declaration* specifies an obligation of States to have Treaties and agreements honoured and respected. According to the International Law Association, this obligation corresponds to a rule of customary international law.[21]

34. Finally, it is important to take into account the **integrity of Indigenous territories** affirmed in the *UN Declaration* – and which is linked to Indigenous peoples' self-determination. In this regard, a July 2013 study of the UN Expert Mechanism on the Rights of Indigenous Peoples has concluded:

> In the promotion of peace, justice and harmonious and cooperative relations between States and indigenous peoples, the Declaration affirms the right to the integrity of their lands and territories (arts. 25–32). Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples (art. 7(2)). Such security includes, *inter alia*, cultural, environmental and territorial aspects.[22]

***Indigenous and Tribal Peoples Convention, 1989* ["ILO Convention 169"] affirms Indigenous peoples' human rights – and in no way diminishes their right of self-determination**

35. Art. 3(1) of the ILO Convention 169 affirms: "Indigenous and tribal peoples shall enjoy the full measure of human rights and fundamental freedoms without hindrance or discrimination." This necessarily includes Indigenous peoples' right to self-determination.

36. At the time of the revision process that led to the adoption of ILO Convention 169, article 1(3) was added to the text: "The use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law." As officially explained by the Chair of the revision process, "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."[23] Therefore, such issues were left for the United Nations to decide.

37. As previously highlighted in this analysis,[24] the *UN Declaration* repeatedly refers to Indigenous peoples as "peoples" and article 3 affirms their right of self-determination. The right of self-determination in the two international human rights Covenants has been repeatedly applied to Indigenous peoples by UN treaty bodies.[25]

38. ILO Convention 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."[26]

39. Further, article 35 of the ILO Convention makes clear that this Convention shall not adversely affect the rights and benefits of Indigenous peoples "pursuant to other … international instruments, treaties, or national laws … custom or agreements." Thus, the rights of Indigenous peoples to self-determination and consent in international instruments – such as the two human rights Covenants and the *UN Declaration* – cannot be adversely affected by ILO Convention 169.[27] This illustrates another significant legal effect of international "declarations".

Conclusions

40. The *United Nations Declaration on the Rights of Indigenous Peoples* affirms that the right of self-determination in international law applies equally to Indigenous peoples. No diminished or second-class right is created.

41. **There is no legitimate way that art. 46(1) can be interpreted to validly undermine Indigenous peoples' right of self-determination.** Other provisions in the *United Nations Declaration on the Rights of Indigenous Peoples* – including other paragraphs of art. 46 – reinforce this conclusion without question.

42. In particular, it would be ill-advised and self-defeating to criticize the *United Nations Declaration on the Rights of Indigenous Peoples* as a whole based on article 46(1).

43. States or others insisting on diminished rights and standards for Indigenous peoples should be effectively challenged.

44. Some States may unjustly choose to interpret the *UN Declaration* in a manner that perpetuates colonialism and is not consistent with the *Charter of the United Nations* and international human rights law. States may also fail to respect the legal opinions of UN treaty bodies, even though the International Court of Justice "ascribe[s] great weight" to the interpretations adopted by such expert bodies.[28]

45. Indigenous peoples should continue to assert their right of self-determination consistent with their own cultures, perspectives, traditions, governance and laws. In such diverse Indigenous contexts, it is beneficial to rely on the *UN Declaration* and other international human rights law.

46. Further, it is important to underline the **significant and growing role of the *UN Declaration* in international law** in reinforcing Indigenous peoples' inherent rights and their implementation. As James Anaya and Rodríguez-Piñero emphasize:

> The articulation and recognition of Indigenous peoples' rights in the last three decades represents <u>one of the most astonishing developments in the history of modern international human rights law</u>. The adoption of the UN Declaration … along with the development of other relevant international instruments and the gradual recognition of Indigenous rights in the jurisprudence and practice of

international human rights bodies and mechanisms, have introduced lasting changes in the conceptual, political, and moral underpinnings of international human rights and policy.[29]

Endnotes

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[2] *International Covenant on Civil and Political Rights*, G.A. Res 2200A (XXI), of 16 December 1966, Can. T.S. 1976 No. 47, accession by Canada 19 May 1976; and *International Covenant on Economic, Social and Cultural Rights,* G.A. Res. 2200A (XXI) of 16 December 1966,; Can. T.S. 1976 No. 46, accession by Canada 19 May 1976, identical article 1.

[3] General Assembly, *Rights of Indigenous peoples: Note by the Secretary-General*, report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, in accordance with Human Rights Council resolution 21/24, UN Doc. A/68/317 (14 August 2013), para. 70. See also International Law Association, "Rights of Indigenous Peoples", Interim Report, The Hague Conference (2010) at 1-2.

Walter R. Echo-Hawk, *In the Light of Justice: The Rise of Human Rights in Native America and the UN Declaration on the Rights of Indigenous Peoples* (Golden, Colorado: Fulcrum Publishing, 2013), at 39: "The standards in the *Declaration* do not create new or special rights for indigenous peoples. … [O]ne purpose of the *Declaration* is to connect the human rights of indigenous peoples to the larger body of international human rights law and make that body more accountable to the needs and circumstances of indigenous peoples."

[4] Human Rights Council, *Report of the Special Rapporteur on indigenous people, James Anaya, Addendum: Report on the Situation of Human Rights of Indigenous Peoples in Brazil*, UN Doc A/HRC/12/34/Add.2 (26 August 2009), para. 22: "The right of self-determination is a foundational right, without which indigenous peoples' other human rights, both collective and individual, cannot be fully enjoyed."

[5] See, *e.g.*, Committee on Economic, Social and Cultural Rights, *Concluding observations of the Committee on Economic, Social and Cultural Rights: New Zealand*, UN Doc. E/C.12/NZL/CO/4 (1 May 2018), para. 8; Human Rights Committee, *Concluding observations of the Human Rights Committee: Canada*, UN Doc. CCPR/C/CAN/CO/5 (20 April 2006) at paras. 8 and 9; Human Rights Committee, *Concluding Observations of the Human Rights Committee: United States of America*, UN Doc. CCPR/C/USA/Q/3 (18 December 2006), para. 37; Human Rights Committee, *Concluding observations of the Human Rights Committee: Panama*, UN Doc. CCPR/C/PAN/CO/3 (17 April 2008) at para. 21; Human Rights Committee, *Concluding observations of the Human Rights Committee: Norway*, UN Doc. CCPR/C/79/Add.112 (5 November 1999) at para. 17; Committee on Economic, Social and Cultural Rights, *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; Committee on Economic, Social and Cultural Rights, *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.

[6] *UN Declaration*, 2nd preambular para. This reinforced by art. 8(1): "Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture."

[7] *E.g.*, *Report of the International Law Commission*, 53rd sess. (23 April-1 June and 2 July-10 August 2001) in UN GAOR, 56th sess., Supp. No. 10 (A/56/10), at 208, para. (5): "Those peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination." [emphasis added]

Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 at 289 (1969), 1155 U.N.T.S. 331, *reprinted in* 8 I.L.M. 679 (1969) (entered into force 27 January 1980), article 53: "For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. [emphasis added]

[8] General Assembly, *Universal realization of the right of peoples to self-determination*, UN Doc. A/RES/72/159 (19 December 2017) (adopted without a vote), para. 1: "Reaffirms that the universal realization of the right of all peoples, including those under colonial, foreign and alien domination, to self-determination is a fundamental condition for the effective guarantee and observance of human rights and for the preservation and promotion of such rights". [emphasis added]

[9] *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), art. 32: "Governments shall take appropriate measures, including by international agreements, to facilitate contacts and co-operation between indigenous and tribal peoples across borders, including activities in the economic, social, cultural, spiritual and environmental fields." [emphasis added]

[10] *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, art. XX, paras. 3 and 4.

[11] *UN Declaration*, 14th preambular para. [emphasis added]

[12] *American Declaration*, art. XXIV, para. 2. [emphasis added]

[13] Grand Council of the Crees (Eeyou Istchee) *et al.*, "Towards a *U.N. Declaration on the Rights of Indigenous Peoples*: Injustices and Contradictions in the Positions of the United Kingdom", Joint Submission to Prime Minister Tony Blair, United Kingdom of Great Britain and Northern Ireland (10 September 2004), para. 136.

[14] *Charter of the United Nations*, Can. T.S. 1945 No. 76; 59 Stat. 1031, T.S. 993. Signed at San Francisco on June 26, 1945. [emphasis added]

See also *Reference re Secession of Québec*, [1998] 2 S.C.R. 217, para. 129.

[15] *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations*, UNGA Res. 2625 (XXV), 25 UN GAOR, Supp. (No. 28) 121, UN Doc. A/8028 (1971): "Nothing in the foregoing paragraphs [on the principles and right of self-determination of peoples] shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour." [emphasis added]

See also UN Declaration, 1st preambular para., where it is affirmed that the *Declaration* is "*Guided* by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter". The purposes of the *Charter* includes: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples" (art. 1(2)). [emphasis added]

[16] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, UNGA Resolution 1514 (XV), 15 U.N. GAOR, Supp. (No. 16) 66, UN Doc. A/4684, adopted on December 14, 1960, para. 6.

[17] *Ibid.*, 2nd preambular para. This para. reproduces art. 55 c of the *Charter of the United Nations*.

[18] Willem van Genugten & Federico Lenzerini, "Legal Implementation and International Cooperation and Assistance: Articles 37-42" in Jesse Hohmann & Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford: Oxford University Press, 2018) 539 at 572: "UNDRIP … should not be read in isolation from

other parts of international law, while in addition it is emphasized that the Declaration must be seen as a *living instrument*, playing a non-static role in further developing and strengthening the legal position of Indigenous peoples in interacting with the societies at large in which they live." [underline added]

[19] It is also worth noting that the International Court of Justice in the *Kosovo Advisory Opinion* affirmed that international law does not prohibit secession. See *Accordance with international Law of the Unilateral Declaration of Independence of Kosovo*, Advisory Opinion, [2010] ICJ Rep. p. 403, para. 80.

[20] See *Charter of the United Nations*, arts. 1(2), 2(2) and 55 c.

[21] International Law Association, "Rights of Indigenous Peoples", Final report, Sofia Conference (2012), http://www.ila-hq.org/en/committees/index.cfm/cid/1024, at 31(Conclusions and Recommendations), para. 10: "States must cooperate in good faith with indigenous peoples in order to give full recognition and execution to treaties and agreements concluded with indigenous peoples in a manner respecting the spirit and intent of the understanding of the indigenous negotiators as well as the living nature of the solemn undertakings made by all parties."

The above conclusion of the International Law Association is highlighted in Willem van Genugten & Federico Lenzerini, "Legal Implementation and International Cooperation and Assistance: Articles 37-42" in Jesse Hohmann & Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, *supra* at 556.

See also 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. No court has yet arisen in which an international court or tribunal repudiated the rule or challenged its validity." [emphasis added]

[22] Human Rights Council (EMRIP), *Access to justice in the promotion and protection of the rights of indigenous peoples: Study by the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc. A/HRC/24/50 (30 July 2013), Annex – Expert Mechanism Advice No. 5 (2013): Access to justice in the promotion and protection of the rights of indigenous peoples, para. 2.

[23] 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]

[24] See para. 3, *supra*.

[25] See para. 4 *supra* and accompanying references.

[26] 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/indigenous/Resources/Publications/WCMS_100792/lang--en/index.htm, at 2.

[27] For a similar conclusion, see Luis Rodríguez-Piñero Royo, "'Where Appropriate': Monitoring/Implementing of Indigenous Peoples' Rights Under the Declaration" in Claire Charters and Rodolfo Stavenhagen, eds., *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples* (Copenhagen: IWGIA, 2009) 314 at 323. The author adds: "The adoption of the [UN] Declaration now naturally calls for a consistent reading of the Declaration and of the [ILO] Convention".

[28] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo),* Merits, Judgment, I.C.J. Reports 2010, p. 639 at 663-664.

[29] S. James Anaya and Luis Rodríguez-Piñero, "The Making of the UNDRIP" in Jesse Hohmann & Marc Weller, *The UN Declaration on the Rights of Indigenous Peoples: A Commentary*, *supra*, 38 at 38. [emphasis added]