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The United Nations Declaration on the
Rights of Indigenous Peoples: A New
Dawn for Indigenous Peoples Rights?

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Abstract:

Governments in many countries of the world struggle with how to accommodate properly the needs and claims [rights] of native/indigenous peoples within their jurisdictions whose presence long predates European conquest and occupation. In this paper, a comparison and contrast of the approaches of the African and other jurisdictions whose jurisprudence is informative to the protection of the rights of African indigenous peoples, like the Inter-American Court of Human Rights compared with the US, Canada, New Zealand and Australia ‘the big four’ who voted against the UN Declaration on the Rights of Indigenous on September 13, 2007 at the UN General Assembly is critically analyzed. The four states that voted against the Declaration ‘vowed’ to protect the rights of indigenous peoples within their jurisdiction using their different domestic human rights mechanisms which they argued were adequate to protect such rights of indigenous peoples. The analysis in this paper resolves around the practical implications of implementing the Declaration and why the four states voted against it with the other 11 states abstaining from the vote. The paper questions the extent to which the Declaration can be held to be ‘binding’ on those states which voted against it, in light of the fact that the Declaration can be said to contain elements of customary international law which is binding to all civilized nations irrespective of whether they voted for the Declaration or not.

Paper Description:

- I. Comparative and International Legal Perspectives on Indigenous Peoples: Critical reflections on the Practicability of Enforcing the UN Declaration on the Rights of Indigenous Peoples

On September 13, 2007, the United Nations General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples [inhereafter the Declaration] by a majority vote

of 144 states in favor, 4 against (Australia, Canada, New Zealand and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russia Federation, Samoa and Ukraine). The states which voted against the Declaration stated in clear terms that they would not be bound by the Declaration, and that it is impossible for them to implement. All this took place the fact that some of these countries have constitutional and Supreme Court rulings that have allowed for aboriginal rights of their indigenous peoples notwithstanding. For example, Canada through its Constitution and Supreme Court, have created significant legal protection and recognition for native/indigenous peoples,¹ Australia too has had such domestic obligations albeit in a different form.²

This raises two core questions viz: to what extent, if at all, does the UN Declaration on the Rights of Indigenous Peoples reflect customary international law or general principles of international law?³ Have the states that voted against the Declaration exempted themselves, through the persistent objector doctrine, from any customary norms that may arise from or be reflected in the Declaration?

In fact, Canada's reasoning in reaction to her vote against the Declaration is worth quoting in extenso:

By voting against the adoption of the text, Canada puts on record its disappointment with both the text's substance and the process leading to it. For clarity, we also underline our understanding that this Declaration is not a legally binding instrument. It has no legal effect in Canada, and its provisions do not represent customary international law.⁴

All the above questions remain hotly contested and still unresolved even among the experts of international human rights law. This paper, will attempt to offer some answers or at least shed a light on some of these issues which appear to be grey areas.

¹ See Sections 25 and 35 of the Canadian Charter of Rights & Freedoms (1982) and the case of *Delgamuukw v. British Columbia* 3 S.C.R. 1010 (1997). Indigenous title is now correctly regarded as *sui generis*.

² See the case of *Mabo v. Queensland* 107 ACR 1, 1992 WL 1290806 (1992) which was the first case in Australia to recognize Aboriginal title but the Court's decision was later overturned when the Queensland Legislature passed legislation overturning the decision. For an excellent discussion of comparative law in several common law jurisdictions, including Canada, see David H. Getches, Charles F. Wilkinson & Robert A. Williams, Jr., *Federal Indian Law* 947-1001 (5th ed. 2004) and the much recent case of *Maya Villages of Santa Cruz and Conejo v. Attorney General*, Claims nos. 172 & 172 of 2007, Belize S. Ct. Judgment of Oct. 18, 2007.

³ Recall the vote in the UN General Assembly on the Declaration: 144 in favor, 4 against, and 11 abstaining. Customary international law evolves from the practice of States in matters of international concern and "general principles" are those commonly accepted by States and reflected in their international relations or domestic legal systems – See Ian Brownlie, *Principles of Public International Law* (6th Ed.) at 15-19.

⁴ Anaya, Draft, op.cit., at 90.

In addition to reliance on domestic law, or where domestic law is unavailing, advocates for indigenous human rights have sought relief through litigation invoking international human rights norms [such as customary international law] and now the UN Declaration in international courts.⁵ Though states are encouraged to establish mechanisms at the national level for the full recognition and protection of the lands, territories and resources indigenous peoples possess by reason of traditional ownership, occupation, or use, as well those which they have otherwise acquired.⁶ Even when the provisions in the domestic jurisdiction appear adequate to protect indigenous peoples rights – like can be said to be the case in the United States and Canada – international human rights norms concerning indigenous peoples is still relevant to the United States courts and law. The views of Professor Phillip P. Frickey are important:

[I]n federal Indian law cases the courts are compelled to consider international law. The reason is simple: the backdrop of international law provides the only satisfactory basis for sorting out the existence of an inherent federal power over Indian affairs. Accordingly, the backdrop of international law should likewise be relevant in considering limitations upon that power Under this approach, international norms about the treatment of indigenous persons would not be directly enforceable in American courts, but instead would provide a relevant and worthwhile backdrop against which to consider constitutional and quasi-constitutional claims.⁷

It is thus clear, that the domestic courts do not only compliment and enforce the international human rights norms concerning indigenous peoples but also offer the most ideal setting for the

⁵ In *The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R., Case No. 11,577, 2001 WL 34034813 (Aug. 31, 2001), a complaint was filed by the Inter-American Commission on Human Rights against Nicaragua alleging that Nicaragua had violated several provisions of the American Convention on Human Rights by its failure to protect adequately the lands of the Awas Tingni. After considering various international provisions relating to the protection of indigenous rights, as well as Articles of the Nicaraguan Constitution, the Court concluded as follows: Para 167 ... the Court considers that due to the situation in which the members of the Awas Tingni Community find themselves due to lack of delimitation, demarcation, and titling of their communal property, the immaterial damage caused must be repaired, by way of substitution, through a monetary compensation. See Final Written Arguments of the Inter-American Commission on Human Rights in the Case of the Awas Tingni Mayagna (Sumo) Indigenous Community Against the Republic of Nicaragua, August 10, 2001, published in 19 *Ariz. J. Int'l & Comp. L.* 325 (2002), at para. 6.4. See Juan F. Perea, et al, *Race and Races: Cases and Resources for a Diverse America* (West, 2007, 2nd ed.) pp. 246-284, at 283. For an excellent overview of the Inter-American human rights framework, see S. James Anaya & Robert A. Williams, Jr., *The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System*, 14 *Harv. Rts. J.* 33 (2001). See also Robert A. Williams, Jr., *Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World*, 1990 *Duke L.J.* 660.

⁶ James Anaya, *International Human Rights and Indigenous Law* (Draft), at 72. For an excellent discussion of the Declaration and scholarly debates leading to its adoption, see S. James Anaya & Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, at Jurist, <http://jurist.law.pitt.edu/Opinion>, Oct. 3, 2007.

⁷ Philip P. Frickey, *Domesticating Federal Indian Law*, 81 *Minn. L. Rev.* 31, 79 (1996).

protection of indigenous peoples rights. However, international human rights courts like the Inter-American Court of Human Rights are relevant in considering limitations of domestic power over indigenous peoples rights.

The provisions in the Declaration relating to lands and resources were the most controversial at the UN General Assembly debates preceding the adoption of the Declaration. Art. 26 of the Declaration appears to recognize the indigenous rights to lands without regard to other legal rights existing in land, either indigenous or non-indigenous.⁸ The view held by the states that voted against the Declaration is that Art. 26 ignores the contemporary realities in most countries by announcing a standard achievement that would be impossible to implement. These states think that the Declaration is over board and arbitrary with no recognition being given to the fact that ownership of land may lawfully vest in others – for example, through grants of freehold or leasehold interests in land.

The views expressed by New Zealand in voting against the Declaration does border on the view that the Declaration makes indigenous peoples ‘citizens plus’ with special rights which the rest of the population does not have. I quote New Zealand in part hereunder:

The provision on lands and resources simply cannot be implemented in New Zealand. Art. 26 states that indigenous peoples have a right to own, use, develop or control lands and territories that they have traditionally owned, occupied or used. For New Zealand, the entire country is potentially caught within the scope of this article ... Furthermore, the article implies that indigenous peoples have rights that others do not have.⁹

New Zealand too expressed reservations about art. 28 of the Declaration. Here below are her views on the article.

In addition, the provisions on redress and compensation, in particular in article 28, are unworkable in New Zealand ... Again, the entire country would appear to fall within the scope of the article ... It is impossible for the State in New Zealand to uphold a right to redress and provide compensation for value for the entire country.¹⁰

Whereas the fears expressed by the ‘big four’ may be valid, Art. 26 on the lands and resources provisions of the Declaration must not only be read in line with the state’s existing domestic laws, but also Art. 46 (2) of the Declaration. For clarity, Art. 46 (2) is reproduced hereunder:

⁸ It is also important to note that the 4 states that voted against the Declaration are those that have historically used and followed the doctrine of discovery and the much discredited terra nullius rule.

⁹ Anaya, Draft, at 91.

¹⁰ *Id.*

In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms 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 and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

The proper reading of Art. 46 of the Declaration may be used to allay the fears expressed by the states that voted against the Declaration.

Of all the states, that expressed their views about the Declaration either in support or against the Declaration, the delegation from Benin made the most impressive speech in relation to the future of the Declaration. The Benin delegation stated thus:

My delegation therefore welcomes the compromise achieved and it is with true pleasure that Benin opts to vote in favor of the text before us, despite the flaws that have been stressed by some delegations, in the hope that the opportunity will arise for the declaration to be improved. It is most important to note that the text has numerous imperfections, but that it remains desirable for it to be implemented on an interim basis while improvements are introduced so that it can be endorsed by all delegations.¹¹

Indigenous peoples must have the right to influence the use of land and natural resources that are important for their survival but the issue of land rights has different connotations in different States owing to historic and demographic reasons.¹²

II. Why Canada, the United States, Australia, New Zealand and Nobody Else Voted Against the UN Declaration on the Rights of Indigenous Peoples¹³

It is important to observe that only 4 States voted against the UN Declaration on the Rights of Indigenous Peoples: viz, Australia, Canada, New Zealand and the United States. Whereas several factors could have induced the 'big four' to vote against the UN Declaration, their decisions turns out to be very unfortunate because these four States are home to almost half of the world's indigenous peoples. Thus, their voting against the UN Declaration has practical

¹¹ *Id.*, at 94.

¹² See Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 *Harvard Human Rights Journal* 57 (1999); and S. James Anaya, *Indigenous Peoples in International Law* (2d ed., 2004).

¹³ Robert A. Williams, Jr., *American Indians*, class presentation to the class of Critical Race Theory and Practice, on March 3, 2009, at the University of Arizona, Rogers College of Law, Tucson, USA (2009).

implications in terms of the enjoyment of the indigenous rights as espoused in the Declaration. All these States share one thing in common; they have a history of using the now discredited doctrines of discovery and *terra nullius* to grab indigenous people's lands. As Chief Justice John Marshall observed in the case of *Johnson v. McIntosh* (1823), the exclusion of all other Europeans, necessarily gave to the nation making the discovery the sole right of acquiring the soil from the natives, and establishing settlements upon it. Chief Justice Marshall argues further that in the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it. The argument given by Chief Justice Marshall in the *McIntosh* case, clearly sums up the main reason why the 'big four' could have voted against the UN Declaration: the Declaration seeks to empower the indigenous peoples and actually give them back that which they have been denied and deprived for generations under legal doctrines such as that of discovery and *terra nullius*, but then, the conqueror will not let go, thus the resistance to the UN Declaration.

In Canada, a similar story exists. Robert A. Williams, Jr., quoting Joseph Trutch, the Commissioner of Land Works for the colonial government in British Columbia, 1867, captures the entire picture:

The Indians really have no right to the lands they claim, nor are they of any actual value or utility to them; I cannot see why they should either retain these lands to the prejudice of the general interests of the Colony, or be allowed to make a market of them either to Government or to individuals.¹⁴

From the above, it is apparent that the colonial master in Canada never intended that the Indian would own land in the colony as such land was to be vested in the colonizer at the time of colonization together with his emigrant population.

Similarly, the Indian was never considered independent of the land, the way the land was passed over to the colonial master, and so did the Indian. The Indian was a mere chattel to be disposed of just like a car in a warehouse after the purchaser has paid the sale price. This view is affirmed in the case of *R. v. Syliboy* thus:

...But the Indians were never regarded as an independent power. A civilized nation first discovering a country of uncivilized people or savages held such country as its own until

¹⁴ Robert A. Williams, Jr., (2009), *Id.*

such time as by treaty it was transferred to some other civilized nation. The savages' rights of sovereignty, even of ownership, were not recognized. Nova Scotia had passed to Great Britain not by gift or purchase or even by conquest of the Indians but by treaty with France, which had acquired it by priority of discovery and ancient possession, and the Indians passed with it ...¹⁵

Some of these countries such as Canada have a constitutional provision on indigenous peoples. However, problems still remain with the practical enforcement and implementation of such constitutional and other legal provisions in the domestic jurisdictions of these states. The constitutional provision on aboriginal rights notwithstanding, Canada's position in relation to the UN Declaration was a vote against:

... Canada's position has remained consistent and principled. We have stated publicly that we have significant concerns with respect to the wording of the current text, including the provisions on lands, territories and resources; free, prior and informed consent when used as a veto; self government without recognition of the importance of negotiations; intellectual property; military issues; and the need to achieve an appropriate balance between rights and obligations of indigenous peoples, member States and third parties.¹⁶

In a nutshell, Canada objects to each and everything the UN Declaration stands for. The statement by Ambassador McNee of Canada before the General Assembly is the hallmark of the disagreements between the four States that voted against the Declaration and the question of what rights, if any, the indigenous peoples living within the territories of those four states can and should in fact claim. Although the Declaration has raised a lot of controversy since its drafting stages, with some states arguing that it makes the indigenous peoples 'citizens plus' enjoying special rights which other members of their populations do not enjoy, the true position and legal standing of the UN Declaration is best summarized by S. James Anaya:

... the Declaration does not attempt to bestow indigenous peoples with a set of special or new human rights, but rather provides a contextualized elaboration of general human rights principles and rights as they relate to the specific historical, cultural and social circumstances of indigenous peoples. The standards affirmed in the Declaration share an essentially remedial character, seeking to redress the systemic obstacles and discrimination that indigenous peoples have faced in their enjoyment of basic human

¹⁵ 1. D.L.R. 307 (Canada) (1929). For an excellent discussion on the use of treaties in between the Indians and their colonizers, see Robert A. Williams, Jr., *Linking Arms Together* (Routledge, 1999).

¹⁶ See Statement by Ambassador McNee to the General Assembly on the Declaration on the Rights of Indigenous Peoples, September 13, 2007.

rights. From this perspective, the standards of the Declaration connect to existing State obligations under other human rights instruments.¹⁷

The argument by Anaya is also fortified in Article 2 of the UN Declaration which states that indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity. In general, the UN Declaration recognizes the right of indigenous peoples not to be subjected to genocide or ethnocide, or actions aimed at or affecting their integrity as distinct peoples, their cultural values and identities, including the dispossession of land, forced relocation, assimilation or integration, the imposition of foreign lifestyles and propaganda.¹⁸

The Canadian government's reference to principled negotiation with its aboriginal peoples is mere hot air. All is not well with the purported negotiations between the Canadian government and its aboriginal peoples. This rather bizarre scenario is remarked upon by Rodolfo Stavenhagen:

In the Canadian province of British Columbia, the Government refused to recognize aboriginal land titles. The courts ruled, however, that the Aboriginal titles had not been extinguished. After years of negotiation, a law on the subject, the Treaty Commissions Act, was adopted.¹⁹

The much touted negotiations by the Canadian government and its aboriginal population have yielded more discomfort than comfort within the aboriginal circles especially in the Province of British Columbia where a sizeable number of aborigines live. One of the indigenous groups involved complains that British Columbia is not negotiating in good faith when it places various obstacles in the way of this community's exercise of its rights and recognizes a mere 8 per cent of the claimed traditional territory. The community complains that the negotiations are useless when it comes to compensation for prior violations committed against it.²⁰ At the height of this dispute is the petition to the Inter-American Commission on Human Rights submitted by the Hul'qumi'num Treaty Group against Canada submitted on May 10, 2007.²¹

In New Zealand, the Treaty of Waitangi/Te Tiriti o Waitangi has been described by Lord Cooke of Thronon as "simply the most important document in New Zealand's history...On the one

¹⁷ See para. 86 of the Report of the UN Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples (2008).

¹⁸ S. James Anaya, Why There Should not have to be a Declaration on the Rights of Indigenous Peoples, Keynote Address to the 52d Congress of Americanists, Seville, July 2006.

¹⁹ See para. 38 of the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (2006).

²⁰ *Id.*

²¹ This petition is still ongoing at the Commission.

hand, it is viewed as the tool used by the British to establish sovereignty in this country...On the other hand, the Treaty is seen as a guarantee to Maori fundamental rights, which over the years, have been severely compromised..."²² It is an established common law doctrine that "discovery" may confer proprietary rights, provided actual occupation takes place.²³

In Australia, the dominant paradigm was the doctrine of *terra nullius*. The legal regime relating to aboriginal rights in Australia is based on mainly legislation since there were no treaties like was the case in New Zealand, Canada and the United States. There are no constitutional provisions spelling out aboriginal rights in Australia. This puts Australia in a very unique position when it comes to aboriginal rights. Australia was considered to be *terra nullius*, an empty land, uninhabited or occupied by people without settled laws or customs. The Aboriginal peoples' legal systems were not seen as organized and so were not recognized. The settlers recognized that Aboriginal people were present in Australia²⁴, but

Resistance, massacres and genocide were also ignored in the application of the doctrine of *terra nullius*, which justified the acquisition of land. Aboriginal resistance was far from insignificant, as many documented examples show...In 1828 the Governor of Tasmania (Arthur) proclaimed martial law, which was tantamount to a declaration of war against Aborigines. During the three years in which martial law remained in force, the military were entitled to shoot on sight any Aboriginal person in the settled districts.²⁵

Thus through military force, the conqueror was able to assert himself over the subdued colonized peoples and by that he established his sovereign rule over the conquered peoples. This was a departure from the long established notion that the aggressor, who puts himself into the state of war with another, and unjustly invades another man's right, can, by such an unjust war, never come to have a right over the conquered.²⁶ As Locke observes:

Though Governments can originally have no other rise than that before mentioned, nor polities be founded on anything but the consent of the people; yet such has been the Disorders Ambition has fill'd the World with, that in the noise of War, which makes so great a part of History of Mankind this consent is little taken notice of: And therefore

²² Marog McDowell & Duncan Webb, *The New Zealand Legal System: Structures, processes and legal theory* (3rd Ed.) at pp. 193-197. For a detailed discussion on the theories used by the settlers to try to legitimize the taking of traditional lands from the Maori inhabitants, see Alan Ward, *An Unsettled History: Treaty Claims in New Zealand* at pp. 125, 147, 148, 149, 156; Carol M. Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press).

²³ *Id.* For an excellent discussion on New Zealand's constitutional and treaty-making processes, see Mark W. Gobbi, Enhancing Public Participation in the Treaty-Making Process: An Assessment of New Zealand's Constitutional Response, *6 Tul. J. Int'l & Comp. L.* 57 (1998).

²⁴ Barbara Harrison, Collaborative Programs in Indigenous Communities: From Fieldwork to Practice at pp. 18-20.

²⁵ *Id.*

²⁶ John Locke, *The Treatises of Government* (1689).

many have mistaken force of Arms, for the consent of the People; and reckon Conquest as one of the Originals of Government. But Conquest is far from setting up any Government, as demolishing an House is from building a new one in its place. Indeed it often makes way for a new Frame of a Commonwealth, by destroying the former; but, without the Consent of the People, can never erect a new one.²⁷

The fact that the predecessors of the current governments in Canada, United States, Australia and New Zealand established their rule over the original inhabitants of those territories through military force up to now blinds these governments to the fact that the original inhabitants of the lands that comprise their present day borders are a people worthy consulting on key issues as clearly laid down in the UN Declaration and that such a process is not only reasonable to erase the historical errors and wrongs committed against these indigenous peoples but is actually the modern and legitimate way of governance. The time to look at the native as a savage has ended; the native is now part and parcel of the State and must be ruled with dignity.

In Australia, the High Court in the *Mabo* case is the judiciary's key input to the *terra nullius* debate in Australia. The case drew attention to issues surrounding native title and the original doctrine of *terra nullius*. In May 1982, Eddie Mabo and others from the Murray Islands in the Torres Strait sought legal recognition of common law title to land. The case was in court for ten years before the Australian High Court gave its decision in June 1992.²⁸ Brennan J. observed thus:

If the international law notion that inhabited land may be classified as *terra nullius* no longer commands general support, the doctrines of the common law which depend on the notion that native peoples may be "so low in the scale of social organization" that it is "idle to impute to such people some shadow of the rights known to our law"...can hardly be retained. If it were permissible in past centuries to keep the common law in step with international law, it is imperative in today's world that the common law should neither be nor see to frozen in an age of racial discrimination.²⁹

The much discredited doctrine of *terra nullius* has lost its taste in the modern world. In fact, although Australia voted against the UN Declaration in September 2007, the regime change in that country has created a change in heart which is currently pro-the Declaration.

According to Rodolfo Stavenhagen, despite those advances, there is still an "implementation gap" between legislation and day-to-day reality; enforcement and observance of the law are

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* It is important to note that the Mabo case decision was later overturned by legislation from the Australian National Parliament.

beset by myriad obstacles and problems.³⁰ As Eide observes, international standards are often ignored by public officials within the State parties. Laws aimed at protecting indigenous peoples' rights or human rights in general are sometimes in conflict with other laws such as those relating to mining or natural resource management.³¹ A number of obstacles have been encountered in the public administration. There is often bureaucratic inertia and an inability to adapt to the new emphasis on the protection of indigenous peoples after centuries of discrimination and neglect.³²

Given the doctrinal and practical limitations of domestic legal systems, indigenous peoples worldwide increasingly look to the processes of international human rights law as tools in their efforts to survive as distinct communities with historically-based cultures, political institutions, and entitlements to traditional or ancestral lands. Indigenous peoples' demands have generated a great deal of activity within global and regional human rights institutions, placing the concerns of these peoples at the forefront of international human rights law.

Two of the States that voted against the UN Declaration reiterated their willingness to protect and promote the rights of indigenous peoples within their domestic jurisdictions. As much as this may appear as a contradiction in light of the fact that most indigenous peoples have in the recent past resorted to taking their human rights to the international human rights fora as opposed to the domestic legal remedies. Canada stated thus:

...we reiterate that Canada will continue to take effective action, at home and abroad, to promote and protect the rights of indigenous peoples based on our existing human rights obligations and commitments. Such effective action we must be clear, would not be undertaken on the basis of the provisions of this [UN] Declaration...Canada will vote against adoption of this text.³³

Similar sentiments were expressed by the United States in voting against the Declaration. The use of rhetoric is not only similar but of almost the same degree and effect. The United States noted:

Although we are voting against this flawed document, my Government will continue its vigorous efforts to promote indigenous rights domestically. Under United States domestic law, the United States Government recognizes Indian tribes as political entities

³⁰ See para. 5 of the Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples (2006).

³¹ Asbjorn Eide, Rights of Indigenous Peoples – Achievements in International Law During the Last Quarter of a Century, 37 *Netherlands Yearbook of International Law* (2006), pp. 109-164, at p. 137-138.

³² *Id.*

³³ Ambassador McNee, *op.cit.*

with inherent powers of self-determination as first peoples. In our legal system, the Federal Government has a government-to-government relationship with Indian tribes.³⁴

Although the United States declined to vote in favor of the Declaration, it pledged to continue its work of promoting indigenous rights internationally and to report of the situation of indigenous persons in communities throughout the world through the United States Department of State and to continue her diplomatic efforts in opposition of racial discrimination against all indigenous individuals and communities.³⁵ Russian delegate used the same rhetoric in abstaining from the vote on the Declaration. Russian delegate stated:

...we cannot support the draft United Nations declaration on the right of indigenous peoples and shall abstain in the voting on the draft resolution A/61/L.67. However, we intend, as in the past, to make promotion and protection of the rights of indigenous peoples.³⁶

Whereas the above states 'undertake' to protect and promote indigenous peoples rights within their respective domestic jurisdiction, how they will do this let alone their willingness and ability to do so remains unclear. What is clear though is that all the States that voted against the Declaration and those which abstained are among some of the countries notorious for denying indigenous peoples rights and hiding behind the domestic veil to escape from international scrutiny and accountability in relation to alleged violation of indigenous peoples' rights.³⁷ Despite the assurances of protection and promotion of indigenous peoples' rights within the domestic sphere, the lack of sufficient recourse at the domestic level is one of the reasons responsible for the upsurge of indigenous peoples concerns at the international level. Contemporary international law has been very helpful in protecting and promoting indigenous peoples' human rights. The Inter-American Human Rights System (OAS) has been very active handling several claims from indigenous peoples alleging human rights violations.

In the case of *Maya Indigenous Communities*,³⁸ Belize was found to have violated Article 23 of the American Declaration by failing to take effective measures to recognize the communal property rights of the lands traditionally occupied and used by the Maya, and by granting concessions to third parties to utilize the traditional property and resources of the Maya people without obtaining "effective consultations." The Commission then went on to recognize the independent nature of indigenous peoples' property right. The Commission noted:

³⁴ Ambassador Hagen of the United States of America in his Address to the General Assembly.

³⁵ *Id.*

³⁶ Ambassador Rogachev, Russian Federation delegate to the UN General Assembly addressing the Gen. Assembly on the UN Declaration.

³⁷ See Richard Lillich et al., *International Human Rights: Problems of Law, Policy and Practice* 1005 (4th ed. 2006).

³⁸ *The Case of the Maya Indigenous Communities of the Toledo District v. Belize*, Inter-American Commission on Human Rights, Report Issued 2004.

Accordingly, the organs of the Inter-American human rights system have recognized that the property rights protected by the system are not limited to those property interests that are already recognized by states or that are defined by domestic law, but rather that the right to property has an autonomous meaning in international human rights law. In this sense, the jurisprudence of the system has acknowledged that the property rights of indigenous peoples are not defined exclusively by entitlements within a state's formal legal regime, but also include that indigenous communal property that arises from and is grounded in indigenous custom and tradition...³⁹

There have also been instances when judges have used international human rights norms to enforce indigenous peoples rights in the domestic sphere. A case in point is *Maya Villages of Santa Cruz and Conejo v. Attorney General*,⁴⁰ in which Chief Justice Abdulai Conteh relied on the international law obligations of the defendants regarding the claimants in upholding the land rights of the petitioners against the Belizean government.⁴¹

III. Conclusion

Thus, despite the controversies surrounding the adoption of the UN Declaration in the General Assembly and prior debates to this vote, the UN Declaration on the Rights of Indigenous Peoples represents an authoritative common understanding, at the global level, of the minimum content of the rights of indigenous peoples, upon a foundation of various sources of international human rights law. The product of a protracted drafting process involving the demands voiced by indigenous peoples themselves, the Declaration reflects and builds upon human rights norms of general applicability, as interpreted and applied by the United Nations and regional treaty bodies, as well as on the standards advanced by ILO Convention No. 169 and other relevant instruments and processes.⁴² To that extent, the Declaration can be said to contain norms of customary international law and therefore binding to all members of the UN General Assembly regardless of whether they voted for, against and or abstained from the vote on the Declaration in September 2007.

³⁹ *Id.*

⁴⁰ Claims Nos. 172 & 172 of 2008, Belize S. Ct. Judgment of Oct. 18, 2007.

⁴¹ See paras. 118-136 of the Judgment.

⁴² Para. 85 of the Report of the UN Special Rapporteur (2008).