

**Pacific Indigenous Peoples Preparatory meeting for the
World Conference on Indigenous Peoples
19 - 21 March 2013, Sydney Australia**

**Agenda Item: The creation of institutions to provide mechanisms for the
implementation of the Declaration; UN Declaration a Treaty or
optional protocol**

**Paper submitted by the Indigenous Peoples Organisation (IPO) Network of
Australia, prepared by Les Malezer.**

**THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES
THE NEXT STEP: TREATY OR PROTOCOL**

The adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples, in 2007, represented a historical milestone in the international struggle by the World's Indigenous Peoples towards acknowledgement and respect of their rights to development.

Many of the participants in the UN process for the Declaration are well aware that the struggle took a quarter of a century to succeed, without taking into account the history of resistance and struggle in the previous decades and centuries.

However for most Indigenous Peoples around the world the struggle must continue to translate the human rights standards, as set out in the Declaration, into purposeful actions and outcomes. Some delegations talked of 'fatigue' following the adoption of the Declaration, a situation where many of the strong advocates took time to rest and recover from the intense struggle. But now the question is being asked 'should another step forward be taken'.

The perceived concern is that the Declaration is non-binding upon the members of the United Nations. There is no requirement that the rights contained in the Declaration be respected or promoted. In usual circumstances a 'declaration' is followed by negotiations to create a 'treaty' based upon the standards set in a declaration.

Treaties have been developed since 1945 as the means to convey human rights into legal form and to create the framework for international human rights law to ensure States take on obligations to respect, promote and fulfil human rights. For example, the Universal Declaration of Human Rights has been conveyed into legal instruments such as the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights.

When the form of a treaty is completed Governments are encouraged to ratify the treaty by becoming a signature and taking necessary actions to bring the treaty into effect in the domestic law of the country. The treaty binds the State to meet their treaty obligations and duties. In most cases the treaty will have provision to

periodically review the efforts made by the States to implement the treaty as well as provide mechanisms and procedures for individual complaints or communications from non-government parties.

One school of thought amongst Indigenous Peoples is that work should commence as soon as possible on the development of a Treaty on the Rights of Indigenous Peoples. This appears to be the logical step to ensure the rights contained in the Declaration become legally-binding.

However many experienced delegates of Indigenous Peoples express caution in using this approach. The most compelling reason to avoid this staging is that support from the member States of the United Nations would not be sufficient for the treaty to be successfully drafted and ratified, and thus the procedure would create an unfortunate adverse result for Indigenous Peoples.

The alternative approach, they argue, is to continue to promote the Declaration, and the rights contained in the Declaration, through diplomatic and strategic methods, with the objective that the Declaration would become a well-accepted norm in international human rights law. The Universal Declaration of Human Rights provides a good precedent for that process. The UDHR is widely accepted in common international and national human rights law, through general acceptance and minimal opposition.

As further support to the concept of ensuring the Declaration on the Rights of Indigenous Peoples is a norm of human rights law, many of the rights contained in the Declaration are already embodied in human rights treaties. The prime example is the right to self-determination. The two Covenants, on Civil and Political Rights and on Economic, Social and Cultural Rights already address the right of self-determination as contained in the Declaration. The Covenants also address other rights which are expressed in the Declaration. As the Declaration explains these rights in the collective interests of peoples, as distinct from the interest of the individual, the Declaration serves as an interpretative tool for the Covenants in particular instances.

Thus the argument can be presented that the rights of Indigenous Peoples can be pursued through existing human rights treaties - the Covenants and the Convention on the Elimination of All Forms of Racial Discrimination, in particular - and the arduous task of developing a treaty would not be necessary.

More recently some delegations of Indigenous Peoples have speculated that an 'optional protocol' might be developed to apply to certain provisions in the Declaration. A 'protocol' is the technical term for a treaty developed within a treaty, i.e. it is a legal agreement which addresses parts of the treaty in more specific detail. An 'optional' protocol means that the protocol only will bind those States who sign the optional protocol.

By assuming the Declaration stands in place of a treaty, the advocates for the optional protocol are seeking a legal form for certain articles contained in the Declaration. This approach would be less arduous than trying to negotiate a treaty for the full range of rights contained in the Declaration. The protocol would focus on

certain articles which compel States to promote and respect the rights of Indigenous Peoples, e.g. Articles 38 and 42.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Should this proposal for an optional protocol gain support further consideration will be required to determine the approach and merit of the proposal.

Further ideas for the development of binding duty and obligations upon States to respect and promote the rights of Indigenous Peoples can be explored. In certain countries around the world changes have been made to the national constitution and/or national legislation to establish legal responsibilities. Perhaps even existing charters and legal instruments can have the same effect through invoking non-discrimination and 'rule of law' provisions.

CONCLUSION

Delegates at the Preparatory Conference should become familiar with options for establishing legal form for the Declaration on the Rights of Indigenous Peoples.

Delegates should also examine proposals for further international action by Indigenous Peoples to pursue goals such as:

- Treaty on the Rights of Indigenous Peoples;
- Optional Protocol on Indigenous Peoples;
- Advancing international human rights jurisprudence and norms on human rights of Indigenous Peoples.

Recommendations

We recommend that:

- 1.
- 2.
- 3.
- 4.