



interpreting the UN DECLARATION

on the Rights of Indigenous Peoples

The *United Nations Declaration on the Rights of Indigenous Peoples* (“*UN Declaration*” or “*Declaration*”) is the most comprehensive international human rights instrument that explicitly addresses the rights of Indigenous peoples. It affirms a wide range of political, economic, social, cultural, spiritual and environmental rights. The rights in the *Declaration* are predominantly collective in nature. At the same time, the rights of Indigenous individuals are positively affirmed and safeguarded in various ways.

The *UN Declaration* is not binding in the same manner as international treaties or

conventions, but it does have diverse legal effects. The *Declaration* is not merely aspirational. As underlined by former Special Rapporteur, James Anaya, in August 2010:

...even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the [United Nations] Charter, other treaty commitments and customary international law. The Declaration [...] is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity ...

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The *Declaration* provides a principled and normative legal framework for achieving reconciliation between Indigenous and non-Indigenous peoples around the world. As described by the UN Expert Mechanism on the Rights of Indigenous Peoples in Geneva: “The United Nations Declaration on the Rights of Indigenous Peoples constitutes a principled framework for justice, reconciliation, healing and peace.”

***UN Declaration* affirms and elaborates on human rights of Indigenous peoples**

The human rights system of the United Nations initiated developing the *UN Declaration* in direct response to the widespread and often horrific human rights violations faced by Indigenous peoples throughout the world. Article 43 affirms that the rights recognized in the *Declaration* “constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world”. This is a clear call for concerted action to live up to and exceed these standards.

It is important to underline that Indigenous peoples’ rights are inherent or pre-existing. The *UN Declaration* does not create any new rights. As indicated in the preamble of the *Declaration*, there is an “urgent need to respect and promote the inherent rights of indigenous peoples”.

Where national laws and policy contradict and fall below the minimum standards set out in the *Declaration*, these laws and policies need to be reformed. They should not be used as an excuse to ignore or circumvent the requirements of the *Declaration*.

At the same time, the *Declaration* is explicit that where existing laws, policies, Treaties or other arrangements already provide human

rights protections that meet or exceed the minimum standards set out in the *Declaration*, these protections must not be lowered in any way. Article 45 states: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.”

***UN Declaration* is a collaborative framework based on Indigenous peoples’ self-determination**

The *Declaration* repeatedly affirms both the right of Indigenous peoples to control their own lives and futures and the obligation of States to work collaboratively with Indigenous peoples. In setting out the rights of Indigenous peoples, the *Declaration* repeatedly uses phrase such as “the right to determine” and “the right to control.” When describing the obligations of States, the *Declaration* repeatedly calls on States to act “in conjunction” with Indigenous peoples and to both consult and cooperate with them.

Unilateral State actions, even for the purpose of implementing the *Declaration*, would violate the clear intent of the *Declaration* and the obligations that it sets out. Article 38 affirms the minimum standard in the *Declaration*: “States, in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”

***UN Declaration* must be read as a whole**

Reading individual articles of the *Declaration* in isolation leads to misinterpretation. The *Declaration* is meant to be a coherent and integral whole. The interpretation of any article must be read together with the rest of the *Declaration*. As in other human rights



instruments, the human rights in the *Declaration* are considered to be indivisible, interrelated and interdependent.

Consider the following:

- Article 2 affirms that Indigenous peoples and individuals have the right to be free from any kind of discrimination in the exercise of their rights.
- Article 3 affirms that Indigenous peoples have the right to self-determination.
- Article 18 affirms that Indigenous peoples have the right to participate in decisions that affect their rights, through representatives chosen by themselves, in accordance with their own procedures.
- Articles 21 and 22 call for “particular attention” to the rights of Indigenous women, elders, youth, children and persons with disabilities and for “full protection and guarantees against all forms of violence and discrimination”. This calls for the whole *Declaration* to be interpreted from the perspective of women, elders, youth, etc.
- Article 46 makes clear that any limitations on the rights in the *Declaration* must be in accordance with international human rights obligations, 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.”

All these provisions, and many others, are relevant to the interpretation of all the other

articles in the *Declaration*, including specific provisions on matters such as language, education, culture and resource development.

The preamble matters

The *Declaration* has two elements. The numbered articles (1-46) affirm and elaborate upon the rights of Indigenous peoples and the related obligations of States. The preamble sets out the intention and vision of the *Declaration*. The text in the preamble is important to interpreting the articles.

For example, the preamble states “all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.”

In addition, the preamble affirms: “nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law.”

The preamble also contains the important statement that “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.”

Some interpretive provisions are also included in the operative provisions. For example, article 45 affirms: “Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.”



***UN Declaration* is an integral part of international human rights law**

The *Declaration* does not exist in isolation. It is an essential part of a wider body of international law affirming the rights of Indigenous peoples. This includes human rights conventions such as the *Convention on the Rights of the Child* that include specific provisions concerning the rights of Indigenous peoples. It also includes the *International Convention on the Elimination of All Forms of Racial Discrimination*. This Convention does not refer specifically to Indigenous peoples, but has been interpreted as applying to Indigenous peoples and individuals and including important State obligations in this regard.

The *UN Declaration* is a living instrument that must be interpreted in accordance with present-day conditions in any given situation. Such an approach must be taken at both national and international levels. A key minimum standard is to ensure the “survival,

dignity and well-being” of Indigenous peoples, as affirmed in article 43 of the *Declaration*. The *Declaration* has universal application to countless contexts relating to Indigenous peoples - always taking into account the progressive development of international human rights law.

Another key development is the *American Declaration on the Rights of Indigenous Peoples*, which was adopted by the Organization of American States by consensus in June 2016. The *American Declaration* is a regional human rights instrument that applies to North, South and Central America and the Caribbean. Many of the provisions in the *American Declaration* mirror, and therefore reinforce, those in the *UN Declaration*. Indigenous peoples in the Americas now have two declarations that explicitly affirm and elaborate upon their human rights and related State obligations.

In any specific situation, the minimum standard is the one that is higher in these two human rights instruments.