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# THE ROLE OF SOFT LAW IN THE INTERNATIONAL LEGAL SYSTEM: THE CASE OF THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

## I. INTRODUCTION

On 13 September 2007 the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples.<sup>1</sup> The Declaration represents the culmination of an extraordinary process which has gradually transformed indigenous peoples from 'victims' to 'actors' of international law.<sup>2</sup> This process experienced a dramatic boost in the last two decades, when the United Nations human rights machinery became increasingly involved in the promotion of indigenous rights.<sup>3</sup> This very process contextually and crucially altered the political and legal climate surrounding the 'indigenous question' at the international level. As a consequence, the era when demands for recognition of *sui generis* rights for indigenous peoples were met with strenuous resistance has definitely passed.<sup>4</sup> By contrast, we now live in an era where indigenous *rights*, rather than *claims*, have come to represent the core of the indigenous debate, where indigenous peoples' and States' representatives sit on an equal footing at the UN Permanent Forum on Indigenous Issues (Forum),<sup>5</sup> where States are increasingly taken before regional and domestic courts for violating the rights of indigenous communities,<sup>6</sup> and where it is argued that some of the provisions embodied in the indigenous rights regime form part of current, or, at least, developing, customary international law.<sup>7</sup> More generally, indigenous peoples have arguably come to represent one of the most influential, and well recognized, parties of a global civil movement committed to the pursuit of justice.<sup>8</sup>

<sup>1</sup> UN General Assembly Resolution 61/295 (13 September 2007). Adopted by a recorded vote of 143 in favour to four against (Australia, Canada, New Zealand and United States), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine).

<sup>2</sup> J Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (Transnational Publishers, Ardsley, 2006).

<sup>3</sup> See E Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' (1994) 16 Hum Rts Q 58–81.

<sup>4</sup> See I Brownlie, *Treaties and Indigenous Peoples* (Clarendon Press, Oxford, 1992) 63.

<sup>5</sup> The Forum is comprised of sixteen independent experts. Of those, eight are nominated by governments and elected by the Economic and Social Council, while eight are appointed by the President of the Council following consultation with indigenous organisations. The significance of the Forum lies in the fact that for the first time 'representatives of States and non-State actors have been accorded parity in a permanent representative body within the United Nations Organisations proper.' See J Carey and S Wiessner, 'A New United Nations Subsidiary Organ: the Permanent Forum on Indigenous Issues' ASIL Insights (April 2001), available at <<http://www.asil.org/insights/insigh67.htm>>.

<sup>6</sup> See, for example, the numerous cases discussed in F Lenzerini (ed), *Reparations for Indigenous Peoples: International and Comparative Perspectives* (OUP, Oxford, 2008).

<sup>7</sup> J Anaya, *Indigenous Peoples in International Law* (OUP, Oxford, 2004) 61–72.

<sup>8</sup> Falk aptly includes the case of indigenous peoples within the 'multifaceted worldwide phenomenon of responding to perceived examples of acute injustice previously inflicted on persecuted and victimized collective identities', which is in turn part of a 'significant trend in support

Notwithstanding these significant developments, the absence of a *universal* instrument specifically designed to protect the rights of indigenous peoples has inevitably precluded the establishment of an effective universal indigenous rights regime. The only international instruments specifically focused on indigenous peoples' rights, prior to the adoption of the Declaration, were the International Labour Organisation Conventions No 107 (ILO No 107) and No 169 (ILO No 169).<sup>9</sup> Yet significant problems existed, and continue to exist, with regard to the scope of application and content of both instruments. After the establishment, in 1989, of ILO No 169, ILO No 107 was declared closed for ratification. Nevertheless it remains valid for those 18 States which, having previously ratified it, decided not to become parties to ILO No 169.<sup>10</sup> Besides this limited number of ratifications, the deplorable assimilationistic approach of the Convention makes the instrument ill-suited to accommodate fairly the rights of indigenous peoples.<sup>11</sup> ILO Convention No 169, has been ratified by only 20 States so far, leaving the majority of indigenous peoples unable to rely on its legal framework.<sup>12</sup> Although it has been rightly noted that its contribution goes beyond the limited number of ratifications,<sup>13</sup> it remains the fact that the instrument cannot be regarded as one of universal scope. In addition, further shortcomings derive from the very content of ILO No 169. Despite representing 'a central feature of international law's contemporary treatment of indigenous peoples' demands',<sup>14</sup> the instrument fails, among other things, to recognize indigenous peoples as 'peoples' proper,<sup>15</sup> to recognize the right to self-determination, and to address contemporary issues such as, for example, indigenous intellectual property rights.<sup>16</sup>

of the pursuit of global justice'. R Falk, *The Declining World Order: America's Imperial Geopolitics* (Routledge, New York, 2004) 117 and 107.

<sup>9</sup> ILO Convention No 107 of 1957 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, text available at <<http://www.ilo.org/ilolex/cgi-lex/convde.pl?C107>> accessed 14 August 2009; and ILO Convention No 169 of 1989 Concerning Indigenous and Tribal Peoples in Independent Countries, text available at <<http://www.ilo.org/public/english/indigenous/>>.

<sup>10</sup> The relevant list is available at <<http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C107>> accessed 14 August 2009.

<sup>11</sup> See, for one, J Anaya, *Indigenous Peoples in International Law* (OUP, Oxford, 2004) 54–56. For a more favourable assessment of the instrument, see A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (CUP, Cambridge, 2007) 49–67.

<sup>12</sup> The relevant list is available at <[http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?\(C169\)](http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?(C169))> accessed 14 August 2009.

<sup>13</sup> The ILO Guide on the Convention correctly acknowledges that ILO No 169 'may be used as a tool to stimulate dialogue between governments and indigenous and tribal peoples, and in this way, to improve their situation.' Thus if one intends to appreciate the importance of the instrument, he or she should not focus on its legal dimension, but rather consider the promotional role it has exercised. See 'ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169): A Manual' (International Labour Office, Geneva, 2003) Foreword.

<sup>14</sup> J Anaya, *Indigenous Peoples in International Law* (OUP, Oxford, 2004) 58.

<sup>15</sup> Article 1(3) of ILO No. 169 specifies that '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.'

<sup>16</sup> See, generally, M Sinjela and R Ramcharan, 'Protecting Traditional Knowledge and Traditional Medicine of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies' (2005) 12 Intl J Minority & Group Rts 1–24.

Alternative systems of protection have been provided within the context of a number of universal human rights instruments, particularly the International Covenant on Civil and Political Rights (ICCPR) and International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).<sup>17</sup> Despite the important contribution offered by the Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD) to the elaboration of international standards on indigenous rights,<sup>18</sup> these instruments 'are not devised specifically to address the historically rooted grievances of indigenous peoples',<sup>19</sup> and therefore can only partly address the full range of claims legitimately advanced by indigenous peoples.

Against this background, the Declaration is expected to fill a crucial gap, providing universal and comprehensive protection to the rights of the world's indigenous peoples. In addition, the Declaration is also expected to guarantee coherence to a regime previously characterized by different approaches and frameworks.<sup>20</sup> The pursuit of these goals, however, might be substantially impaired by the very nature of the Declaration, which, adopted by means of a UN General Assembly Resolution, belongs to what is normally referred to as soft law.<sup>21</sup> On the one hand, since soft law instruments lack binding force<sup>22</sup> their legal significance and potential to affect State behaviour cannot be taken for granted. On the other hand, however, soft law cannot be simply dismissed as non-law. Instead, its value should be evaluated taking into account two fundamental elements. First, under the complexity and dynamism of contemporary international law-making, international standards may well emerge as a result of the interplay of different instruments, regardless of their nature.<sup>23</sup> It follows that special attention should be paid to the relationship between soft law and existing

<sup>17</sup> Respectively, 999 UNTS 171 (16 December 1966) and 660 UNTS 195 (7 March 1966).

<sup>18</sup> On the contribution of human rights instruments to the recognition and promotion of indigenous rights in international law, see P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002).

<sup>19</sup> J Anaya, *Indigenous Peoples in International Law* (OUP, Oxford 2004) 290.

<sup>20</sup> A large number of international, and regional, institutions deal with indigenous peoples' rights, including, for example, the World Bank, the UN Development Programme, the World Intellectual Property Organisation, the Asian Development Bank, and several UN human rights treaty bodies. The Declaration represents the ideal instrument to coordinate each of these parallel actions. On this issue, see also J Gilbert, 'Indigenous Rights in the Making: the United Nations Declaration on the Rights of Indigenous Peoples' (2007) 14 *Intl J on Minority and Group Rts* 207, 212.

<sup>21</sup> On soft law generally, see A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (2<sup>nd</sup> edn, OUP, Oxford, 2006) 141–158, and CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 *ICLQ* 850–866. For a critical view of soft law, see J Klabbbers, 'The Undesirability of Soft Law' (1998) 67 *Nord J Intl L* 381–391.

<sup>22</sup> It should be noted that certain General Assembly resolutions, eg those referred to in Article 17 of the United Nations Charter, are binding upon the organs and members States of the United Nations. See M Shaw, *International Law* (5<sup>th</sup> edn, CUP, Cambridge, 2003) 108.

<sup>23</sup> In this regard, it has been aptly observed that soft law and hard law are connected and intertwined to such an extent that sometimes it may be difficult to draw clear-cutting distinctions between the two. For example, soft-law instruments may have a specific normative content that is actually 'harder' than certain 'soft' obligations included in some treaties, and, equally importantly, that non-binding instruments may provide for supervisory mechanisms characteristic of hard law texts. See, D Shelton, Law, 'Non-Law and the Problem of "Soft Law"' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 10.

hard law. Secondly, the category of soft law includes, among others, inter-State conference declarations, UN General Assembly resolutions, codes of conduct, guidelines and the recommendations of international organisations. It is therefore clear that various soft law instruments will have different legal significance, as well as different degrees of effectiveness. This assertion goes far beyond the limited formal aspect of the instrument concerned. More importantly, it refers to, *inter alia*, the different contexts within which an instrument is adopted, the circumstances which have led to its establishment, its very normative content and the institutional setting within which it exists.

With this in mind, although legal obligations continue to be associated with 'greater expectation of conforming behaviour and consequences for non-compliance',<sup>24</sup> it comes as no surprise that States have also become concerned about 'compliance with other forms of international commitment.'<sup>25</sup> This article, recognizing the growing importance of non-binding instruments in the international legal system, submits that, in the light of the context in which it has been established and its very normative content, the Declaration has important legal effects and generates reasonable expectations of complying behaviour. The relevant discussion will be developed as follows. Section two will focus on the general character and content of the Declaration, seeking to highlight the far-reaching implications of the rights therein recognized, as well as the uniqueness of the instrument in the sphere of international human rights. Section three will look at the Declaration as a soft law instrument. First, it will evidence how the choice of soft law actually enhanced the value of the Declaration in a number of important respects, and, secondly, it will emphasise that such a choice has not prevented the Declaration from having significant legal effects. Lastly, section four will discuss the Declaration's potential to affect State behaviour in conjunction with an analysis of the abovementioned evolving indigenous rights regime.

## II. AN OVERVIEW OF THE CHARACTER AND CONTENT OF THE DECLARATION

As emphatically highlighted by the former UN High Commissioner for Human Rights, Louise Arbour, who welcomed it as a 'triumph for justice and human dignity',<sup>26</sup> the Declaration has a remarkably strong moral force. Its *raison d'être* can be discerned from one passage of the preamble which affirms that 'indigenous peoples have suffered from historic injustices as a result of, *inter alia*, their colonization and dispossession of their lands, territories and resources.'<sup>27</sup> It is precisely because the consequences of such historical injustices continue to have a negative effect on their lives and conditions that the Declaration recognizes the *urgent* need to respect and protect the rights of the world's indigenous peoples.<sup>28</sup> It is important to emphasize, therefore, that the rights established in the Declaration are not aimed at transforming indigenous peoples into a privileged category of international law, but, rather, at guaranteeing their very 'survival, dignity and well-being.'<sup>29</sup>

Within this moral framework, the idea, and principle, of equality plays a major role. Up until the second half of the last century, international and national policies

<sup>24</sup> *ibid.*

<sup>25</sup> *ibid.*

<sup>26</sup> At <<http://www.ohchr.org/EN/NewsEvents/Pages/DeclarationIP.aspx>> accessed 14 August 2009.

<sup>27</sup> Preambular paragraph 6.

<sup>28</sup> Preambular paras 7 and 8.

<sup>29</sup> art 43.

towards indigenous peoples were still openly aimed at assimilating them into dominant societies, thus denying any value to indigenous cultures and any rights to indigenous peoples.<sup>30</sup> Although positive developments in this regard have occurred in the last decades, especially in relation to the international dimension,<sup>31</sup> these kinds of deprecable practices have continued to take place in different regions of the world. Against this background, the Declaration aptly emphasizes that 'indigenous peoples are equal to other peoples',<sup>32</sup> and that 'all peoples contribute to the diversity and richness of civilizations and cultures.'<sup>33</sup> Accordingly, it affirms that 'indigenous peoples and individuals have the right not to be subjugated to forced assimilation or destruction of their culture.'<sup>34</sup> The lack of a definition of indigenous peoples in the Declaration is also related to the principle of equality. If someone other than indigenous peoples themselves were to decide who is indigenous and who is not, the principle of equality would be deprived of its very essence. Thus, the Declaration follows a visible trend recently emerged at the international level whereby self-identification should be central in determining the indigenous status of a group.<sup>35</sup>

The significance of the Declaration, however, does not simply derive from its remarkable moral force. This is in fact combined with an equally strong normative content which makes the Declaration the most radical instrument in the sphere of international human rights.<sup>36</sup> This is so because, inter alia, the Declaration is fundamentally based on the recognition of collective rights, expressly recognizes the right to self-determination to a sub-State group (article 3),<sup>37</sup> and, no less important, introduces, for the first time, a right to autonomy as such (article 4).<sup>38</sup> Other particularly strong and challenging provisions refer to the issue of land rights, namely article 26 on the right of indigenous peoples to own their lands, article 28 on the right to redress, including restitution, for the lands that they have lost without their free, prior and informed

<sup>30</sup> Consider, for example, ILO Convention No 107 of 1957 (revised only in 1989) and the 'stolen generation' policy adopted by the Australian government up until the early 1970s. See 'Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families' (1997), available on the website of the Australian Human Rights and Equal Opportunity Commission at <[http://www.hreoc.gov.au/pdf/social\\_justice/bringing\\_them\\_home\\_report.pdf](http://www.hreoc.gov.au/pdf/social_justice/bringing_them_home_report.pdf)> accessed 14 August 2009.

<sup>31</sup> In particular, as noted above, in 1989 ILO Convention No. 107 was replaced by the more progressive ILO Convention No. 169, whose preamble affirms that 'considering that the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world, have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards . . .'.<sup>32</sup> Preambular paragraph 2.

<sup>33</sup> Preambular para 3.

<sup>34</sup> art 8.

<sup>35</sup> The concept of 'indigenous peoples' in international law has clearly evolved from a narrow understanding related to ideas of historical precedence and colonial subjugation towards a more inclusive and functional understanding. Against this background, constructivist approaches to the issue of definition should be preferred to positivistic ones. On this issue, see B Kingsbury, "'Indigenous Peoples" in International Law: a Constructivist Approach to the Asian Controversy' (1998) 92 AJIL 414–457.

<sup>36</sup> P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002) 375.

<sup>37</sup> As noted by Cassese, 'current international law on self-determination is blind to the demands of ethnic groups (not constituting a racial group) and national, religious, cultural or linguistic minorities'. A Cassese, *International Law* (2<sup>nd</sup> edn, OUP, Oxford, 2005) 61.

<sup>38</sup> See, generally, Z Skurbaty (ed), *Beyond a One-Dimensional State: An Emerging Right to Autonomy?* (Martinus Nijhoff Publishers, Leiden, 2005).

consent, and Article 32 on the right to determine priorities and strategies for the development or use of their lands, including the relevant resources. It goes without saying, therefore, that the strong content of the Declaration ‘challenges State sovereignty at a [very] deep level.’<sup>39</sup> The importance of having such a strong content, however, must be evaluated in the light of the international consensus developed around the most challenging provisions of the Declaration as well as the relationship between such provisions and existing law. As will be discussed below, there is reason to argue that the strong content of the Declaration is in line with recent normative developments related to indigenous peoples’ rights in the context of international human rights, and does not contravene existing norms of international law.

The Declaration, however, also recognizes less controversial, and yet crucial, rights of indigenous peoples, such as the right to be free from any kind of discrimination (article 2), the right to practice and revitalize their culture (article 11), the right to manifest and practise their spiritual and religious traditions (article 12), the right to participate in decision-making in matters which would affect them (article 18), the right to their cultural and intellectual property (article 31), and the right to determine their own identity or membership in accordance with their customs and traditions (article 33). An important point should be stressed with regard to the nature of all the abovementioned rights, which are commonly referred to as ‘special’ or ‘*sui generis*’ rights of indigenous peoples. The Declaration does not create special rights in the sense that they are ‘separate[d] from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples.’<sup>40</sup> More precisely, it considers recent normative developments regarding indigenous peoples’ rights, which took place both at the international, regional and national level, and merges them with established principles of international human rights law as well as existing international standards for the protection of indigenous peoples.<sup>41</sup> By virtue of this successful synthesis, it crystallizes a comprehensive set of principles and rights, which, while innovative and far-reaching,<sup>42</sup> are nevertheless grounded on, generally, established norms of international law, and, specifically, international human rights law. This holds true also with regard to the most controversial rights, namely the right to self-determination and land rights. A specific analysis of the concerned articles will be presented in conjunction with the discussion of the content of the Declaration in section four below. Here, instead, it is important to stress that although these provisions undoubtedly confer strong rights on indigenous peoples, they nevertheless need to be interpreted not only in accordance with current international law, as established by

<sup>39</sup> A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (CUP, Cambridge, 2007) 102.

<sup>40</sup> Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, SJ Anaya, UN Doc A/HRC/9/9 (11 August 2008) para 40.

<sup>41</sup> On the interaction between these three layers, see W Van Genugten and C Perez-Bustillo, ‘The Emerging International Architecture of Indigenous Rights: The Interaction between Global, Regional, and National Dimensions’ (2004) 11 *Intl J on Minority and Group Rts* 379–409.

<sup>42</sup> As aptly observed by Irene-Erica A. Daes, ‘more is at stake, economically and politically, in this ... Declaration than perhaps any other human rights instruments submitted for to the Commission on Human Rights for approval since the International Covenants of Human Rights.’ I Daes, ‘Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples’ (1994) 63 *Nord J Intl L* 205, 211.



a number of preambular paragraphs and articles,<sup>43</sup> but also with the very spirit of the Declaration, that is to 'enhance harmonious and cooperative relations between the State and indigenous peoples.'<sup>44</sup>

A final remark should be made in relation to the Declaration's approach to the issue of collective rights. By recognizing that collective rights are at the core of indigenous peoples' claims and cultures, the Declaration significantly distances itself from other international human rights instruments.<sup>45</sup> Although it is certainly true that a number of collective rights have already been recognized in the context of other human rights instruments,<sup>46</sup> the Declaration is unique in that it is the only document to be *fundamentally* based on the recognition of such rights.<sup>47</sup> It is particularly telling, for example, that whereas the Declaration constantly refers to the collective rights of indigenous peoples, the principal UN instrument established to protect and promote the rights of minorities simply refers to rights of *persons* belonging to national or ethnic, religious and linguistic minorities.<sup>48</sup> The Declaration seeks a fair balance between collective and individual rights by endorsing a conciliatory vision whereby each individual has individual rights and responsibilities within the context of collective rights. Article 35, for example, affirms that 'indigenous peoples have the right to determine the responsibilities of individuals to their communities.' At the same time, however, one crucial passage of the preamble importantly recognizes 'that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as people.'<sup>49</sup> Accordingly, a number of articles strengthen the invoked coexistence of collective and individual rights,<sup>50</sup> including article 1 which establishes that 'indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.'<sup>51</sup>

Thus, it is clear that the Declaration aims at establishing a positive and enriching interaction between collective and individual rights.<sup>52</sup> Notably, the purpose of this conceptualization is not to weaken, but, on the contrary, to enrich the doctrine of

<sup>43</sup> Among others, preambular paragraphs 1, 16, 17, and arts 1 and 46.

<sup>44</sup> Preambular paragraph 18.

<sup>45</sup> On the relationship between individual and collective rights, see, among others, P Jones, 'Human Rights, Group Rights, and Peoples' Rights' (1999) 21 Hum Rts Q 80–107; D Sanders, 'Collective Rights' (1991) 13 Hum Rts Q 368–386; C Holder and J Comtassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights' (2002) 24 Hum Rts Q 126–151; A Buchanan, 'The Role of Collective Rights in the Theory of Indigenous Peoples' Rights' (1993) 3 Transnat'l L & Contemp Probs 89–108.

<sup>46</sup> Particularly, the African Charter on Human and Peoples' Rights, 1520 UNTS No 26, 363 (27 June 1981). See Articles 19–24.

<sup>47</sup> These considerations refer to the context of human rights instruments proper, and not, for example, to the case of ILO Conventions.

<sup>48</sup> United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, adopted by General Assembly Resolution 47/135 of 18 December 1992.

<sup>49</sup> Preambular paragraph 22.

<sup>50</sup> arts 1, 2, 6, 7, 8, 9, 14, 17, 24, 33, 35, 40, and 44.

<sup>51</sup> art 1.

<sup>52</sup> The Declaration's vision resembles the indigenous belief according to which the very identity of indigenous peoples 'is shaped by the dynamic balance between and linkage of [their] collective and individual rights.' See the 'Explanatory Note on the Collective Rights of

human rights. This circumstance, coupled with the Declaration's intent to reconcile 'the pursuit of civil and political rights with economic social and cultural rights',<sup>53</sup> provides a decisive contribution for the construction of a more just and complete human rights system.

### III. THE CHOICE OF SOFT LAW IN THE CONTEXT OF INDIGENOUS PEOPLES' RIGHTS

The discussion of the general character and content of the Declaration highlighted two major points. First, the Declaration represents a crucial step towards a more just and effective regime of indigenous peoples' rights, and is expected to contribute importantly to the amelioration of the life conditions of the worlds' indigenous peoples. Secondly, it also has important implications with regard to the international human rights system as it is the first instrument to be fundamentally based on the co-existence between collective and individual rights and to recognize a number of rather controversial rights to a sub-State group. As noted above, however, any positive interpretation of such circumstances must also take into account the non-binding nature of the Declaration. In this regard, the following considerations suggest that the choice of soft law in fact enhanced the value of the Declaration in a number of important respects.

International law-making is a complex and dynamic process characterized by the use of different instruments, including non-binding ones, and the participation of diverse actors, including non-State actors.<sup>54</sup> On the basis of each particular case, the concerned participants will have to choose among a variety of instruments and forms. In particular, it will be for States to balance the potential advantages and disadvantages of choosing a legally binding form, and, therefore, ultimately determine the nature of the text. Nevertheless, this final decision may be importantly affected by the intervention of non-State actors. Against this background, and under special circumstances, it is not surprising that soft law can be a rather valuable alternative to hard law. In the context of indigenous peoples' rights, this is certainly true with regard to three main aspects.

First, it is evident that a soft law document is to be preferred to no document at all, and, similarly, a soft law document represents a better outcome than a treaty whose value is substantially impaired by a poor number of ratifications, or by rather ambiguous or diluted provisions.<sup>55</sup> These observations are particularly relevant in the case of the Declaration, since, as noted above, previous attempts by the ILO to establish

Indigenous Peoples, Proposal by Indigenous Representatives, submitted during the Seventh Session of the Working Group on the Draft Declaration, UN Doc E/CN.4/2002/98, Annex II.

<sup>53</sup> E-I A Daes, *Indigenous Peoples: Keepers of Our Past— Custodians of Our Future* (IWGIA, Copenhagen, 2008) 155.

<sup>54</sup> See, among others, A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007); C Chinkin, 'Normative Development in the International Legal System', in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 21–42; A Hurrell, 'International Law and the Changing Constitution of International Society', in M Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP, Oxford, 2001) 327–347.

<sup>55</sup> See CM Chinkin, 'The Challenge of Soft Law: Development and Change in International Law' (1989) 38 ICLQ 850, 861.

binding Conventions of universal scope on indigenous peoples' rights have not proved very successful. When in the 1950s the ILO decided to produce the first of these Conventions, namely ILO No 107, several States questioned the decision on the basis that the ILO was not competent to set legal standards in the area. Nevertheless, the project continued and the ultimate request of numerous States to finalize the document in the form of a recommendation, as opposed to a convention, was dismissed.<sup>56</sup> The outcome of such an inflexible approach was, rather unsurprisingly, that only a few States ratified the text.<sup>57</sup> Arguably, the number of ratifications would have been even lower if the Convention, instead of being informed by an assimilationistic approach, genuinely aimed to protect indigenous peoples' rights. It should also be noted that since the ILO has established Convention No 169, namely the revised version of Convention No 107, the number of ratifications have been lower than for ILO No 107.<sup>58</sup> It is clear, therefore, that States are currently rather reluctant to subscribe to legally binding obligations with regard to indigenous peoples' rights. Having said this, if one considers the context within which the decision to draft the Declaration was made, it is easy to find important similarities with the ILO example. The reports of the first sessions of the UN Working Group on Indigenous Populations (WGIP), the body which produced the first draft of the Declaration, show that while a number of States were critical about the very idea of drafting a Declaration,<sup>59</sup> others were concerned about the content of such document and accordingly suggested refraining from setting ambitious targets.<sup>60</sup> All considered, it may well be argued that this reluctant attitude would have amounted to hostile opposition if, rather than a soft law instrument, States had been asked to establish a legally binding treaty. By contrast, the choice of soft law has guaranteed the adoption of an instrument of universal scope that all indigenous peoples may use to foster their rights.<sup>61</sup>

A second important advantage deriving from the use of soft law is that it normally allows for the more active participation of non-State actors.<sup>62</sup> By contrast, if the treaty form is agreed, non-State actors are likely to be 'excluded from crucial stages of negotiations and the conclusion of the text.'<sup>63</sup> This openness was particularly valuable in the context of indigenous rights, for indigenous peoples could, and continue to rely

<sup>56</sup> See L Rodriguez-Pinero, *Indigenous Peoples, Postcolonialism, and International Law: the ILO Regime (1919–1989)* (OUP, Oxford, 2005) 121–139.

<sup>57</sup> Twenty-seven States had ratified it before the entry into force of ILO Convention No 169, see (n 10).

<sup>58</sup> Twenty States have so far ratified ILO Convention No 16 see (n 12).

<sup>59</sup> 'Report of the Working Group on Indigenous Populations on its First Session' UN Doc E/CN.4/Sub.2/1982/33 (25 August 1982) paras 25–33 and 54.

<sup>60</sup> 'Report of the Working Group on Indigenous Populations on its Fourth Session' UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) para 62.

<sup>61</sup> As aptly observed by an indigenous representative of the Saami Council, 'there exists[ed] a clear link between the absence of universal instrument protecting the rights of indigenous peoples and the problems faced by indigenous peoples. See 'Report of the Working Group on the Draft Declaration on its Second Session' UN Doc E/CN.4/1997/102 (10 December 1996) para 55.

<sup>62</sup> D Shelton, 'Law, Non-Law and the Problem of "Soft Law"' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 13.

<sup>63</sup> C Chinkin, 'Human Rights and the Politics of Representation: Is There a Role For International Law,' in M Byers (ed) *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP, Oxford, 2001) 141.

on a rather influential and successful global movement.<sup>64</sup> Indeed, it has been rightly pointed out that the indigenous movement has in recent years left 'its [crucial] imprint on much of the United Nations' human rights work.'<sup>65</sup> As we shall see, the direct participation of indigenous peoples became a distinctive mark of the Declaration's drafting process. Crucially, this participation made the indigenous peoples' voice heard at the relevant institutions in such a decisive way that that their claims were seriously addressed and their views constructively considered. The active participation of indigenous peoples during the drafting process, and subsequent negotiations, was key to the inclusion in the final text of the Declaration of vital, and yet contentious, provisions such as those on the right to self-determination and land rights. It follows that the content of the Declaration would be considerably less progressive and challenging had indigenous peoples been excluded from the very process of producing it.<sup>66</sup>

Soft law may also 'provide more immediate evidence of international support and consensus than a treaty.'<sup>67</sup> This is so because, even once agreed upon, a treaty will have to wait the necessary number of ratifications before entering into force. For indigenous peoples, instead, it was crucial that, after more than twenty years of negotiations, the final instrument could be instantly effective. This is so because urgent action is key to the protection of their rights. In addition, the possibility of entering reservations on fundamental provisions of a treaty may weaken importantly the idea of international support, which, instead, represented a crucial factor in the context of indigenous rights.

#### *A. The Legal Effects of the Declaration*

Having considered the practical advantages connected with the use of soft law in the context of indigenous peoples' rights, it is now important to focus on the legal consequences of the Declaration as soft law. In this regard, the crucial point is to determine whether the choice of soft law ultimately prevented the Declaration from having important legal effects. The following considerations suggest that this is not the case.

First, the strong relationship between the content of the Declaration and existing law should be recognized. The fact that the Declaration contains provisions that refer to rights and principles already recognized, or emerging, in the realm of international human rights, and, more specifically, within the indigenous rights regime, represents a first important indication of the legal significance of the instrument. As this issue is also particularly relevant with regard to the Declaration's effectiveness, a more

<sup>64</sup> For an overview, see R Niezen, *The Origins of Indigenism: Human Rights and the Politics of Identity* (University of California Press, Berkeley, 2003).

<sup>65</sup> A Eide, 'Rights of Indigenous Peoples: Achievement in International Law During the Last Quarter of a Century' (2006) 37 *Neth Int'l L Rev* 155, 162.

<sup>66</sup> Interestingly, according to the predominant view among analysts of social movements, 'access to institutions leads to co-optation and deradicalization as challenges modify their claims to ones that are more acceptable with authorities.' Yet the case of the indigenous movement, which refused to give up its fundamental claims, proved that this is not always necessarily the case. See R Morgan, 'On Political Institutions and Social Movement Dynamics: the Case of the United Nations and the Global Indigenous Movement' (2007) 28 *Intl Political Science Rev* 273, 282.

<sup>67</sup> A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 212.

detailed discussion will be presented in conjunction with the analysis of the potential impact of the Declaration in section four below.

Secondly, the Declaration may have important consequences with regard to the creation of international treaty law in that it may represent the first step toward the establishment of a future treaty, thus becoming a part of a broader 'multilateral treaty-making process.'<sup>68</sup> A considerable number of human rights conventions have been adopted after a lengthy process which had General Assembly resolutions as their 'sparks of formal gestation'.<sup>69</sup> The classic example is, of course, the Universal Declaration of Human Rights which promoted the adoption of more specific and legally binding human rights instruments, and also had the more general 'effect of setting standards of State behaviour.'<sup>70</sup> The Declaration is no exception to this general rule. To the contrary, it should be noted that in 2005 the United Nations High Commissioner for Human Rights and the Working Group on Indigenous Populations proposed that during the Second International Decade of the World's Indigenous People consideration should be given to the 'elaboration of a binding United Nations instrument to protect indigenous peoples.'<sup>71</sup>

Thirdly, although 'viewing the Declaration or substantial parts of it as customary international law may be rather premature',<sup>72</sup> the document may have significant effects on the formation of customary international law. In particular, as stated by the International Court of Justice (ICJ) in the Legality of Nuclear Weapons Opinion, 'General Assembly resolutions, even if they are not binding, may . . . provide evidence important for establishing the existence of a rule or the emergence of an *opinio iuris*.'<sup>73</sup> Generally, the fact that the Declaration was not adopted by unanimous vote might weaken its contribution in this respect. However, a more attentive analysis of the recorded vote suggests that this is not necessarily the case. The limited weight of a resolution would normally result from the opposition of a considerable number of States or even a small number of States provided that these are the States whose interests are specially affected.<sup>74</sup> In the case of the Declaration contrary votes were cast by the USA, Canada, New Zealand and Australia. Without denying the significance of such a circumstance, it should be highlighted that these four States represent only a

<sup>68</sup> A Boyle, 'Soft Law in International Law-Making' in M Evans (ed), *International Law* (2<sup>nd</sup> edn, OUP, Oxford, 2006) 145.

<sup>69</sup> C Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 *Cal West Intl L J* 445, 470.

<sup>70</sup> G R Lande, 'The Changing Effectiveness of General Assembly Resolutions' (1964) 58 *ASIL PROC* 162, 163.

<sup>71</sup> Draft Programme of Action for the Second International Decade of the World's Indigenous People, Report of the Secretary General, Addendum A/60/270/Add.1 (26 August 2005).

<sup>72</sup> A Xanthaki, 'Indigenous Rights in International Law over the Last 10 Years and Future Developments' (2009) 10 *Melbourne J Intl L*, 1, 10.

<sup>73</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, ICJ Rep 1996, 226, para 70. It has also been argued that 'the process of drafting and voting for non-binding normative instruments also may be considered a form of State practice.' D Shelton, 'Law, Non-Law and the Problem of "Soft Law"', in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 1.

<sup>74</sup> The International Court of Justice, while discussing whether a conventional rule can be considered to have become a general rule of international law, found that widespread and representative participation in a convention might suffice 'provided it include that of States whose interests [are] specially affected.' *North Sea Continental Shelf, Judgment*, ICJ Reports 1969, 3, para 73.

minority of States specially affected by the Declaration. In fact indigenous peoples live in more than sixty States,<sup>75</sup> and the estimated total number of indigenous people in the world is around 300 million.<sup>76</sup> In addition, they cannot be considered among the most immediately affected States. When compared to other countries in Latin America and Asia, only New Zealand has a high percentage of indigenous people within its own territory.<sup>77</sup> Certainly a more focused discussion would be required in order fully to assess the implications of the Declaration for customary international law.<sup>78</sup> With regard to the issue of *opinio iuris*, however, it would seem that these contrary votes fail to represent the view of a significant segment of the international community, and therefore cannot per se prevent its emergence.<sup>79</sup>

In sum, the non-binding nature of the Declaration does not negatively affect the value of the document. Rather than limiting its potential universality, it actually enhanced it. In addition, it allowed indigenous peoples' representatives to negotiate directly with States' delegates, and created favourable conditions for international support to develop. Lastly, it did not prevent the instrument from having significant legal effects.

#### IV. THE DECLARATION'S POTENTIAL TO GENERATE STATE COMPLIANCE

Whereas the previous section discussed the value of the Declaration as a soft law instrument, this section is concerned with the Declaration's potential to affect State

<sup>75</sup> The numbers vary according to different sources. For an overview of most of these countries, see 'The Indigenous World' published in May every year by the influential NGO International Work Group for Indigenous Affairs, available at <<http://www.iwgia.org/sw162.asp>> accessed 14 August 2009. In addition, even States which do not belong to this group may be affected by the Declaration with regard to their foreign policy. This is confirmed, for example, by the fact that ILO No 169 has been also ratified by States such as the Netherlands and Spain.

<sup>76</sup> 'The Rights of Indigenous Peoples' UN Office of the High Commissioner for Human Rights Fact Sheet No 9 (Rev 1), available at <<http://www.ohchr.org/Documents/Publications/FactSheet9rev.1en.pdf>> accessed 14 August 2009. The combined indigenous population of the USA, Canada, New Zealand and Australia, instead, does not reach 10 million. These countries have not ratified ILO No 169. *The Indigenous World 2009* (International Work Group for Indigenous Affairs, Copenhagen 2009). On the question of how many indigenous people exist on the planet, see P Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002) 15–18.

<sup>77</sup> Approximately, New Zealand 17 per cent, Australia 2.5 per cent, Canada 3.6 per cent, USA 1.4 per cent (minus Alaska and including those who identify as Native American in combination with another ethnic identity). Compare these numbers to those of countries such as Guatemala (60 per cent), Bolivia (62 per cent), Mexico (13 per cent), Nepal (37 per cent), Malaysia (12 per cent) and the Philippines (10 per cent). *The Indigenous World 2009* (International Work Group for Indigenous Affairs, Copenhagen, 2009).

<sup>78</sup> See S Allen, 'The UN Declaration on the Rights of Indigenous Peoples: Towards a Global Legal Order on Indigenous Rights?', available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1400665](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1400665)> accessed 14 August 2009; and J Anaya and S Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-Empowerment, Jurist Legal News and Research Forum' (3 October 2007) available at <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>> accessed 14 August 2009.

<sup>79</sup> In this regard, two additional points should be made. First, given that the opposition of these four States was not directed toward the Declaration as a whole, a number of fundamental articles and principles would nevertheless remain unaffected. Secondly, these negative votes should be reconsidered in the light of important developments which have recently occurred in the concerned countries, especially in Canada and Australia. See section 4.c below.

behaviour. Specific sets of factors are commonly used to assess expectations of State compliance with soft law. Among the authors who have proposed their own lists of factors there exists substantial convergence on three paramount themes, namely context, content and institutional setting.<sup>80</sup> Accordingly, the case of the Declaration will be assessed with regard to: first, the circumstances, and in particular the degree of consensus, which surrounded its drafting and adoption; second, its language and content; and lastly, the existence, and the effectiveness, of follow-up mechanisms capable of generating significant pressure towards compliance. It is crucial that these three criteria be considered altogether. This is not only because each criterion reinforces the others, but also because it is the actual combination of them which ultimately determines the effectiveness of the instrument. More generally, the investigation needs to be conducted in conjunction with an analysis of the indigenous peoples' rights regime which has recently emerged at the international level.

*A. Circumstances, and Degree of Consensus, which Surrounded the Drafting and Adoption of the Declaration*

The context surrounding the adoption of the Declaration offers a first important indication of the potential impact of the Declaration. Far from representing a pioneering instrument in the area, the Declaration is the culmination of a significant political and legal process formally started in the early 1980s.<sup>81</sup> This circumstance, which will be discussed further in the next section, provided a solid background to the Declaration facilitating, inter alia, its reception among States. Besides this general, yet relevant aspect, a number of specific circumstances related to the history of the Declaration, and in particular its drafting process, evidence the special legitimacy and authoritativeness of the instrument, thus offering important indications of its overall value.<sup>82</sup>

First, as highlighted by the Chairperson of the UN Permanent Forum on Indigenous Issues, Ms Victoria-Tauli Corpuz, the Declaration has been one of the most extensively

<sup>80</sup> See, among others, G Abi-Saab, 'Cours General de Droit International Public' (1987) 207 *Recueil des Cours de l'Academie de Droit International* 160 and 161; D Shelton, Law, 'Non-Law and the Problem of "Soft Law"' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, (OUP, Oxford, 2000) 13–17; G R Lande, 'The Changing Effectiveness of General Assembly Resolutions' (1964) 58 *ASIL PROC* 162–170; and ME Ellis, 'The New International Economic Order and General Assembly Resolutions: the Debate Over the Legal Effects of General Assembly Resolutions Revisited' (1985) 15 *Cal West Intl L J* 647–704.

<sup>81</sup> Yet important events in connection with the progressive recognition of indigenous peoples' rights in international law anticipated this final stage of the process. For an account of these events, see E Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic' (1994) 16 *Hum Rts Q* 58–81; RL Barsh, 'Indigenous Peoples: An Emergent Object of International Law' (1986) 80 *AJIL* 369–385; J Anaya, *Indigenous Peoples in International Law* (OUP, Oxford, 2004) 49–72.

<sup>82</sup> Commenting on the then Draft Declaration, Anaya noted that the Draft stood 'in its own right as an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles' and that 'the extensive deliberations leading to the draft declaration, in which indigenous peoples themselves played a leading role, enhance the authoritativeness and legitimacy of the draft.' J Anaya, *Indigenous Peoples in International Law*, (OUP, Oxford, 2004) 65.

discussed and negotiated texts in the history of the UN.<sup>83</sup> The process, which essentially started in 1985 when the members of the WGIP decided that ‘the time had come to begin the preparation of a draft’,<sup>84</sup> reached a conclusion only after twenty-two years of fervent negotiations, deadlocks and compromises. The first step consisted in the adoption of the Draft Declaration by the Sub-Commission on the Promotion and Protection of Human Rights in 1994.<sup>85</sup> After that, States and indigenous peoples’ representatives began a long negotiating process at the Working Group on the Draft Declaration (WGDD) which lasted more than ten years. By contrast, the process experienced a dramatic, and unexpected, boost once the Draft reached the Human Rights Council. The newly established body adopted the Declaration at its first session on June 2006 and recommended it for adoption by the General Assembly, which succeeded in finally voting on the document on September 2007.<sup>86</sup>

The second distinctive feature of the drafting process relates to the direct and large participation of indigenous peoples’ representatives. In particular, indigenous organizations were allowed to participate in the sessions of both the WGIP and WGDD regardless of their consultative status with the Economic and Social Council (ECOSOC),<sup>87</sup> a notably uncommon circumstance by UN standards. This remarkable outcome is in line with modern calls to enhance ‘popular participation’ in law-making processes in order to promote the legitimacy and value of the provisions concerned.<sup>88</sup> The fact that this participation involved indigenous peoples is even more remarkable since they represent both non-Western and disadvantaged groups. It is important to emphasize that States themselves repeatedly acknowledged that indigenous participation has been not only vital but also necessary to the production of the Declaration.<sup>89</sup>

Finally, the drafting process received exceptional support not only from States but also the United Nations system. This is crucial in attempting to evaluate the degree of consensus around the Declaration. Here consensus should be understood as an ‘overwhelming majority’ or a ‘convergence of international opinion’, and should not be confused with the circumstances under which no vote on a resolution is requested for its very adoption. In this regard, it should be noted that large majorities voted in

<sup>83</sup> ‘UN Forum Chairperson Decries Delay in Adopting Declaration on Indigenous Rights’, 12 December 2006, Available at <<http://www.un.org/apps/news/story.asp?NewsID=20959&Cr=indigenous>> accessed 14 August 2009.

<sup>84</sup> See ‘Report of the Working Group on Indigenous Populations on its Fourth Session’ UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985) para 58.

<sup>85</sup> UN Doc E/CN.4/1994/2.Add.1 (20 April 1994).

<sup>86</sup> For a more detailed analysis of the history of the Declaration, see S Errico, ‘The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview’ and S Errico, ‘The UN Declaration on the Rights of Indigenous Peoples is Adopted: An Overview’ (2007) 7 HRL Rev 741–759.

<sup>87</sup> In the latter case, indigenous organizations had to apply to the Coordinator of the International Decade of the World’s Indigenous People. Although States had to be consulted before accrediting the participation of indigenous organizations, their consent was not required, and ultimately a large number of indigenous organisations attended the relevant sessions.

<sup>88</sup> R Falk, *Human Rights Horizons: the Pursuit of Justice in a Globalizing World* (Routledge, New York, 2000) 62–63.

<sup>89</sup> See, for example, the statements of the representatives of Denmark, Canada, Norway, Chile, Sweden, USA, Colombia and the Russian Federation at the Second Session of the WGDD. ‘Report of the Working Group on the Draft Declaration on its Second Session’ UN Doc E/CN.4/1997/102 (10 December 1996) paras 23–34.



favour of the Declaration both at the Human Rights Council and the General Assembly.<sup>90</sup> Moreover, the statements of governments' representatives during the sessions of the WGDD suggest the existence of a strong convergence on the underlying principles of the Declaration. As noted above, however, it is the remarkably intense commitment of the United Nations which particularly reinforces the idea of consensus. This is especially true since such support did not come exclusively from those UN bodies directly involved in the production of the Declaration. The General Assembly, for one, constantly supported the whole project. After establishing, in 1993, the First Decade of the World Indigenous People (1994–2004), it encouraged the Commission on Human Rights to consider the draft declaration produced by the Sub-Commission with a view to achieving its final adoption within the Decade.<sup>91</sup> However, once it realized that this would not be possible, it established the Second Decade of the World Indigenous Peoples (2005–2015) and urged 'all parties involved in the process of negotiation to do their utmost to . . . present for adoption as soon as possible a final draft United Nations declaration on the rights of indigenous peoples.'<sup>92</sup> Similarly, other UN bodies and specialized agencies have on more than one occasion expressed their support for the Declaration, contributing to keep the issue of indigenous peoples at the forefront of the UN human rights agenda.<sup>93</sup>

Moreover, it should be stressed that references to the Declaration can be found in major documents recently adopted under the auspices of the United Nations. In 1993, the World Conference on Human Rights called on the WGIP to complete the drafting of the declaration and recommended that the Commission on Human Rights consider the renewal and updating of its mandate upon completion of such drafting.<sup>94</sup> Similarly, the 2001 World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance called upon States to conclude negotiations on and approve as soon as possible the text of the draft declaration.<sup>95</sup> Finally, special consideration should be given to the 2005 World Summit, notably the largest gathering of world leaders in United Nations history. The document adopted at the end of this Summit, and included in General Assembly Resolution 60/1, reaffirmed the commitment of the international community to adopt a Declaration on the rights of indigenous peoples before the end of the Second Decade.<sup>96</sup>

<sup>90</sup> At the Human Rights Council 30 States voted in favour and 4 voted against (with 11 abstentions).

<sup>91</sup> UNGA Res 49/214 (23 December 1994).

<sup>92</sup> UNGA Res 59/174 (20 December 2004) para 12.

<sup>93</sup> See the list of documents submitted by UN organizations at each Session of the PFII on the website of the Forum, at <<http://www.un.org/esa/socdev/unpfii/index.html>>.

<sup>94</sup> Vienna Declaration and Program of Action, adopted by the World Conference on Human Rights on 25 June 1993, paras 28 and 29. Text available at <[http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En)> accessed 14 August 2009.

<sup>95</sup> Durban Declaration and Programme of Action, adopted by the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, Durban, South Africa, from 31 August to 8 September 2001, para 206. Text available at <<http://www.unhcr.ch/pdf/Durban.pdf>> accessed 14 August 2009.

<sup>96</sup> 2005 World Summit Outcome, included in UNGA 60/1 (16 September 2005) para 105. More generally, it is remarkable that, while pledging to take action on crucial global issues such as sustainable development, terrorism, peace building and human rights, the final document also refers in several circumstances to the issue of indigenous peoples. See para 127. The text of the document is available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/487/60/PDF/N0548760.pdf?OpenElement>> accessed 14 August 2009.

In the light of the above it is possible to conclude that the adoption of the Declaration was surrounded by significant international support and consensus and that specific circumstances related to its history and drafting process indicate that the instrument is to be regarded as highly legitimate and authoritative.

### *B. The Language and Content of the Declaration*

The second criterion to be considered relates to the actual content of the Declaration. As aptly observed by Shelton, one would normally expect that 'the harder the content of the obligation the better compliance is likely to be.'<sup>97</sup> By contrast, ambiguity and vagueness may favour non-compliance. In this respect the Declaration is certainly an instrument characterized by a hard content. Firstly, it envisages a rather extended list of indigenous peoples' rights. Secondly, and contextually, it establishes a vast number of States' obligations. The constant use of the term 'shall' in describing the content of such obligations is per se illustrative of the intention of the drafters. In addition, a more general, yet important, point should be made in connection with the use of declarations in UN practice. More precisely, under UN standards a declaration is 'a formal and solemn instrument, suitable for rare occasions when principles of great and lasting importance are being enunciated.'<sup>98</sup> Thus the international community recognizes that the principles underlying the Declaration are vested with special value, a circumstance which, in turn, enhances the importance of the whole content of the instrument.

Having said this, one should not overestimate the importance of having a 'hard' content. This indeed is not per se sufficient to create strong expectation of compliance. In order for the hard content to be relevant, another requirement must be met, namely that the provisions included in the text be related to existing law or principles of law, or reflect existing, or emerging international law standards. In this regard, as noted above, the Declaration represents the culmination of a broader, comprehensive political and legal process, which provided, inter alia, a solid legal background. The following observations help to appreciate this important point.

#### *1. The Declaration and existing law*

First, the Declaration may be regarded as evidence of existing law. As noted above, this is so because the Declaration aims to merge together diverse legal standards related to indigenous peoples' rights which have been elaborated in recent years by different international, regional and national bodies. It follows that some of its provisions 'assist in specifying and authenticating extant facets of international law.'<sup>99</sup>

<sup>97</sup> D Shelton, 'Law, Non-Law and the Problem of "Soft Law"' in D Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System* (OUP, Oxford, 2000) 14.

<sup>98</sup> Memorandum of the Office of Legal Affairs, UN Secretariat, 34 UN ESCOR, Supp (No 8), 15, UN Doc E/CN.4/1/610 (1962), cited in D Shelton, *Soft Law*, The George Washington University Law School Public Law and Legal Theory Working Paper No 332, Legal Studies Research Paper No. 322, 4. Available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1003387](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1003387)> accessed 14 August 2009.

<sup>99</sup> C Joyner, 'UN General Assembly Resolutions and International Law: Rethinking the Contemporary Dynamics of Norm-Creation' (1981) 11 *Cal West Intl L J* 445, 460.

This is especially true with regard to those rights already accepted under general international law, such as the right not to be subjected to any act of genocide (included in article 7 of the Declaration), or under the minority rights regime, such as the right of a group to practice its own cultural traditions and customs (article 11 of the Declaration), and to public participation (article 18 of the Declaration).

However, the same applies with regard to some of the rights specifically designed for indigenous peoples, and in particular the controversial rights on traditional lands. The Declaration clearly recognizes, and protects, the special relationship existing between indigenous peoples and their lands, a fundamental aspect of any indigenous culture. Article 25, in particular, recognizes the right of indigenous peoples 'to maintain and strengthen their distinctive spiritual relationship' with their lands. Accordingly, article 26 establishes the right of indigenous peoples to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired, as well as their right to own, use, develop and control the lands, territories and resources that they possess.<sup>100</sup> In this regard, it is important to observe that existing international norms already refer to the same category of rights. Article 14 of ILO Convention No 169, for example, recognizes the right of indigenous peoples to own their lands. Similarly, article 15 of the same text provides that the rights of indigenous peoples 'to the natural resources pertaining to their lands shall be specially safeguarded.'

In addition, a number of key international instruments produced in the area of international environmental law demand that the spiritual relationship existing between indigenous peoples and their lands be respected. These instruments recognize indigenous peoples' important contribution to sustainable development, and call for the protection of their traditional cultures and lifestyles, which, notably, are based on the ownership and possession of their traditional lands. The 1992 Biodiversity Convention, for example, establishes that each contracting party shall 'respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.'<sup>101</sup> Similarly, the 1992 Rio Declaration offers an important contribution to this discussion. Although this instrument is not legally binding, it constitutes 'the most significant universally endorsed statement of general rights and obligations of States affecting the environment',<sup>102</sup> and is therefore worth mentioning. Principle 11 of the Rio Declaration recognizes the vital role of indigenous people with respect to environmental management and development, and accordingly demands that States recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.<sup>103</sup>

<sup>100</sup> Moreover, Article 32 crucially requests that, before approving any project affecting indigenous lands, territories or other resources, States 'shall consult and cooperate with indigenous peoples in order to obtain their free and informed consent.'

<sup>101</sup> 1992 Convention on Biological Diversity, Article 8(j), 31 ILM 818 (1992).

<sup>102</sup> P Birnie and A Boyle, *International Law & The Environment* (2<sup>nd</sup> edn, OUP, Oxford, 2002) 82.

<sup>103</sup> The Rio Declaration on Environment and Development (14 June 1992), 31 ILM 874 (1992).

## 2. The practice of UN human rights treaty bodies

Additional legal support for the content of the Declaration is provided by the well-established practice of international human rights treaty bodies, especially the HRC and CERD. These two bodies have to date produced a significant number of decisions, recommendations, and observations with respect to indigenous peoples' rights. In particular, the jurisprudence developed by the HRC has proved essential for the process of elaborating new standards of international human rights of indigenous peoples.<sup>104</sup>

The HRC has done so by promoting a progressive interpretation of the right to culture included in article 27 of the ICCPR so to secure, among others, the right of indigenous peoples to conduct traditional economic activities and to live in harmony with their land and resources.<sup>105</sup> Despite its general integrationist thrust,<sup>106</sup> CERD also played a role in this remarkable process, embracing progressive views, especially with regard to land rights. For example, in General Recommendation No 23 it called upon States Parties 'to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources.'<sup>107</sup> This General Recommendation is also of special relevance in connection with article 28 of the Declaration, which provides the right to redress, including restitution, of the lands, territories and resources which indigenous peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used, or damaged without their free and informed consent. Where this is not possible, the article introduces the right to just, fair and equitable compensation, which should take the form, as far as possible, of lands, territories and resources equal in quality, size and legal status. Interestingly, CERD's Recommendation demands that, where indigenous peoples have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, States should take steps to return those lands and territories. Only when this is for factual reasons not possible, the Recommendation concludes, should the right to restitution be substituted by the right to just, fair and prompt compensation.<sup>108</sup>

<sup>104</sup> See P Thornberry, *Indigenous Peoples and Human Rights* (MUP, Manchester, 2002), 116–181.

<sup>105</sup> Article 27 refers to 'ethnic, religious or linguistic minorities', yet the Committee has promoted a particular reading of the provision aimed to address specific issues related to indigenous peoples. For example, with regard to the right to culture included in the Article, the Committee stated that 'culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.' See HRC General Comment No 23, *The Rights of Minorities* (Art. 27), available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument)> accessed 14 August 2009.

<sup>106</sup> P Thornberry, *Indigenous Peoples and Human Rights* (MUP, Manchester, 2002), 202, fn 202.

<sup>107</sup> CERD General Recommendation N 23 on Indigenous Peoples (18 August 1997) available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument)> accessed 14 August 2009.

<sup>108</sup> The General Recommendation further emphasises that such compensation should as far as possible take the form of lands and territories. It should also be noted that the recent jurisprudence of the Inter-American Court of Human Rights provides further support for the content of Article 28. See, in particular, *Comunidad Indígena Yakye Axa v Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005).

Even the most controversial article of the Declaration, that is, article 3 on self-determination, is supported by the practice of these two bodies, especially the HRC. article 3 of the Declaration establishes that 'indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' As this is the first time that an international human rights instrument expressly recognizes the right to self-determination to a sub-State group, it is not surprising that many States expressed a certain discomfort about having such a far-reaching provision included in the text of the Declaration. In particular, a few States maintained that the recognition of self-determination to indigenous peoples would be contrary to current international law.<sup>109</sup> Consequently, several alternative versions of the article were proposed with a view to emphasizing the internal aspect of the right, and, contextually, ruling out the possibility that indigenous self-determination would also include a right to secession.<sup>110</sup> Since none of these proposals was eventually accepted, it remains to be established whether the final, straightforward, wording of article 3, ultimately voted by the vast majority of States, is also compatible with current international law. A number of factors suggest that this is the case.

First, the reports of the sessions of both the WGIP and WGDD clearly indicate that article 3 of the Declaration should not be interpreted as conferring a right to secession on indigenous peoples.<sup>111</sup> It follows that the validity of the principle of territorial integrity of States remains unaffected. This becomes especially true when the Declaration, as noted above, is read as a whole and interpreted in accordance with its very spirit.<sup>112</sup> Secondly, the inclusion in the Declaration of article 4 further elucidates the issue by stating that 'in exercising their right to self-determination, indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.' Two important conclusions can be drawn in the light of the co-existence of article 3 and 4 in the Declaration: first, indigenous self-determination should be read essentially (and yet not exclusively) as a right to autonomy, or internal self-determination; and, secondly, although self-determination should be substantially implemented by means of autonomous settings, indigenous self-determination transcends the limited scope of autonomy. Although it is not the purpose of this article to discuss in detail the extent and content of indigenous self-determination, it is important to note

<sup>109</sup> See for example the statement of the representative of the US at the Second Session of the WGDD. 'Report of the Working Group on the Draft Declaration on its Second Session', UN Doc E/CN.4/1997/102 (10 December 1996) para 325.

<sup>110</sup> Among others, the representative of Venezuela proposed the following wording: 'Indigenous peoples have a right to self-determination. By virtue of that right they have the right to autonomy, or self-government in matter relating to their internal and local affairs . . .', 'Report of the Working Group on the Draft Declaration on its Second Session', UN Doc E/CN.4/1997/102 (10 December 1996) para 318.

<sup>111</sup> For example, summarizing the debate on the right to self-determination that took place at the WGDD, the Chairperson-Rapporteur once noted that 'there was broad agreement that, in the context of the draft declaration, the right to self-determination could not be exercised to the detriment of the independence and territorial integrity of the State', and that some governments were ready to accept the article 'on the understanding that it did not imply a right of secession', whereas others were ready to clarify the content of article 3 in order to make it acceptable to others. 'Report of the Working Group on the Draft Declaration on its Fifth Session', UN Doc E/CN.4/2000/84 (6 December 1999) paras 83–85.

<sup>112</sup> See (n 44).

that only within the context of self-determination proper do issues such as, for example, the international personality of indigenous peoples, partnership on an equal footing with the State, and strong and effective control of traditional lands acquire special relevance.<sup>113</sup> Importantly, such an understanding of article 3 would not be contrary to current international law.

Additional support for this conclusion also comes from the practice of the HRC. In recent years, this body has recognized on more than one occasion, both in its Concluding Observations on State Reports and Individual Communications, that Article 1 of the ICCPR on self-determination extends to indigenous peoples.<sup>114</sup> On one occasion, for example, it emphasized that, in the context of article 1, Australia 'should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.'<sup>115</sup> Similarly, while addressing the issue of indigenous peoples' control over lands and resources in the Canadian context, the HRC stressed that 'the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence.'<sup>116</sup> It is, therefore, evident that the right of indigenous peoples to self-determination, as constructed in the Declaration, does not challenge the principle of territorial integrity, nor does it contravene existing norms and standards of international human rights law. On the contrary, it is actually in line with the recent jurisprudence of UN human rights treaty bodies.<sup>117</sup>

### 3. General principles

Lastly, the content of the Declaration should be analysed in connection with 'general norms or principles [which] can affect the way courts decide cases.'<sup>118</sup> As aptly illustrated by Boyle and Chinkin, these principles do not necessarily originate from treaties, or other binding instruments, nor derive from national law exclusively.<sup>119</sup> By contrast, it is the endorsement of States that ultimately confer them with legitimacy, as the case of the principle of sustainable development illustrates.<sup>120</sup> Thus, when adequately

<sup>113</sup> For a comprehensive analysis of indigenous peoples' right to self-determination, see P Aikio and M Scheinin (eds), *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Abo Akademi University, Abo, 2000). See also A Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture, and Land* (CUP, Cambridge, 2007) chapter 4.

<sup>114</sup> See, for example, the following Concluding Observations: Mexico 1999 (CCPR/C/79/Add.109, 27 July 1999, para 19); Norway 1999 (CCPR/C/79/Add.112, 1 November 1999, para 17); and Sweden 2002 (CCPR/CO/74/SWE, 24 April 2002, para 15); and the following Individual Communications: *Apirana Mahuika et al v New Zealand* case, Communication No. 547/1993, CCPR/C/70/D/547/1993 (27 October 2000) para 9.2; and *JGA Diergaardt v Namibia* case, Communication No 760/1997, CCPR/C/69/D/760/1997 (6 September 2000) para 10.3.

<sup>115</sup> Concluding Observation on Australia 2000 (A/55/40, 24 July 2000, paras 498–528, section 3: Principal subjects of concern and recommendations).

<sup>116</sup> Concluding Observations on Canada 1999 (CCPR/C/79/Add.105, 7 April 1999, para 8).

<sup>117</sup> For an overview of CERD's approach to self-determination, see General Recommendation No. 21: Right to Self determination (23 August 1996), available at <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/dc598941c9e68a1a8025651e004d31d0?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/dc598941c9e68a1a8025651e004d31d0?Opendocument)> accessed 14 August 2009.

<sup>118</sup> A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 222.

<sup>119</sup> *ibid* 223.

<sup>120</sup> According to Boyle and Chinkin, the reference to sustainable development in the ICJ's decision on the *Case Concerning the Gabčíkovo-Nagymaros Dam* shows that, although

supported, these principles are capable of influencing not only the practice of States and international organizations but also, under certain conditions, the interpretation, application and development of other rules of law.

With regard to the Declaration, the clearest example of interaction with this kind of general principles concerns the issue of indigenous peoples' land rights. The convergence of a number of soft and hard law instruments suggests that a general principle whereby indigenous peoples' land rights should be specifically protected by virtue of the special relationship which links indigenous peoples and their lands has clearly developed.<sup>121</sup> The importance of this principle is crucially confirmed by a recent decision of the Supreme Court of Belize with regard to the land rights of some Mayan communities.<sup>122</sup> After emphasizing that where a General Assembly resolution contains principles of general international law States are not expected to disregard them, the Court held that, since the Declaration embodies general principles relating to indigenous peoples and their lands and resources, it had to be taken into serious account in the context of the specific case.<sup>123</sup>

The considerations developed in this section suggest that the Declaration, far from being detached from legal reality, embodies applicable international human rights standards as well as important legal principles. Furthermore, some of its provisions directly reflect the content of existing international treaties, while others are in line with the recent practice of human rights treaties bodies such as the HRC and CERD.

### *C. Follow-Up Mechanisms*

The last criterion to be considered in order to evaluate the potential impact of the Declaration relates to the existence, and effectiveness, of follow-up mechanisms. Such mechanisms should be focused on two connected actions, namely promotion and monitoring of State compliance. It goes without saying that in order to assess fairly the outcome of these processes one should adopt a rather flexible approach. In other words, since effective and systematic implementation cannot be guaranteed even with regard to international legally binding treaties, it is obvious that one should set reasonable and realistic expectations with regard to the Declaration. This said, the fact remains that only if there is evidence of a certain degree of compliance can the instrument be regarded as effective.

Article 42 of the Declaration suggests that the function of promoting respect for and full application of the Declaration's provisions, as well as of following up its

'sustainable development is not in the nature of a legal obligation, it does represent a policy goal or principle that can influence the outcome of litigation and the practice of States and international organisations, and it may lead to significant changes and developments in the existing law.'  
ibid 224.

<sup>121</sup> See, among others, ILO Convention No. 169 Articles 13, 14 and 15; CERD General Recommendations No 23 on Indigenous Peoples (18 August 1997) see (n 100); World Bank Operational Policies 4.10 of 1 July 2005, para 16, available at <<http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/EXTPOLICIES/EXTSAFEPOL/0,,contentMDK:20543990~menuPK:1286666~pagePK:64168445~piPK:64168309~theSitePK:584435,00.html>>. See also the following section on the jurisprudence of the Inter-American Court of Human Rights.

<sup>122</sup> *Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No 171 and 172 (10 October 2007).

<sup>123</sup> ibid para 132.

effectiveness, should be carried out by the United Nations, its bodies and specialized agencies including those at the country level, and by States. Although the presence in the text of such an article is undoubtedly to be welcomed, it is clear that article 42 does not indicate which procedures should be actually employed and which organs should ultimately, and essentially, intervene. Nevertheless, article 42 highlights a first paramount point, namely that this mechanism of promotion and monitoring of the Declaration should take place both at the international and national level. Indeed, going a step further, it may be argued that article 42 refers to the existence of a heterogeneous follow-up mechanism which is based on the interaction of the international, regional and national layer.<sup>124</sup> Against this background, the role of judicial bodies should be particularly emphasized, as they may vitally enhance compliance with the Declaration by passing binding decisions which, albeit essentially based on regional and national law, may be influenced by significant provisions and principles included in the Declaration.

Looking firstly at the international level, there is no doubt that the issue of compliance represents a primary concern, as recently evidenced by the plan of action for the Second International Decade of the World's Indigenous People (2005–2015), which identified, among the key objectives, that of 'developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.'<sup>125</sup> Thus, the intention to supervise the process of compliance with the Declaration certainly exists. A problem, however, may arise from the large number and variety of UN bodies and agencies directly or indirectly working with indigenous peoples. More precisely, the risk exists that a lack of coordination may have negative effects on the overall impact of their activities, consequently weakening the effectiveness of the international mechanism. To alleviate the problem, the UN Forum was established with the role, *inter alia*, of promoting the integration and coordination of activities related to indigenous issues within the UN.<sup>126</sup> The Forum not only will promote an integrated approach among UN bodies based on the content of the Declaration, but also will be at the forefront in ensuring the effecting implementation of the Declaration.<sup>127</sup> Yet, the activities of the Forum, especially in the light of its broad mandate, cannot *per se* assure an effective follow-up mechanism, particularly with regard to specific and concrete contexts.

The most significant contribution to this end, therefore, may come from the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People (Rapporteur), established in 2001 by the Commission on Human

<sup>124</sup> The crucial interaction between the three levels is repeatedly highlighted in the plan of action for the Second International Decade of the World's Indigenous People. 'Draft Programme of Action for the Second International Decade of the World's Indigenous People', Report of the Secretary-General, UN Doc.A/60/270 (18 August 2005).

<sup>125</sup> *ibid* para 9(v).

<sup>126</sup> Established by Economic and Social Council Resolution 2000/22.

<sup>127</sup> 'Internationalizing the Indigenous Peoples' Movement and Indigenous Peoples' Rights' Paper presented by the Chairperson of the Forum, Ms Victoria Tauli-Corpuz, the 1<sup>st</sup> International Conference on Cordillera Studies: Indigenous Peoples and Local Communities in Transition, University of the Philippines Baguio, 7–9 February 2008.



Rights.<sup>128</sup> The Rapporteur's mandate, recently extended by the Human Rights Council for a further period of three years, now includes the 'promotion of the Declaration as well as other international instruments relevant to the advancement of the rights of indigenous peoples'.<sup>129</sup> His function can be equated to that of a 'normative intermediary', that is, 'a party, authorized by States or [as in this case] an international organisation seeking to promote observance of a norm, who . . . seeks to induce compliance through a hands-on process of communication and persuasion with relevant decision-makers'.<sup>130</sup> On-site country visits arguably represent the most effective activity he performs. These are missions to selected countries with a view to meeting governmental, indigenous peoples and civil society's representatives and ultimately aimed to produce a final report which highlights the main problems connected with the indigenous population of the State concerned.<sup>131</sup> Importantly, each report includes a number of recommendations, essentially addressed to Governments, that the Rapporteur considers essential for the advancement and protection of indigenous peoples' rights. If country-visits provide a valuable occasion to enhance State compliance with the Declaration, recent activities of the Rapporteur generally demonstrate his willingness to couple this promotional role with systematic follow-up activities. Indeed the Rapporteur has, firstly, introduced special procedures to monitor the implementation of his recommendations, and secondly, as a result of such process, produced a comprehensive study on the best practices employed by Governments and other agencies in implementing these recommendations.<sup>132</sup> The appointment on March 2008 of James Anaya, a well-known international lawyer and advocate of indigenous peoples' rights, suggests that the Rapporteur will continue to play a decisive role in the field.<sup>133</sup>

The last significant contribution at the international level comes from the work of UN human rights treaty bodies, especially the HRC and CERD. Their constant scrutiny of States' policies with regard to indigenous peoples will provide in fact the most immediate form of monitoring State compliance with the Declaration. In this regard, it should be emphasised that in its Concluding Observations on the fourth, fifth and sixth periodic reports of the United States, the CERD, while recognizing that the US

<sup>128</sup> Commission on Human Rights Resolution 2001/57. The mandate, originally for three years, was later renewed for a further three years by Commission on Human Rights Resolution 2004/62.

<sup>129</sup> UN Doc A/HRC/L.26 (25 September 2007).  
<sup>130</sup> SR Ratner, 'Does International Law Matter in Preventing Ethnic Conflict?' (2000) 32 *NYU J of Intl L & Politics* 591, 668.

<sup>131</sup> As of today, the Special Rapporteur has conducted the following country-visits: Guatemala (UN Doc E/CN.4/2003/90/Add.2); The Philippines (UN Doc E/CN.4/2003/90/Add.3); Mexico (UN Doc. E/CN.4/2004/80/Add.2); Chile (on two occasions, UN Doc E/CN.4/2004/80/Add.3 and UN Doc A/HRC/12/34/Add.6); Colombia (UN Doc E/CN.4/2005/88/Add.2); Canada (UN Doc E/CN.4/2005/88/Add.3 and Corr.1); South Africa (UN Doc E/CN.4/2006/78/Add.2); New Zealand (UN Doc E/CN.4/2006/78/Add.3); Ecuador (UN Doc A/HRC/4/32/Add.2); Kenya (UN Doc A/HRC/4/32/Add.3); Bolivia (UN Doc A/HRC/11/11); Nepal (UN Doc A/HRC/12/34/Add.3); Brazil (UN Doc A/HRC/12/34/Add.2).

<sup>132</sup> 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen', Addendum, Study Regarding Best Practices Carried Out To Implement the Recommendations Contained in the Annual Reports of the Special Rapporteur, UN Doc A/HRC/4/32/Add.4 (26 February 2007).

<sup>133</sup> For more details on the appointment, see <<http://www2.ohchr.org/english/issues/indigenous/rapporteur/index.htm>> accessed 14 August 2009.

did not vote for the Declaration, recommended that the instrument 'be [nevertheless] used as a guide to interpret the State Party's obligations under the [ICERD] relating to indigenous peoples.'<sup>134</sup>

Having identified the main viable options at the international level, it is now important to discuss the contribution offered by regional and domestic bodies. Indeed international institutions, despite exercising decisive pressure toward compliance, cannot ultimately assure it. For this reason, it is crucial to consider whether regional and national institutions may respond positively to the inputs of international agents. Encouragingly, recent developments suggest that the regional and national layers may indeed work to that end within a solid international framework.

Regionally, it can be expected that the Declaration will become increasingly relevant in the Inter-American context, where since 2001 the Inter-American Court of Human Rights (Inter-American Court) has developed a well-established jurisprudence in the area of indigenous peoples' rights.<sup>135</sup> In particular, the Inter-American Court has recognized on more than one occasion that the right to property established by the Inter-American Convention on Human Rights (Inter-American Convention) should be read, in the light of the distinct spiritual relationship between indigenous peoples and their lands, as including the right of indigenous peoples to collective ownership of their ancestral lands.<sup>136</sup> The Inter-American Court's inclination towards progressive interpretations of human rights provisions derives essentially from two intertwined elements.<sup>137</sup> First, article 29(b) of the Inter-American Convention establishes that no provision thereof may be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognised by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party.' Thus, the Inter-American Court has to consider relevant regional and international conventions before formulating its final view, so as to ensure that its decision takes into account the most progressive legal standards existing in connection with the issues at stake. Second, a well-established principle of the Court is that 'human rights treaties are live (sic) instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions.'<sup>138</sup> In applying this principle the Inter-American Court has significantly extended the content of the '*corpus juris* of international human rights law' that needs to be taken into account when interpreting human rights treaties. For the Court this now includes not only legally binding international instruments, but also non-binding instruments such as declarations and

<sup>134</sup> UN Doc CERD/C/USA/CO/6 (February 2008) para 29.

<sup>135</sup> See JM Pasqualucci, 'The Evolution of International Indigenous Rights in the Inter-American Human Rights System' (2006) 6 HRL Rev 281–322.

<sup>136</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Series C 79 (2001); *Moiwana Community v Suriname*, Inter-American Court of Human Rights, Series C 124 (2005); *Comunidad Indígena Yakye Axa v Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005); *Sawhoyamaxa Indigenous Community v Paraguay*, Inter-American Court of Human Rights, Series C 146 (2006); *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C 172 (2007).

<sup>137</sup> For a critical assessment of this inclination, see GL Neuman, 'Import, Export, and Regional Consent in the Inter-American Court of Human Rights' (2008) 19 EJIL 101–123.

<sup>138</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, Inter-American Court of Human Rights, Series C 79(2001) para 146. See also, *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, Advisory Opinion OC-16/99, Inter American Court of Human Rights, Series A 16(1999) para 114.

recommendations.<sup>139</sup> In other words, the Inter-American Court clearly recognizes the important contribution of instruments of ‘varied content and juridical effects.’<sup>140</sup> It comes as no surprise, therefore, that against this background the Court made its first explicit reference to the Declaration in 2007 in *Saramaka People v Suriname*.<sup>141</sup>

With regard to regional settings, mention should also be made of the African context, where an important process of recognition and promotion of indigenous peoples’ rights is currently ongoing. Although historic and socio-political circumstances play against the establishment of minority rights regimes generally,<sup>142</sup> the African Commission of Human Rights (African Commission) has recently begun to address seriously the issue of indigenous peoples’ rights in the region. In 2003 it adopted a Report of the Working Group on Indigenous Populations/Communities in Africa (WGIPC) recognizing that, in Africa, indigenous peoples and communities do exist and suffer from common human rights violations that are often of a collective nature.<sup>143</sup> Consequently, both the African Commission and the WGIPC have begun to scrutinize State policies with regard to indigenous peoples. Against this background, the African Commission’s reaction to the adoption of the Declaration is particularly important.<sup>144</sup> Welcoming it as a very significant instrument for the promotion and protection of indigenous peoples’ rights all over the world, the African Commission stated that the Declaration will become a very valuable tool and a point of reference for its efforts to ensure the promotion and protection of indigenous peoples’ rights on the African continent.<sup>145</sup> As noted above, the particular political and socio-economic conditions characteristic of the African region urge a rather cautious assessment of the potential impact of the Declaration on African States. Nevertheless, it remains the fact that the positive and dynamic approach taken by the African Commission should be regarded as a rather encouraging aspect.

<sup>139</sup> For example, in *Comunidad Indígena Yakye Axa v Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005), para 128; *Juridical Condition and Rights of the Undocumented Migrants*, Advisory Opinion OC-18/03, Inter-American Court of Human Rights, Series A 18(2003), para. 120; *The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*, Advisory Opinion OC-16/99, Inter American Court of Human Rights, Series A 16(1999), para 115.

<sup>140</sup> *Comunidad Indígena Yakye Axa v Paraguay*, Inter-American Court of Human Rights, Series C 125 (2005), para 128.

<sup>141</sup> *Saramaka People v Suriname*, Inter-American Court of Human Rights, Series C 172 (2007). More specifically, while considering whether, and to what extent, Suriname could grant concessions for the exploration and extraction of natural resources found within Saramaka territory, the Court considered, inter alia, Article 32 of the Declaration. See para 131.

<sup>142</sup> F Viljoen, *International Human Rights Law in Africa*, (OUP, Oxford, 2007) 279–280.

<sup>143</sup> ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission’s Working Group on Indigenous Populations/Communities, (2003). Available at <[http://www.achpr.org/english/resolutions/resolution70\\_en.html](http://www.achpr.org/english/resolutions/resolution70_en.html)> accessed 14 August 2009.

<sup>144</sup> For an overview of the African position on the Declaration prior to its adoption, W van Genugten, ‘The African Move Towards the Adoption of the 2007 Declaration on the Rights of Indigenous Peoples: the Substantive Arguments behind the Procedures’ available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1103862](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103862)> accessed 14 August 2009.

<sup>145</sup> ACHPR/Res.121 (XXXII) 07 Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 28 November 2007. Available at <[http://www.achpr.org/english/resolutions/resolution121\\_en.htm](http://www.achpr.org/english/resolutions/resolution121_en.htm)> accessed 14 August 2009.

Turning to the national dimension, only a few months after the adoption of the Declaration a number of noteworthy events took place. The Bolivian government adopted a national law which reflects the exact content of the Declaration,<sup>146</sup> whereas Ecuador and Nepal have used it 'as a normative reference in recent ... constitutional revision processes.'<sup>147</sup> Remarkably, on 3 April 2009 the Australian Government formally endorsed the Declaration, reversing the decision of the previous government to oppose it.<sup>148</sup> Significant initiatives have also been taken in Canada and Japan. On 8 April 2008 the Canadian House of Commons adopted a motion calling for Parliament and Government to 'fully implement the standards contained' in the Declaration.<sup>149</sup> In June 2008 the Japanese Diet unanimously passed a resolution that recognized the Ainu as indigenous people of Japan, and called on the government to take specific actions following the adoption of the Declaration.<sup>150</sup>

Crucially, a national court has also recognized the relevance of the Declaration with respect to a legal dispute. As briefly discussed above, the case was heard by the Supreme Court of Belize in October 2007 and concerned the alleged failure of the Government of Belize to recognize, protect and respect the customary land rights of some Maya communities, thus violating the relevant provisions of the Constitution of Belize establishing the right to property.<sup>151</sup> Despite being resolved essentially in terms of national, and regional law, the international dimension certainly played a fundamental role. In particular, Chief Justice AO Conteh held that the Declaration 'is of such force that the defendants, representing the Government of Belize, will not disregard it.' As a member of the international community, he noted, Belize 'has subscribed to commitments in some international humanitarian treaties', including the 'commitment to recognise and protect indigenous people's rights to land resources.' He then emphasized the fact that Belize voted in favour of the Declaration and that article 42 of the Declaration calls for States to promote respect for and full application of the provisions included therein. Therefore, he concluded, Belize is 'bound, in both domestic law ... and international law ... to respect the rights to and interests of the claimants as members of the indigenous Maya community, to their lands and resources which are the subject of this case.'

In sum, it is arguable that institutional mechanisms are in place to enhance and monitor State compliance with the Declaration. The value of the existing follow-up

<sup>146</sup> Ley 3760 de los Derechos de los Pueblos Indígenas del Mundo of 7 November 2007. See <[http://www.presidencia.gov.bo/prensa/marc\\_vpr.asp?id=200711065](http://www.presidencia.gov.bo/prensa/marc_vpr.asp?id=200711065)> accessed 30 October 2008.

<sup>147</sup> 'Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People' SJ Anaya, UN Doc A/HRC/9/9 (11 August 2008), para 54.

<sup>148</sup> See 'United We Stand—Support for United Nations Indigenous Rights Declaration a Watershed Moment for Australia' (3 April 2009) available at <[http://www.hreoc.gov.au/about/media/media\\_releases/2009/21\\_09.html](http://www.hreoc.gov.au/about/media/media_releases/2009/21_09.html)> accessed 14 August 2009.

<sup>149</sup> See 'UN Experts Welcome Canadian House of Commons Endorsement of the Declaration on the Rights of Indigenous Peoples' (18 April 2008) available at <[http://www.unog.ch/unog/website/news\\_media.nsf/\(httpNewsByYear\\_en\)/0DF2B67C18A6B662C125742F00321882?OpenDocument](http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/0DF2B67C18A6B662C125742F00321882?OpenDocument)> accessed 30 October 2008.

<sup>150</sup> See 'Diet officially declares Ainu indigenous' *The Japan Times Online* (7 June 2008) available at <<http://search.japantimes.co.jp/member/member.html?mode=getarticle&file=nn20080607a1.html>> accessed 30 October 2008.

<sup>151</sup> *Manuel Coy et al v The Attorney General of Belize et al*, Supreme Court of Belize, Claims No 171 and 172 (10 October 2007). The following passages refer to paras 118–134.

mechanisms can only be appreciated with reference to the interdependence between the international, regional, and national levels. In particular, whereas international bodies such as the Rapporteur have the primary function of promoting compliance with and monitoring State response to their recommendations and decisions, regional and national courts have the power to make legally binding decisions taking into account the content of the Declaration.

#### V. CONCLUSIONS

The UN Declaration on the Rights of Indigenous Peoples represents a unique instrument in the sphere of international human rights. Its original approach towards the issue of collective rights and radical recognition of controversial rights such as the right to self-determination and land rights for a sub-State group require attentive consideration on the part of international lawyers. More importantly for indigenous peoples, however, the Declaration has a very specific function, namely that of contributing to improve their poor living conditions. Whether such strong expectations will be met remains to be established. For the time being, however, this article has sought to demonstrate that, regardless of its non-binding nature, the Declaration has the potential effectively to promote and protect the rights of the world's indigenous peoples. Under the complexity and dynamism of contemporary international law-making, the relevance of a soft law instrument cannot be aprioristically dismissed. Only a tailored analysis will provide a valid indication of an instrument's legal significance and potential to affect State behaviour. In the case of the Declaration, the overall value of the instrument needs to be assessed in conjunction with an analysis of the evolving indigenous rights regime at the international level. This analysis evidences a few important points. First, the use of soft law has actually enhanced the value of the Declaration in a number of important respects, particularly its universality and legitimacy, and does not prevent the Declaration from having important legal effects with regard to international treaty-making and customary international law. Secondly, there exists a solid relationship between the normative content of the Declaration and the norms, standards, and principles related to indigenous peoples that have recently emerged at the international level. This circumstance has important consequences with regard both to the legal significance and compliance pull of the Declaration. Thirdly, institutional mechanisms for the promotion and monitoring of the Declaration are in place, thus moving the relevant international setting closer to that of a hard law instrument. All this suggests that the Declaration has important legal effects and can generate reasonable expectations of conforming behaviour. It follows that its adoption should certainly be welcomed and its potential implications fully explored and appreciated.

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