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A study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples, focusing on a potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources at the domestic level

Note by the secretariat

Pursuant to decision E/2012/43-E/C.19/2012/13, para. 109 of the United Nations Permanent Forum on Indigenous Issues at its eleventh session, Ms. Dalee Sambo Dorough and Ms. Megan Davis, Members of the Forum, were appointed to undertake a study on an optional protocol to the United Nations Declaration on Rights of Indigenous Peoples, focusing on a

[1] E/C.19/2014/1

potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources at the domestic level. The outcome of the study is hereby submitted to the Permanent Forum's thirteenth session.

I. Introduction

1. Since the adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) there has been discussion about the need for a mechanism by which to monitor the implementation of the UNDRIP and its interpretation in international law. This was partly recognized by Article 42 of the UNDRIP which provides that:

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

2. Following discussions on Article 42 at the United Nations Permanent Forum on Indigenous Issues (UNPFII) in 2009, the UNPFII hosted an Expert Group Meeting on the role of the Permanent Forum in the implementation of the UNDRIP by virtue of Article 42.[2] In recent times there has been increased cooperation and coordination between the UNPFII, the Special Rapporteur on the Rights of Indigenous Peoples and the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) and this coordination has brought to bear the unique nature of each of the three mandates. Each of these mechanisms contribute significantly to the implementation of the UNDRIP although not in a wholly coordinated way. In addition, each of these bodies and their secretariats have significant workloads and commitments and therefore could not function as an oversight body to the implementation of the UNDRIP.

[2] *Report of the international expert group meeting on the role of the Permanent Forum on Indigenous Issues in the implementation of article 42 of the United Nations Declaration on the Rights of Indigenous Peoples* E/C.19/2009/2.

3. Indigenous peoples in particular are becoming increasingly concerned with a mechanism to monitor and coordinate the implementation of the UNDRIP. The recently concluded Alta Declaration and the Lima Declaration recommend a mechanism to review, monitor and report on the UNDRIP. The Alta Declaration recommended:

> the creation of a new UN body with a mandate to promote, protect, monitor, review and report on the implementation of the rights of Indigenous Peoples, including but not limited to those affirmed in the Declaration, and that such a body be established with the full, equal and effective participation of Indigenous Peoples.[3]

4. Perhaps the most acute reason for the increased attention being given to the establishment of a mechanism is in the work of the UN Special Rapporteur, who through his mandate has conducted many country visits. Despite the expressions of commitment to the UNDRIP worldwide, the Special Rapporteur has observed *"a lack of knowledge* and understanding about the Declaration, the values it represents or the deep-seated issues confronting the indigenous peoples that it addresses".[4] According to the Special Rapporteur a "still pending crucial task" is raising awareness about the Declaration among Government actors, the United Nations system, indigenous peoples themselves, and, more generally, society.[5] The creation of a complaint mechanism is one way to promote greater understanding of the content of the Declaration; and therefore awareness can be achieved.

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[3] para [1], Theme 2: UN system action for the implementation of the rights of Indigenous Peoples, *World Conference on Indigenous Peoples 10 – 12 June 2013, Alta Outcome document.*

[4] Rights of indigenous peoples Note by the Secretary-General A/68/317.

[5] Rights of indigenous peoples Note by the Secretary-General A/68/317.

It will remain difficult for the goals of the Declaration to be achieved amid competing political, economic and social forces unless the authorities and non-indigenous sectors of the societies within which indigenous peoples live come to share in awareness and conviction about those goals.

5. The Special Rapporteur's concern about the insufficient knowledge and use of the UNDRIP by member states and civil society has played out in the Universal Periodic Review. He has characterized this dynamic as well as lack of recognition of the "significant normative weight" of the Declaration and its "foundations in equality and human rights" as "factors that debilitate commitment to and action by States." The lack of knowledge and expertise globally on the UNDRIP is a concern for the UNPFII. The failure of some member states to take seriously the goals and rights contained within the UNDRIP is detrimental to indigenous peoples' rights and well-being.

6. One way of addressing the paucity of knowledge and the lack of consistency in its implementation is to establish a mechanism to protect, review, monitor, and report on the UNDRIP. This mechanism can be empowered through the development of an agreement called an 'Optional Protocol'. There is a lack of literature on the technical aspects of an Optional Protocol. There is no literature that militates against our advocacy for an Optional Protocol to the UNDRIP. In fact, the literature reveals a persuasive precedent of the UN system, for well over thirty years establishing additional or supplementary mechanisms associated with an international human rights instrument - notably Declarations - that have not crystallised in the

form of treaty to be acceded to ratified by member state parties. Here, we draw attention to the communication procedure of the Commission of the Status of Women established in 1947 decades before the existence of the UN Convention on the Elimination of All Forms of Discrimination Against Women.[6] In addition to this, since 1975, the Commission on Human Rights has not infrequently established a variety of mechanisms aimed at improving the protection of human rights; particularly where there appears to be a consistent pattern of human rights violations. The former 1503 procedure is one such mechanism.[7] Another non-treaty-based mechanism is the Working Group on Arbitrary Detention.[8] The mandate of the Working Group is to consider individual complaints and is based on Article 7, 9, 10, 11, 13, 14, 18, 19, 20 and 21 of the Universal Declaration on Human Rights. Another example was the establishment of the Working Group on Enforced or Involuntary Disappearances.[9]

7. Prior to discussion about the potential form and content of an Optional Protocol to the UNDRIP, some fundamental principles must be stated and recognized. As noted above, the Alta Declaration proposes a new UN body that inter alia "protects" indigenous peoples' rights and so, too, should any new mechanism that emerges on the basis of this study. It must be noted that the recommendation made to the UNPFII requested that it specifically highlight lands, territories and resources. However, the basic principles that underscore the universality of human rights and that they are inter-related, inter-connected, indivisible and inter-dependent, including those embraced by the UNDRIP, must be fully recognized in the context of the advancement of a

[6] ECOSOC res 76 (V) of 5 August 1947.
[7] ECOSOC Res 1503 (XLVIII)(1970).
[8] CHR resolution 1991/42 extended in 2007 HRC resolution 6/4.
[9] CHR resolution 20 (XXXVI) (1980).

possible Optional Protocol.[10] The UNDRIP, as an Indigenous specific human rights instrument must therefore, be understood as a whole and its various articles must be interpreted in relation to one another.

8. Furthermore, the jurisprudence that is evolving through the UN treaty bodies and mechanisms as well as regional human rights bodies in Africa, the Inter-American system and elsewhere remains highly important. The rulings of regional bodies, such as the African Commission on Human and Peoples" Rights and the Inter-American Court of Human Rights are legally binding. Such jurisprudence must be safeguarded and in no way diminished or undercut by the potential mechanism discussed herein. In this regard a voluntary protocol on the Declaration would mean that states could not insist upon contradictory understandings or substandard positions to be binding on indigenous peoples. In fact, given the normative weight of the UNDRIP - the human rights norms that are embraced by the Declaration including core principles of equality and non-discrimination, cultural integrity, property and self-determination - discussions about and the development of a additional procedures or a voluntary protocol is a natural development in international human rights law.[11] This has been the case in regard to women's rights, arbitrary detention and disappearances.

[10] See, eg H Steiner, P Alston and R Goodman, *International Human Rights in Context: Law, Politics and Morals* (3rd ed) Oxford University Press, 2007 519; See J Donnelly, 'The Relative Universality of Human Rights (2007) 29(2) *Human Rights Quarterly* 281, 288-9; E Brehms, *Human Rights: Universality and Diversity* (Martinus Nijhof The Hague 2001), 17; Office of the High Commissioner for Human Rights, 'What Are Human Rights? at http://www.ohchr.org/en/issues/pages/whatarehumanrights.aspx; Dalee Sambo Dorough, 'Human Rights' in United Nations Permanent Forum on Indigenous Issues, 'State of the World's Indigenous Peoples', 192 available at < http://www.un.org/esa/socdev/unpfii/documents/SOWIP_chapter6.pdf>; see also, UN Population Fund, Human Rights Principles available at <http://www.unfpa.org/rights/principles.htm>.

[11] Rights of indigenous peoples Note by the Secretary-General A/68/317 para [64] for Special Rapporteur discussion on the normative weight of the Declaration.

9. Indeed, any outcome from this study and its recommendations, including possible negotiated understandings or agreements, must not fall below the minimum standards of the UNDRIP. Any such outcomes must be consistent with the protection and promotion of rights of Indigenous peoples as well as the jurisprudence of UN and regional treaty bodies. For this reason any future mechanism would have to be worked out in broad terms that must be agreed to by states and indigenous peoples in the design and creation of the Optional Protocol.

10. This study is divided into two parts; Part I What is an Optional Protocol describes what an optional protocol is and why they are used in international human rights law including examples of current optional protocols and the limitations of such instruments. Second, the study explains the reasons why the UNDRIP would be strengthened by an Optional Protocol.

II. What is an optional protocol

A. What is an Optional Protocol?

11. An Optional Protocol is a supplementary agreement to a main agreement. Human rights treaties are often preceded by an additional agreement known as an Optional Protocol intended to establish a specific complaint mechanism and procedure for protecting human rights and enforcing the original treaty, or to supplement a substantive area of the treaty with further measures to be subscribed to by state parties. Once acceded to, the Optional Protocol becomes legally binding under international law. An Optional Protocol “may be on any topic relevant to the original treaty and is used either to further address something in the original treaty, address a

new or emerging concern or add a procedure for the operation and enforcement of the treaty—such as adding an individual complaints procedure".[12]

12. Optional Protocols often contain stricter measures than the treaty to which they relate; state parties may choose whether they want to ratify the Optional Protocol and therefore they are not automatically binding on original treaty parties. In addition, Optional Protocols have their own specific ratification mechanisms that operate independently of original treaties: "Generally, only States that have already agreed to be bound by an original treaty may ratify its optional protocols".[13]

Why adopt an Optional Protocol?

13. If a treaty has not made sufficient provision for its enforcement and accountability Optional Protocols are often created to fulfil this function. Accountability functions can involve individual complaints process, known as a "communications procedure" or an "inquiries procedure". A communications procedure permits individuals or groups representing individuals to bring a complaint to the supervisory committee responsible for enforcing the protocol. The second 'inquiries procedure' enables a supervisory committee to investigate on its own volition:

In the UN Human Rights Treaty System, an Optional Protocol establishes judicial and review authority for human rights committees. That is, through an Optional Protocol a Committee may review individual complaints in a similar way to that of a traditional human rights court. Also, in

[12] Introduction to the Convention on the Rights of the Child, United Nations Children's Fund (UNICEF) available at: http://www.unicef.org/crc/files/Definitions.pdf

[13] Optional Protocols to the Convention on the Rights of the Child are an exception to this.

cases of grave and systematic violations of human rights, some Committees can initiate an investigation in an attempt to hold States Parties accountable.[14]

14. In addition, an 'early warning and urgent action' capacity may allow a treaty body to insert itself into an ongoing, "urgent" human rights violations condition in an attempt to compel immediate compliance by a state member.

15. The two Optional Protocols to the International Covenant on Civil and Political Rights were developed because the ICCPR State Parties considered that

> in order further to achieve the purposes of the International Covenant on Civil and Political Rights ... and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in part IV of the Covenant ... to receive and consider, as provided in the present Protocol[s], communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.[15]

16. The first Optional Protocol is an individual complaints mechanism enabling individuals to submit complaints or communications to the Human Rights Committee. The second Optional Protocol abolishes the death penalty.

[14] ICESCR Advocacy Kit.
[15] Preamble to the ICCPR Optional Protocol.

17. The Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women entered into force 22 December 2000. The preamble references the Optional Protocol's establishment arising from the Vienna Declaration:

> Recalling the Beijing Platform for Action, pursuant to the Vienna Declaration and Programme of Action, supported the process initiated by the Commission on the Status of Women with a view to elaborating a draft optional protocol to the Convention on the Elimination of All Forms of Discrimination against Women that could enter into force as soon as possible on a right-to-petition procedure'.[16]

18. The CEDAWs Optional Protocol includes an inquiry procedure and a complaints procedure that allows the Committee to conduct inquiries into grave and systematic abuses of women's human rights in countries that become States parties to the Optional Protocol.[17] The CEDAW Optional Protocol is based on the article 20 inquiry procedure of the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

19. Although the preamble is not as explicit as other Optional Protocol's with respect to the reason for its establishment, it allows for: investigation of substantial abuses of women's human rights by an international body of experts[18]; is useful where individual communications fail to

[16] Preamble, CEDAW.

[17] Article 8, Optional Protocol.

[18] UN Women Optional Protocol to the Convention on the Elimination of All Forms of Discrimination available at https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm

reflect the systemic nature of widespread violations of women's rights[19]; allows widespread violations to be investigated where individuals or groups may be unable to make communications (for practical reasons or because of fear of reprisals)[20]; gives the Committee an opportunity to make recommendations regarding the structural causes of violations[21]; and allows the Committee to address a broad range of issues in a particular country.[22]

20. The Convention on the Rights of the Child has two Optional Protocols. The first is the Optional Protocol on the Rights of the Child on the Involvement of Children in armed conflict and the second is the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. In regard to the first Optional Protocol, the text is explicit about the reasons for the development and adoption of the Optional Protocol. For example the text states that state parties are, 'disturbed by the harmful and widespread impact of armed conflict on children and the long-term consequences it has for durable peace, security and development'. In addition state parties condemn 'the targeting of children in situations of armed conflict and direct attacks on objects protected under international law, including places that generally have a significant presence of children, such as schools and hospitals'. The preamble also notes the need to strengthen further the implementation of the rights within the CROC since the:

[19] UN Women Optional Protocol to the Convention on the Elimination of All Forms of Discrimination available at https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm
[20] UN Women Optional Protocol to the Convention on the Elimination of All Forms of Discrimination available at https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm
[21] UN Women Optional Protocol to the Convention on the Elimination of All Forms of Discrimination available at https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm
[22] UN Women Optional Protocol to the Convention on the Elimination of All Forms of Discrimination available at https://www.un.org/womenwatch/daw/cedaw/protocol/whatis.htm

> adoption of the Rome Statute of the International Criminal Court, in particular, the inclusion therein as a war crime, of conscripting or enlisting children under the age of 15 years or using them to participate actively in hostilities in both international and non-international armed conflict,

Considering therefore that to strengthen further the implementation of rights recognized in the Convention on the Rights of the Child there is a need to increase the protection of children from involvement in armed conflict

21. The Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment entered into force 22 June 2006. It allows for the creation of a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment. The preamble expressly states the reason for the Optional Protocol is to strengthen to implementation of CAT rights:

> Convinced that further measures are necessary to achieve the purposes of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (hereinafter referred to as the Convention) and to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment

22. The Optional Protocol to the Convention on the Rights of Persons with Disabilities entered into force 3 May 2008 and recognizes the right of the Committee to receive and consider communications from or on behalf of individuals or groups of individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of the provisions of the Convention.

Are there limitations to Optional Protocols?

State party

23. The limitations to adopting Optional Protocols are that most commonly the communications processes can only be used by individuals or groups in states that are party to and has ratified the relevant treaty.

Legal status

24. The legal status of Committee decisions as a consequence of an Optional Protocol varies. It is a basic principle of international law that state legal systems are sovereign and that for a decision to have legal consequence domestically usually it requires an enabling act to transform international law into domestic law: "Committee 'views' are not binding in the way that domestic courts are binding, nor are States free to disregard them at will. The legal force of Committee views lies between these two extremes ... [and its reports] constitute, at minimum, very persuasive analyses and guidance".[23] Essentially Optional Protocols are 'optional' or voluntary and therefore ratifying them indicates a transaction of good faith between the state and

[23] Human Rights Resource Law Centre 2009, pg. 8 available at www.hrlrc.org.au/files/Revised-Ch-2-Intro-to-Human-Rights-Law.doc

the individuals and groups involved in the relevant subject matter; in the case of the UNDRIP, between indigenous peoples and the state.

Reservations

25. In regard to treaties state parties may enter Reservations when ratifying Optional Protocols, as long as they are not incompatible with the principles of the Optional Protocol and the treaty. However, as the UNDRIP is a Declaration of the United Nations General Assembly this would not be required. Indeed the fact that a Declaration is not a treaty compounded with the voluntary or optional nature of the procedure it may be that the Optional Protocol can achieve more lasting and mutually agreeable outcomes.

III. Why does the UNDRIP need an optional protocol?

Engagement and Review of UNDRIP provisions

26. Though states already have binding obligations in international law in regard to the right to self-determination and property rights, in the context of Indigenous peoples, based on customary international law, there is an urgent need for additional, explicit measures to be taken. There is a need for the establishment of a mechanism to monitor both the content and the weight of the UNDRIP. An Optional Protocol is one mechanism that could facilitate this in cooperation with member states. In particular in relation to the right to self-determination, rights to lands, territories and resources and the right of free, prior and informed consent, there is a need to monitor and consolidate the content and weight of such rights. The exigency of such a mechanism is primarily explained with reference to the work of the United Nations Special

Rapporteur on the Rights of Indigenous Peoples who has raised a concern on the basis of his own observations over five years that the UNDRIP, 'is weakened by certain ambiguities and positions about the status and content of the Declaration'.[24] In particular continual reference to the Declaration as "non-binding or merely aspirational" accords the UNDRIP a "diminished status" and rationalises "a diminished commitment to its terms".[25]

What are Declarations?

27. Declarations are adopted by resolution of the United Nations General Assembly pursuant to Article 13 of the Charter of the United Nations, which empowers the UNGA to make recommendations with respect to the progressive development of international law and its codification and in assisting in the realisation of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.[26] Declarations can be compared or contrasted to treaties which are "binding" upon those states that ratify them and implement them into domestic law. The distinction between 'binding" and "non-binding" is brought into sharp focus when considering the UNDRIP. An over-emphasis on the "non-binding" status of the Declaration can imply that the instrument is not effective or has any legal consequence; this is incorrect. According to the Special Rapporteur,

[24] Rights of indigenous peoples Note by the Secretary-General A/68/317.

[25] Rights of indigenous peoples Note by the Secretary-General A/68/317.

[26] For purposes of this study, the focus is upon UNGA adopted Declarations. However, it is understood that not all Declarations are adopted by the GA, e.g. ILO Declarations.

to say simply that the Declaration is non-binding is an incomplete and potentially misleading characterization of its normative weight. It has long been widely understood that standard-setting resolutions of the General Assembly can and usually do have legal implications, especially if called “declarations”, a denomination usually reserved for standard-setting resolutions of profound significance.[27]

28. In regard to General Assembly declarations:

even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal commitments that are related to the Charter, other treaty commitments and customary international law. The Declaration builds upon the general human rights obligations of States under the Charter and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity that are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to be generally accepted within international and State practice, and hence to that extent the Declaration reflects customary international law.

29. On the issue of customary international law Emmanuel Voyiakis states the law as follows, ‘GA Resolutions can provide inspiration for the development of new customary international

[27] Rights of indigenous peoples Note by the Secretary-General A/68/317.

practices. Second, such Resolutions may often help to sharpen existing customary practices';[28] an example being the *Universal Declaration of Human Rights*.

30. Despite its "non-binding" character, and non-treaty status, the UNDRIP is a consensus document that received the majority support of the United Nations members and subsequently all UN members because it already 'embodies many human rights principles already protected under international customary and treaty law and sets the minimum standards for States Parties' interactions with the world's indigenous peoples'.[29] This consensus, the authoritative nature of the instrument and under the UN Charter, member states have an obligation to respect and promote those rights.[30]

Customary International Law

31. It is the position of the International Law Association Expert Committee on the Rights of Indigenous Peoples and the UN Special Rapporteur on the Rights of Indigenous Peoples that aspects of the UNDRIP constitute customary international law: *The relevant areas of indigenous peoples' rights with respect to which the discourse on customary international law arises are self-determination, autonomy or self-government, cultural rights and identity, land rights as well*

[28] Emmanuel Voyiakis, 'Voting in the General Assembly as Evidence of Customary International Law?' in Stephen Allen & Alexandra Xanthaki (eds.), Reflections on the UN Declaration on the Rights of Indigenous Peoples (Hart Publishing Ltd, 2011) 207.

[29] Law Council of Australia, Background Paper 'Policy Statement on Indigenous Australians and the Legal Profession' (February 2010) 6.

[30] Articles 1 (2), 1 (3), 55 and 56 of the UN Charter.

as reparation, redress and remedies.[31] Lorie Graham and Siegfried Wiessner provide the following explanation:

> [the] UNDRIP is a solemn, comprehensive and authoritative response of the international community of States to the claims of indigenous peoples, with which maximum compliance is expected. Some of the rights stated therein may already form part of customary international law, others may become fons et origo of later-emerging customary international law. Scholarly analyses of State practice and opinion juris have concluded that indigenous peoples are entitled to maintain and develop their distinct cultural identity, their spirituality, their language, and their traditional ways of life; that they hold the right to political, economic and social self-determination, including a wide range of autonomy and that they have a right to the lands they have traditionally owned or otherwise occupied and used.[32]

32. Customary international law, as a source of international law can emerge when a significant number of states hold common agreement with respect to a norm: the content and compliance. To meet the requirements of customary international law as set down by the International Court of Justice evidence is required of widespread state practice in addition to opinio juris which translates as the belief by states that such practice is required by law.[33] Once the state practice and belief is established, the custom can crystallise into binding international law, if such acts

[31] International Law Association, Rights of Indigenous Peoples (2012) 43.
[32] Lorie M. Graham and Siegfried Wiessner, 'Indigenous Sovereignty, Culture and International Human Rights Law Resistance' The South Atlantic Quarterly (2009) 110 (2), 405.
[33] North Sea Continental Shelf (Federal Republic of Germany v Denmark, Federal Republic of Germany v Netherlands) [1969] 169 ICJ Rep 3.

amount to settled practice. While the test is "notoriously difficult to achieve"[34] according to the Special Rapporteur, "[*i*]*t cannot be much disputed that at least some of the core provisions of the Declaration, with their grounding in well-established human rights principles, possess these characteristics and thus reflect customary international law*".[35] This is supported by the International Law Association:

> even though it cannot be maintained that UNDRIP as a whole can be considered as an expression of customary international law, some of its key provisions can reasonably be regarded as corresponding to established principles of general international law, therefore implying the existence of equivalent and parallel international obligations to which States are bound to comply with.

33. In addition the International Law Association concluded in its report on the UNDRIP that the unequivocal judicial and para-judicial practice of treaty bodies, as well as the pertinent state practice at both the domestic and international level, unequivocally show that a general opinio iuris as well as consuetudo exists within the international community according to which certain basic prerogatives that are essential in order to safeguard the identity and basic rights of indigenous peoples are today crystallized in the realm of customary international law.

Peremptory norms of international law

34. The UNDRIP also reflects jus cogens or peremptory norms of international law. Peremptory norms are universal norms from which no derogation is permitted; even a contrary treaty provision. Peremptory norms include freedom from genocide and the international norms

[34] Megan Davis. 'To bind or not to bind: The United Nations declaration on the rights of indigenous peoples five years on' (2013) 19 *Australian International Law Journal* 17-48.

[35] Rights of indigenous peoples Note by the Secretary-General A/68/317.

prohibiting racial discrimination. In addition the right to self-determination is viewed by many as a peremptory norm.

Land, territories and resources

35. In relation to customary international law, one of the areas that commentators and lawyers agree is a distinct body of developing customary international law is land, territories and resources. According to the International Law Association the state practice with respect to Indigenous land rights 'has developed both at the legislative (including constitutional) and jurisdictional level'.[36] Since the adoption of the UNDRIP, Professors Anaya and Wiessner - based on a global study of state practice with respect to Indigenous land - have argued a distinct body of customary law that accords with the Indigenous right to 'demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used'.[37] This customary norm was referred to in the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. In this decision the Inter-American Commission on Human Rights had asserted that, "there is an international customary international law norm which affirms the rights of indigenous peoples to their traditional lands" and this was not refuted by Nicaragua, 'therefore acquiescing with the assumption that indigenous land rights are protected by customary international law'.[38]

36. In addition, the International Law Association has identified jurisprudence emanating from the UN treaty bodies in relation to lands, territories and resources including the HRC stressing

[36] International Law Association, *Rights of Indigenous Peoples* (2012).
[37] S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment' Jurist (2007) available at: http://www.law.arizona.edu/news/Press/Anaya100307.pdf.
[38] International Law Association, *Rights of Indigenous Peoples* (2012).

the obligation of States parties to the ICCPR to "provide an effective restitution of ancestral lands" to indigenous peoples[39]; the CERD proclaiming an obligation for the States parties to the International Convention against All Forms of Racial Discrimination to "to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories".[40]

37. On this point the International Law Association report found that in recent times a significant number of member states have developed reparation policies aimed at redressing indigenous peoples for the lands they have been deprived of.[41] The ILA has found this practice has emerged from: Argentina, Australia, Bangladesh, Belize, Bolivia, Botswana, Brazil, Cambodia, Canada, Chile, Colombia, Costa Rica, Ecuador, European Union, India, Japan, Laos, Malaysia, Mexico, New Zealand, Nicaragua, Norway, Paraguay, Peru, Philippines, South Africa, Taiwan, United States of America and Venezuela.[42]

IV. Process for the Development of an Optional Protocol on UNDRIP in relation to lands, territories and resources

38. Disputes between member states, third parties and Indigenous peoples over lands, territories and resources have and continue to be the subject of protracted and costly litigation. Yet the PFII

[39] International Law Association, Rights of Indigenous Peoples (2010) 45; See also, *Report of the United Nations High Commissioner for Human Rights on indigenous issues*, UN Doc. A/HRC/4/77 of 6 March 2007, para. 8.
[40] UN Doc, HR1/GEN/1/Rev.7, General Recommendation XXIII (1997), *The Rights of Indigenous Peoples*, para 5.
[41] International Law Association, *Rights of Indigenous Peoples* (2010) 44-45.
[42] International Law Association, *Rights of Indigenous Peoples* (2010) 42.

has previously emphasised the role the UNDRIP can play in shifting the dynamics of disputes between Indigenous peoples and member states:

> In cases where negotiations with the State did not succeed, the Declaration could be a major factor in litigation for rights or in complaints brought before the human rights treaty bodies. The Declaration could also help to shift the dynamics of disputes so that the burden of proof was not always placed on indigenous peoples, but rather on States. Participants referred to examples where the Declaration had already been effectively used in dialogue between indigenous peoples and the State.

39. The role that the UNDRIP can play in dialogue between Indigenous peoples and states underpins the impetus for the development of an optional or voluntary protocol. Therefore it is important that the elements of such an agreement are carefully considered. We consider that an Optional Protocol for the UNDRIP should be:

A) Voluntary;

B) confined to UNDRIP provisions pertaining to lands territories and resources;

C) Negotiated through extensive dialogue between Indigenous peoples and nation-state members;

D) Composition: independent human rights experts;

E) Process: Agreement in principle.

A. Voluntary

40. In order for any such mechanism to be effective and develop satisfactory and lasting solutions it must develop incrementally. We suggest that the UNDRIP mechanism is optional or voluntary and should not compel states to engage. Cooperation and partnership should define the work of the mechanism as this reflects the spirit of the UNDRIP. The mechanism would provide an informal, voluntary process or pathway for parties to resolve disagreements in a cooperative environment to reach mutually acceptable resolution. The outcomes should ultimately ensure implementation of the UNDRIP standards and further protect and promote the rights of Indigenous peoples. This approach gives participants greater control over the outcomes and is more likely to lead to successful and sustainable solutions. However, such a voluntary mechanism cannot serve as a way for states to avoid being monitored by existing international or regional human rights bodies and mechanisms or domestic courts. Rather, a voluntary Optional Protocol should invite states to act in good faith and to engage at a higher level of commitment and to raise standards on the basis of mutually acceptable resolution.

41. It would be useful to have both a communications and an inquiries procedure for the UNDRIP mechanism. The inquiries aspect of the mechanism could invite a more pro-active process that would prompt attention and eventually dialogue/negotiations by parties concerned and not a punitive approach by Committee members. Once a state has ‘voluntarily’ submitted to the mechanism, the procedure would be one that is a trigger for dialogue and negotiation.

B. Confined to UNDRIP provisions pertaining to lands, territories and resources

42. There is potential to confine these initial, first voluntary measures to the issues related to lands, territories, and resources. This is because these are the provisions that seemingly trigger

the most difficult matters to resolve between states, indigenous peoples and third parties. The proliferation in litigation and jurisprudence internationally over the past decade on the lands, territories and resources cluster informs the importance and urgency of such an approach.[43] The reports of the UN Special Rapporteur on the Rights of Indigenous Peoples illustrating the significant struggles of Indigenous peoples around the world in relation to their lands, territories and resources provides cogent evidence of the pressing need for a mechanism that encourages negotiation and dialogue between parties. The committee could monitor and provide expert advice on established principles and developing norms. For example, there is a lot of interest in free, prior and informed consent (FPIC) particularly from the Business sector. Such a body could be informed by the "Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, which was endorsed by the Human Rights Council.[44] The option for states, indigenous peoples and third parties to discuss the content and weight of FPIC could provide some coherency to its meaning based on the important work of the UN Special Rapporteur on the Rights of Indigenous Peoples in elucidating the procedural aspect of FPIC (based on comprehensive consultations with stakeholders) as well as potentially avoid costly litigation.

[43] The Hague Conference Report, Committee on Rights of Indigenous Peoples, 2010, pp 20-24, at http://www.ila-hq.org/en/committees/index.cfm/cid/1024; Sofia Conference Report, Committee on Rights of Indigenous Peoples, 2012, pp 23-28, at http://www.ila-hq.org/en/committees/index.cfm/cid/1024. Both reports discuss the proliferation of both litigation and jurisprudence specifically concerning Indigenous land rights. See, eg, Case of the Kichwa Indigenous People of Sarayaku v Ecuador (Merits and Reparations), (Inter-American Court of Human Rights, Ser C, No 245, 27 June 2012). Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Merits) (African Commission on Human and People's Rights, Comm 276/2003,25 November 2009) [227].

[44] Report of the Special Representative of the Secretary- General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework A/HRC/17/31.

43. It must be acknowledged that in relation to FPIC, the UNDRIP has been explicitly addressed by the UN Global Compact and the Working Group on the issue of human rights and transnational corporations and other business enterprises. Furthermore, special rapporteurs and independent experts continue to address FPIC in the context of the UNDRIP, including the UN human rights treaty bodies, regional human rights mechanisms, the Permanent Forum and the EMRIP. Therefore, an Optional Protocol and mechanism associated with the UNDRIP could also be informed or guided by such interpretations in favor of protecting and promoting the rights of indigenous peoples. Establishing an Optional Protocol based on lands, territories and resources provisions can be considered a starting point to be expanded to the whole of the Declaration in the future. Again, with the understanding of the inter-related, inter-dependent, indivisible and inter-connected nature of human rights, thereby ensuring the interpretation of these fundamental provisions in the context of the whole of the UNDRIP, other international human rights law, and relevant domestic law.

C. Negotiated through extensive dialogue between Indigenous peoples and member states

44. Negotiation of the mechanism must occur through extensive dialogue between indigenous peoples and member states. This could be done through a series of expert meetings, as a human rights working group or coordinated by the three mechanisms, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), the Special Rapporteur on the Rights of Indigenous Peoples and the UNPFII. Dialogue and negotiation between the two parties is essential to ensure that the mechanism has legitimacy. Importantly indigenous peoples' participation is a way of realizing the right to self-determination and the process would trigger all necessary elements of

FPIC. In addition, indigenous peoples and states are more likely to take seriously the work of the mechanism if they have had an equal role in its development; as occurred with the UNDRIP.

D. Composition of such a mechanism

45. The composition of the mechanism should involve a pool of independent international human rights law experts who are versed/skilled/educated/experienced in Indigenous cultural contexts. Members should have demonstrated expertise in subject areas of the UNDRIP. Members of this pool could be called upon or appointed, in collaboration with the Indigenous peoples and the relevant state concerned, and then be dispatched to review on basis of a communication or inquiry procedure. The position would require any member to be ready and willing to be dispatched to a member state if necessary. The suggested composition of such a mechanism promotes agility, integrity, and top drawer international legal expertise. Finally it is our belief that as beneficiaries of the rights contained within the UNDRIP indigenous peoples should have significant weight in collaborating with states on the selection of such experts, in the spirit of collaboration that was embedded in the Declaration drafting process.[45]

E. Agreement in principle

[45] One such precedence was the drafting process of the UNDRIP itself, wherein Indigenous peoples effectively changed the rules of the UN by insisting and successfully securing their direct role in the entire standard-setting process, including at some stages, Indigenous co-chairs of key sessions of drafting. This dynamic was supported by UN member states on the basis that Indigenous peoples were the ultimate beneficiaries of the UNDRIP. Furthermore, in relation to Indigenous peoples' rights to lands, territories and resources, historical injustices, dispossession, and denial of land rights squarely places the burden upon member states to rectify these conditions. See generally K. McNeil, "The Onus of Proof of Aboriginal Title", 37 Osgoode Hall L.J. (1999) at 775, where the author argues that indigenous peoples should be able to rely on present or past possession to raise a presumption of Aboriginal title, and so shift the burden onto the Crown in proving its own title.

46. Finally, it would be highly constructive to develop an "agreement in principle" that reinforces the rights of indigenous peoples so that there is agreement upon fundamental principles that will guide discussions or negotiations about a UNDRIP Optional Protocol. In this way, all parties will have a clear understanding and basic ground rules throughout the design or creation of this much needed mechanism. Such an agreement in principle may include recognition of the UNDRIP and its normative weight; principles of equality and non-discrimination; the right to self-determination of Indigenous peoples will be given full effect in relation to their direct engagement in the negotiations; that the intent of the Optional Protocol is for the promotion and protection of the rights of indigenous peoples; recognition of the need for all parties to act in good faith; inter-related nature of the UNDRIP standards; a suggested time frame for completion of discussion, dialogue or negotiation concerning the Optional Protocol; and financial support to ensure indigenous peoples' direct engagement in such discussions.

V. Conclusion

Urgency of a Mechanism Implementation

47. This study was written in response to a recommendation at the 2013 meeting for an Optional Protocol to the United Nations Declaration on the Rights of Indigenous Peoples, focusing on a potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of indigenous peoples' rights to lands, territories and resources at the domestic level. This recommendation follows many years of discussion about the need for a voluntary or optional mechanism to monitor the implementation of the UNDRIP. This study has already highlighted the concerns of the United Nations about the lack of comprehensive

national political and legal initiatives aimed at upholding the minimum standards of the UNDRIP. In particular the 2013 report of the United Nations Special Rapporteur on the Rights of Indigenous Peoples to the Human Rights Council emphasized his grave concern for the "debilitating" actions of member states in underplaying or minimizing the weight and content of the UNDRIP.

Recommendations:

48. To have a voluntary/optional mechanism to serve as a complaint mechanism aimed at negotiation and dialogue underpinned by the principle of partnership as enshrined in the UNDRIP.

- The mechanism is voluntary at the request of member states (including third parties) and indigenous peoples concerned.
- The mechanism is confined to UNDRIP provisions and those conflicts or contentious issues specifically pertaining to lands territories and resources.
- The mechanism is negotiated through extensive dialogue between indigenous peoples and member states on mutually agreed terms.
- The mechanism to be composed of key international lawyers experienced in international law and Indigenous human rights including the UNDRIP, selected by indigenous peoples and states in collaboration. These members are non-remunerated (with the exception of expenses), easily accessible and willing to be "dispatched".