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Main Achievements and Challenges in the Implementation of the UNDRIP, and a Proposal for a Strategic, Programmatic Approach for Accelerated Implementation of the UNDRIP

Introductory remarks

When I received an invitation to participate in this Expert Group Meeting (EGM) and present a paper on best practices and challenges in the implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and the role of the three UN mechanisms in that regard, I was very grateful for this opportunity to - hopefully - make a useful contribution.

My perspective for writing this paper will be the local community and national level, because that is where Indigenous Peoples are feeling the day-to-day threats and challenges of non-implementation of the UNDRIP, and because that is where my own experience is rooted. In other words, how can our communities see and feel the difference of the existence and effectiveness of the Declaration; how can the United Nations, including the three indigenous-specific mechanisms of the UN make a difference in the daily lives of Indigenous Peoples; how can specialized agencies at country level and States within their own countries, promote respect for and full application of the Declaration?

This paper is divided into two sections:

1. An analysis of the main achievements and challenges in the implementation of the UNDRIP;
2. Based on this analysis, a recommendation for a strategic and programmatic approach to overcoming these main challenges, with focus on the community and national level, including a short potential outline of such a programme.

1. Analysis of the main achievements and challenges in the implementation of the UNDRIP

This section will focus on the (1) favorable factors and (2) challenges in Central and South America and the Caribbean. However, this analysis may be useful for other regions to compare and learn from and/or to identify relevant strategic entry-points. Also, the challenges, threats and obstacles that Indigenous Peoples are facing, are very similar worldwide.

1.1. Favorable factors

The Central and South America and Caribbean region stands out from other global geopolitical regions with regard to standards on Indigenous Peoples. The Latin-American probably in a relatively positive manner; the Caribbean region much less so. Some reasons for that are:

- In various Latin-American countries, Indigenous Peoples and persons from mixed descent (including *mestizos* and *campesinos*) were/are a not-so-small minority of the total

population and therefore had/have some, or substantial, political power and influence on national policies, even if only by their weight (number of votes) during elections time.

- Indigenous Peoples in the Latin-American and Caribbean region have suffered extensive degrees of genocide, ethnocide, slavery, assimilation and other forms threatening their mere existence. Post-colonial and contemporary governments in the Latin-American region have recognized this and have been more willing to instate legal protective measures, even if only from a perspective of protection and not because of the concept of Indigenous Peoples' (collective) rights. Indigenous Peoples in the Caribbean region however, were made almost or even completely extinct from their ancestral territories during colonial times, and the course of history has been rather different there, namely very little to no protection of Indigenous Peoples in the Caribbean region.
- Indigenous Peoples were (and are) ethnically, culturally distinct segments of society, and unlike other regions in the world, in Latin-America there have not been much fundamental debates on who are indigenous and who not. Indigenous peoples' identity has therefore remained relatively strong, even if not always equally outspoken. In Caribbean countries, this evolved differently, however.
- The legislation of Latin-American countries is generally different from that of other post-colonial (and especially commonwealth) countries, conceptually and factually. That has probably also made it easier to incorporate standards on Indigenous Peoples. Many Caribbean countries, however, still have common law legislations and are much more reluctant to incorporate legal standards on Indigenous Peoples.
- Indigenous Peoples in the Latin-America region have "enjoyed" early and much attention from missionaries, anthropologists and environmentalists, among others. To varying extents, Indigenous Peoples have been effective in reshaping and redirecting this attention into constructive and strategic partnerships that have supported the struggle towards recognition of, and respect for Indigenous Peoples' rights. Again, this has not been the case in Caribbean countries where almost the contrary happened.
- Latin-American countries have generally had more revolutionary, decolonization-oriented and socialist governments, also thanks to revolutionary movements in these countries. The policies of these governments were favorable towards decolonization thinking, also for Indigenous Peoples.
- Regional solidarity between governments but also example-setting within the Latin-American region have been relatively strong, and peer-pressure is relatively strong, also with regard to setting standards for Indigenous Peoples. So countries that would, on their own, not think of setting certain standards, felt obliged to "follow suit".
- These factors, in synergy, have made that many Latin-American countries have had an early, positive attitude towards ILO Convention 169 and therefore ratified it.
- The existence of a regional human rights' mechanism, composed of the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IA-Court) as autonomous organs of the Organization of American States (OAS), staffed predominantly by professionals and judges who came from the abovementioned progressive environments in their respective Latin-American countries, has been a very important catalyst for contemporary standard-setting on Indigenous Peoples' rights. Due to the often-volatile political climate in Latin-America, human rights in general have

always been a high-profile topic, and the opinions, recommendations and judgments from this mechanism, Indigenous Peoples-related or not, have consistently gained broad public attention, leading to broad public awareness on human rights.

- The OAS also has, since 1990, a special rapporteurship on the rights of Indigenous Peoples¹. In June 2016, the OAS also adopted, after negotiations during more than 17 years, the American Declaration on the Rights of Indigenous Peoples².
- With regard to Indigenous Peoples, the IA-Court has taken relatively progressive decisions on Indigenous Peoples' rights, thus setting relatively high standards for the region. Notably is the explicit mentioning of the UNDRIP as a benchmark for reaching its decisions, among others in the Case of the Kaliña and Lokono Peoples v. Suriname (November 2015).³ The number of cases in this Court involving Indigenous Peoples' rights is in itself significant, and the fact that many countries in the region now have a judgment "against them" to recognize Indigenous Peoples' rights, helps to put this issue on their agenda.
- More recently, however, the IACHR and IA-Court have experienced fairly outspoken criticism of governments on their Indigenous Peoples'-related recommendations and decisions, as being "too progressive" and "against national interest". There has even been mentioning by Latin-American leaders of the "need to review the mandate" and "restructuring" of the regional human rights bodies.
- Again in deviation of Latin-American countries, very few Caribbean countries have accepted the jurisdiction of the IA-Court, even though they are member of the OAS. Instead, there exists a Caribbean Court of Justice, which has so far not had many Indigenous Peoples-related cases. In "The Maya Leaders Alliance and Others v. The Attorney General of Belize" case this court affirmed the rights of the Maya indigenous communities over their traditional lands in Belize.

Another significant characteristic of the Latin-American region is with the Indigenous Peoples themselves, briefly itemized as follows:

- A rather long-existing, high Indigenous Peoples' organizational level, national and regional
- Early awareness and consistent demand for their rights, within the abovementioned environment
- Core support (i.e. support for core expenses such as salaries, rent and transport, and not only for specific projects) to Indigenous Peoples' organizations by international donors
- Lobby and advocacy, as well as outreach and awareness among Indigenous Peoples, have therefore also been relatively extensive
- Utilization of legal means and mechanisms to demand adherence to Indigenous Peoples' rights standards, in national and regional courts

¹ <http://www.oas.org/en/iachr/indigenous/mandate/Functions.asp>

² http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-075/16

³ http://www.corteidh.or.cr/docs/casos/articulos/seriec_309_ing.pdf

- And, as a significant best practice, utilizing the UNDRIP not simply as a “non-binding declaration” but as an actual standard-setting instrument, similar to recent jurisprudence of the Inter-American Court of Human Rights.

In summary, the (legal) environment for full implementation of the UNDRIP is relatively supportive in Latin America; much less so in the Caribbean region. However, actual implementation is still far away for many Indigenous Peoples and communities. There are substantial challenges, and the threats to the rights, lives and interests of Indigenous Peoples in the Latin America and Caribbean region remain unabated.

1.2. Challenges and obstacles to UNDRIP implementation

Against this panorama of a favorable environment, what are some of the practical reasons that the UNDRIP is still far from being fully implemented, probably not only in the Latin-American and Caribbean region but globally?

Political will

Governments and legislators, as the main duty-bearers to implement and enforce international standards including the UNDRIP at national level, have to deal with a range of often conflicting rights and interests. Indigenous peoples worldwide have probably all heard similar arguments and misconceptions why favorable legislation has not (yet) been made or adapted:

- National interest goes first; Indigenous Peoples’ interest cannot prevail over that
- Investments and business interests will suffer from recognition of Indigenous Peoples’ rights
- The majority population will not allow “extra rights” for Indigenous Peoples
- Other ethnic groups will also want similar rights
- Collective rights do not fit within our legislative system
- Collective rights go against individual rights
- There will be too many difficulties if these rights are recognized (e.g. legal conflicts with existing title or concession owners, law enforcement and governance problems if indigenous territories would have autonomy, etc.)
- You (Indigenous Peoples) are internally divided and your proposals are not the wish of the whole IP population
- There are other pressing problems and Indigenous Peoples’ rights are not a priority.

In addition, Indigenous Peoples in some regions and countries also have the tough challenge of dealing with the unwillingness of some governments to even recognize their existence as Indigenous Peoples, rather than only as a minority or ethnic group or local community or disadvantaged group. Some governments do not even want to recognize the existence of any collectivity at all.

Within the context of this short paper it is impossible to provide the counterarguments to all these (often pseudo or untrue) arguments. Suffice to say that if there would be real political will, none of these and other arguments would be unsurpassable, and pragmatic, just and legally sound models could readily be found through a respectful dialogue with Indigenous Peoples.

Power, money and conflicting interests

In many countries, ownership over land and natural resources means having political and economic power, particularly in countries where land and/or (subsoil) natural resources are state property. Having the exclusive authority to issuing land or land use titles is a very sensitive but powerful prerogative. Surrendering, transferring or even sharing such power, or making it subject to Indigenous Peoples' free, prior and informed consent (FPIC), is not something that officials (and their political parties) with such interests want to do out of their free choice, and they will resort to excuses as mentioned above. There may also be conflicting interests of government officials who have personal stakes in land and/or businesses, and do not want to their interests to be threatened by Indigenous Peoples as rights-holders. Of course, these are hopefully only very few cases and this is not to say that all governments are corrupt or that all ruling political parties and their officials have hidden interests.

Capacity for effective advocacy and exerting political pressure

Changes in policy and legislation that are not really or readily desired by ruling governments often need to be demanded, through effective advocacy and pressure. There are of course many possible strategies for such advocacy and pressure, ranging from soft diplomacy to outright protests. The limited capacity of Indigenous Peoples to design and implement such strategies can be a crucial obstacle to effectively achieve policy and legislative changes. "Capacity" should be interpreted broadly, and can include:

- financial resources
- human resources
- access to information (factual information e.g. on legislative options but also examples of appropriate strategies and lessons-learned from other Indigenous Peoples)
- opportunities to strategize internally (especially involving all relevant actors/communities/organizations)
- possibilities to implement the advocacy strategy in a consistent manner and not in a piecemeal fashion depending on available project financing
- strategic, inspiring and visionary leadership
- motivated workers within communities
- alignment of the strategy throughout the indigenous movement so that "all noses point in one direction" and there is no opportunity for divide-and-rule tactics from opponents
- sufficient outreach and sensitization of the general population to sympathize and ideally support Indigenous Peoples, and establishing strategic partnerships to this end with other movements and organizations. This is particularly important in cases where Indigenous

Peoples are only a small percentage of the population and do need strategic partners if they alone cannot achieve the necessary “critical mass”.

These are just some of the many aspects of the needed capacity to effectively advocate and exert pressure, with many variations depending on the specific circumstances.

Local community capacity – information and awareness

It merits to stress that “capacity” as referred to above, must also exist at the very local community level, because that is where the threats are felt and dealt with on a day-to-day basis; it is the local communities that have to deal with demanding, manipulating, misleading, intrusive or even abusive or aggressive individuals, organizations (NGOs and others), companies, governments or even other forces (e.g. drug gangs or guerrilla groups); it is within their territories that activities are undertaken that destroy their environment and future, and violate Indigenous Peoples’ rights. All of the abovementioned aspects of strengthening capacity are just as applicable for indigenous communities, but particular attention is needed for the aspect of access to information and the need for awareness and understanding of communities and their leaders of their rights. They are often the first ones who must demand compliance with the UNDRIP and other standards.

However, they must have sufficient access to information, and know that they have and may demand these rights, and that they are not just asking for favors. An often-heard complaint, justified or not, is that what happens at international level, goes unnoticed and without much beneficial impact for the local level. People who are familiar with these (international) processes of course know better, but at community level there simply are these complaints.

Fact is, information and awareness to local communities need to be improved. That is a challenge in itself, because there are many communities, many languages, logistic and financial issues, etc. Again, strategic, concerted approaches are necessary, because letting it flow on its own or having only incidental or isolated activities may take too much precious time and may not deliver the desired results. Private interests are much faster and can overtake our communities if no timely action is taken.

Strong and visionary leadership

Although briefly mentioned under the broad umbrella of “capacity”, some words may also be useful on the issue of strong and visionary Indigenous Peoples’ leadership. Indigenous Peoples often deal with dual or even multiple governance systems: the traditional indigenous authorities, departmental and/or municipal decentralized authorities, and central State’s authorities; sometimes also other authorities such as political parties and churches or even illegal structures such as drug gangs that have informal control over certain regions. Although the respective competencies and authority of each of these governance systems may be well-known by the Indigenous Peoples, the hierarchy or mutual relations are often not formalized, leading to confusion or even conflicts, therewith delaying and confusing processes of Indigenous Peoples’ self-determination.

In some cases, there may be active attempts of influencing, infiltration, corrupting or co-opting indigenous leaders, to weaken the Indigenous Peoples' movement. There are even various examples of intimidation ranging to outright murder of indigenous leaders. These threats are compounding the picture of challenges to the implementation of the UNDRIP.

Yet, we are in continuous dire need of these strong and visionary leaders who are well-rooted in their indigenous worldview, culture and traditions, to stand up and tirelessly defend Indigenous Peoples' rights, inspire, educate and motivate our peoples and communities, and lead the way. At the same time, we need well-informed peoples and communities to support and empower the leaders and keep them on the right path. Elders, spiritual and cultural leaders and guides, must not be forgotten in this regard.

Legal processes

Indigenous Peoples are increasingly confronted with, but also utilizing, legal processes to determine who's right or not. Going the legal route to demand implementation of Indigenous Peoples' rights standards, including the demanding of UNDRIP or ILO 169 application, is of course a tricky strategy and has substantive risks but also considerable opportunities. The limited capacity, in this case legal capacity to fully build and bring forward or defend a court case, can again be an important challenge, particularly for small communities who are confronted with big company interests. External legal assistance is therefore often necessary and welcome. But these processes take a long time, are very costly and need to be equally guided by indigenous visions and perspectives and not only "western" perspectives on who is right and for which reasons. Effectively bringing international legal standards into play in a domestic or even municipal legal case can be a challenge for a locally trained legal professional. Bringing cases all the way up to national or even regional human rights' mechanisms requires great determination, perseverance and resources, but also trust and unwavering support and solidarity from the involved communities. Opponents will be fast to utilize divide-and-rule tactics if they notice any internal discord.

Much more can be said about legal processes, but within the scope of this paper only a few remarks on commonly encountered challenges have been made.

- **Donor agendas**

Many indigenous communities and organizations necessarily have to rely on donor assistance, whether from government projects, NGOs, international development assistance, thematic funds e.g. for biodiversity or climate change, etc. These donors all have their own agenda, thematic areas, preferences, rules and guidelines, reporting requirements, etc. Indigenous communities and organizations have to deal with those, and also with the associated risks. Some of those risks are:

- Too much following donor agendas and topics instead of self-defined priorities and strategies
- Pressure to use donor concepts and methods which may or may not be appropriate for Indigenous Peoples
- “Sequestration” or diversion of already scarce indigenous human resources to work on (external) projects and negligence of own priorities
- Undue pressure from donors on the recipients to accept their (maybe unrelated) proposals, or consent of indigenous organizations and communities out of fear to lose the financial support
- Accusations of corruption, misappropriation, incorrect (financial) reporting, etc.

International pressure

A next big challenge is the lack of pressure for actual implementation and proactive monitoring of the UNDRIP and other standards by the international community. There are of course the conventional built-in, treaty-specific monitoring mechanisms e.g. under the Human Rights Council. But pressure is also very necessary at local and country level, regional organizational level (e.g. UNASUR or OAS in the context of the Americas), and in bilateral or multilateral relations, because that is what national governments are much more sensitive to: peer pressure, pressure from (trade or donor) countries and pressure from international financial institutions where they get grants or borrow money.

But right there it is very silent on Indigenous Peoples’ standards! Even though some of these institutions and donor countries have certain policies and/or guidelines and are signatories to conventions and declarations that contain standards for Indigenous Peoples’ rights, they often do not insist on their full implementation and/or insufficiently monitor compliance with those. Similarly, peer countries or regional intergovernmental organizations do not seem willing to include Indigenous Peoples’ issues in their bilateral or regional meetings or general diplomatic relations. In many international forums and processes there are active efforts to keep indigenous issues out of sight, dismissing those as “not relevant for this forum”. Even binding judgments related to Indigenous Peoples, for example of the Inter-American Court of Human Rights, are seemingly ignored (compare that to a trade-related judgment of some trade regulating body...).

In other words, while the international community sets international standards, they do not equally enforce and adhere to all standards, particularly at country level and in their bilateral relations. The accountability of donors therefore needs to be improved, another issue that has been flagged for a long time already.

Media strategy

The media, be it at local, national, regional or international level, are a crucial factor for any policy process and particularly for sensitive processes such as Indigenous Peoples’ rights. The media can be instrumental, among others for influencing public opinion, increasing pressure on policy makers, increasing transparency and accountability, and, in general, giving Indigenous

Peoples a voice, especially if they are not able or allowed to participate. Taxpayers, company shareholders, people who give money to organizations for “development projects” and other actors who should be demanding accountability of official development assistance (ODA) donors and international financing institutions (IFIs), don’t even know the impacts of projects and (lack of) policies of the institutions that they support. The insufficiently utilized role of the media to educating them is another challenge. The media themselves, at the same time, are often not sensitized or interested. The media can also trigger adverse reactions, of course. Careful but especially strategic partnerships with media actors is therefore crucial in the struggle towards implementation of the UNDRIP and other Indigenous Peoples’-related standards.

2. Recommending a strategic and programmatic approach, with focus on the community and national level

Writing a critical analysis is a relatively easy task, and much if not all of the above challenges have been already mentioned earlier in other documents and forums, in different forms and orders and from different perspectives. Hopefully, however, the above analysis may still be deemed useful, even for simply having a (incomplete) listing with annotations, or for having a list of issues some of which one may not have considered as such earlier, or for triggering even more thought and action. The following outline proposal similarly does not pretend to provide an immediate solution. To the best, it provides some input towards a process to define solutions.

Building on the call of the WCIP for accelerated, planned action, the basic premise of this outline is, that a strategic and programmatic (i.e. through a specifically designed programme, made up of interrelated projects) approach that is consistently implemented in a coordinated manner, can make a substantive difference. Taking into account that it is not only the “what” that needs to be done, but also (especially) the “how”.

2.1. A programmatic approach – the “how”

The recommendation is above all to take a strategic, programmatic approach: designing and implementing a strategic programme with objectives, outcomes, outputs, timelines, logframe, budget, management arrangements, and monitoring and evaluation mechanisms, among others. Anticipated advantages of such an approach include:

- it concretizes the many good proposals into one action instead of isolated activities, with corresponding targets and timeline
- it promotes joint planning, in this case of the three indigenous-specific UN mechanisms
- it promotes joint and coordinated implementation, thus increasing the impacts
- it supports results-oriented actions
- it may clarify roles, responsibilities and contributions of the involved implementing agencies which may come out during the programme’s implementation, and will thus also serve as a learning experience

- it may be easier to fundraise for, although it will of course also be much more expensive, as an integral programme instead of small projects.

This is not to say that the individual activities and programmes of the three mechanisms should drastically change or cease to be individual. The difference would be that each one's projects, insofar relevant for the overall programme, are "fitted into" a programmatic framework with joint objectives and targets. Separate projects and activities under each one's mandate continue as usual. The System-Wide Action Plan on achieving the UNDRIP (SWAP) that was developed as a result of the 2014 World Conference on Indigenous Peoples can be used as the broader UN system-wide framework in which the three indigenous-specific mechanisms will have their own strategic programme of action.

For example, the objective of joint monitoring of UNDRIP implementation could be one of the components within such a joint programme, with a clear target of 3 countries per year. Information gathered through the PFII's usual work (incl. UN, State and Indigenous Peoples' reports, and existing recommendations from the recommendation database) feed into the EMRIP's consideration of those countries, plus country visits by the SRIP. There should be targeted interaction with the Indigenous Peoples' organizations of those countries, supporting them for the relevant country-level information-gathering, including of disaggregated national data and indicators on Indigenous Peoples⁴, and awareness, including media engagement. Funding for those national actions by Indigenous Peoples' organizations could come from UN agencies at country level, who should commit to supporting this programme as part of the implementation of the SWAP (doing so by reserving earmarked funds for that, in their annual work plans). The reports on these three countries would be published widely, including through friendly media contacts in influential mainstream media houses (including those within these three countries).

This is just a quick example of only one component, to illustrate how such a programme could be designed and implemented as a strategic and coordinated mechanism. There will be many remarks to be made, about the practicality, funding, need for flexibility, political considerations, etc. etc. Those can all be discussed in the process of designing a programme. But the main thrust of the proposal in this current document is to take a programmatic approach in itself, by way of increasing strategic direction, coordination and impact. Only making bilateral work arrangements without an actual programme, may not be sufficiently results-oriented and operational, or can water down over time.

The "how" of taking accelerated action includes being strategic. This "strategicness" of the programme should continuously be kept in mind, among others by focusing the expected results consciously on the real challenges as identified above and by other such analyses. Also by empowering the right actors, but also targeting the right changes even if they are sensitive. The programme should be designed in such a way that the implementation itself will be an empowering process for Indigenous Peoples' organizations, utilizing strategies such as on the job

⁴ The "Indigenous Navigator" initiative of the ILO may be considered for this.

training and support (instead of using external experts). It is recommended to focus the programme on community and country level results, as in the example above.

2.2. Outline of the programme – the “what”

Following is an example of how such a joint programme of the three UN mechanisms could look like, and would need to be discussed/ revised/ expanded if this proposal would be deemed fit for follow-up. The programme would not make an actual distinction between the “what” and the “how”; those aspects will need to be intertwined continuously in every component and activity. As mentioned, the main challenges identified in the analysis above are addressed in this outline.

Overall objective: Achieving an accelerated implementation of the UNDRIP

Timeframe: 2017 – 2022

Expected outcomes:

1. The capacity of Indigenous Peoples to effectively advocate for UNDRIP implementation has been strengthened in at least 15 priority countries. The details of this component would be defined at country level, and could be incorporated into the UNDAF of those countries, with the necessary funding.
2. The general public, worldwide, is well aware of the provisions of the UNDRIP. This will require a professional media strategy (to be made as initial activity under the programme) and partnerships with major media houses, particularly those at country level.
3. A global “clearing house mechanism” for UNDRIP awareness at local indigenous community level is fully functional. Such information mechanism could be utilizing easily accessible communication channels e.g. Facebook, Whatsapp and YouTube. This will need dedicated staff in the three mechanisms who distill and process information in easy but strategic messages, including lessons-learned and examples of strategies for local communities.
4. The international human rights system will have enhanced capacities for technical advisory services and awareness raising aimed at assisting and influencing local actors to build patterns of compliance and initiatives of implementation (recommendation of Prof. James Anaya; EGM 2015)
5. The three indigenous-specific UN mechanisms have a functional compliance mechanism in place for monitoring UNDRIP implementation in at least three countries per year (see description under the example given under the heading “a programmatic approach”)
6. The three indigenous-specific UN mechanisms have a functional compliance mechanism in place for monitoring adhesion of the UNDRIP by major donor agencies and IFIs. This will also need to be developed as an initial activity under the programme, and would involve the defining of a compliance monitoring framework as well as requesting yearly reports of major donors and IFIs.

Management of the programme: The programme would be overseen by a Steering Committee composed of representatives of the three UN mechanisms, and managed by a Programme Coordinator, to be hired by the PFII Secretariat.

Monitoring and evaluation: The programme would have a monitoring and evaluation mechanism that ensures periodic, at least half-yearly, stocktaking of the achievements and adjustments where necessary; to be done by local indigenous community representatives from all global regions. The logframe, including indicators for the implementation of the programme, will be the basis for continuous monitoring and evaluation.

2.3. Next steps

If this proposal is deemed appropriate and feasible by the three UN mechanisms, a more detailed Concept Note could be made for outreach to potential donors, and proposals may also be developed for submission to relevant call for proposals of (human rights) funds and programmes.

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