The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview

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1. Background

The draft UN Declaration on the Rights of Indigenous Peoples (‘Declaration’) is the outcome of a long and laborious process which started in the 1980s. However, even before this process began, concerns over the condition of indigenous peoples worldwide had already been raised within the United Nations and its predecessor, the League of Nations.

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2 In 1949, the General Assembly recommended that the Economic and Social Council carry out a study ‘on the social problem of the aboriginal populations . . . of the American continent’, see GA Res. 275(III), 11 May 1949. Additionally, the International Labour Organization (ILO), one of the UN specialised agencies, began to focus on indigenous issues and in 1957, following a number of studies and expert meetings organised under the auspices of the ILO, the first international binding instrument regarding indigenous peoples was adopted: ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957, 328 UNTS 247. It entered into force on 2 June 1959. This convention was subsequently revised, because of its widely criticised integrationist approach, by ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, 1650 UNTS 384 (ILO Convention No. 169). However, it should be noted that although the former convention is closed to further ratifications, it is still in force for 18 States (Angola, Bangladesh, Belgium, Cuba, Dominican Republic, Egypt, El Salvador, Ghana, Guinea-Bissau, Haiti, India, Iraq, Malawi, Pakistan, Panama, Portugal, Syrian Arab Republic and Tunisia). For an analysis of the ILO’s involvement in indigenous matters, see Rodriguez-Piñero, Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989) (New York: Oxford University Press, 2005).

3 For example, the attempt made in the 1920s by the leader of the Council of the Iroquois Confederacy to have the League of Nations consider the Iroquois dispute with Canada. On this, see Anaya, Indigenous Peoples in International Law, 2nd edn (Oxford: Oxford University Press, 2004) at 57.
Despite their history of colonisation and oppression, indigenous groups have not benefited from the international regime of decolonisation. The regime was designed to benefit the population of a colonial entity as a single whole, regardless of its ethnic composition, whilst the so-called ‘blue water thesis’ prevented the regime from being applied to those indigenous communities living within the territory of independent countries.\(^4\) Instead, the plight of indigenous peoples has been dealt with from a human rights perspective with a particular focus on the discrimination suffered by those peoples.\(^5\) Unsurprisingly, a study on the problem of discrimination faced by indigenous peoples, conducted by José R. Martínez Cobo,\(^6\) was the impetus for a number of steps which led to the drafting of the Declaration. In 1982, following the publication of the initial findings of Cobo’s study, the Economic and Social Council (ECOSOC) established the Working Group on Indigenous Populations\(^7\) (WGIP) which was mandated to: (i) review developments pertaining to the human rights of indigenous peoples; and (ii) elaborate international standards to protect those rights. In fulfilling this mandate, the WGIP interpreted the second task to include the formulation of provisions to be incorporated in a future declaration on indigenous rights. Accordingly, a first draft declaration on the rights of indigenous peoples was achieved in 1993.\(^8\)

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\(^4\) The ‘blue water thesis’, incorporated in GA Res. 1541(XV), 15 December 1960, provides that for a colonial territory to be eligible to request non-self-governing status under Chapter XI of the UN Charter, the first step in the decolonisation process, it must be ‘geographically separate’ from the colonising state.


\(^7\) The WGIP, made up of five independent experts, was established pursuant to ECOSOC Res. 1982/34, 7 May 1982, and put under the supervision of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. It is worth noting the use of the word ‘populations’ instead of ‘peoples’ which reflected States’ fears about the implications potentially flowing from the definition of indigenous groups as ‘peoples’, in particular, regarding the principle of self-determination. However, the debate regarding the reference to ‘populations’ rather than ‘peoples’ has now come to an end; see ‘2005 World Summit Outcome’, 24 October 2005, A/RES/60/1 at para. 127, which consolidates recognition of the expression ‘Indigenous Peoples’. See also ‘International workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples’, 29 November 2005, E/CN.4/2005/WG.15/CRP.1.

\(^8\) This was despite ‘[a]rguments between government delegations and the indigenous [that] seemed interminable, their position statements incommensurable’. See Thornberry, Indigenous Peoples and Human Rights (Manchester: Manchester University Press, 2002) at 10.
and submitted to the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) which approved it in 1994.\textsuperscript{9} The draft was subsequently transmitted to the Commission on Human Rights for discussion. Concerns expressed by States with regard to some of the core provisions of this first draft declaration, namely those on the right to self-determination of indigenous peoples and the control over the natural resources existing in their traditional lands, meant that an agreement on the proposed text could not be reached. Rather than approving the WGIP draft, the Commission set up a Working Group on the Draft Declaration as a specific forum where negotiations between States and representatives of indigenous groups could take place.\textsuperscript{10}

The Declaration, adopted by the Human Rights Council on 29 June 2006, is the outcome of this process. The adoption of the Declaration, marking a significant turning point in UN efforts to recognise indigenous peoples’ rights, was made possible thanks to the favourable votes of 30 States,\textsuperscript{11} including several European and Latin American States and, notably, a number of African and Asian States. The significance of such a wide distribution of support for the Declaration is made apparent when compared to the table of ratifications for the main international binding instrument concerning indigenous peoples’ rights currently in force, ILO Convention No. 169, which includes European and Latin American States only.\textsuperscript{12}

Unfortunately, the process of adopting the Declaration has undergone an unexpected slow-down. The Declaration was brought before the General Assembly for its consideration and adoption at its 61st session. However, on 28 November 2006, the Third Committee of the General Assembly (Social, Humanitarian and Cultural Committee), which was charged with discussing a draft resolution containing the Declaration on the Rights of Indigenous Peoples, adopted an amendment proposed by Namibia on behalf of the African Group of States by which the General Assembly

\textsuperscript{9} Sub-Comm Res. 1994/45, 16 August 1994. This first Draft Declaration is commonly known as the ‘original draft’ or ‘Daes’s draft’ after the Chairperson-Special Rapporteur of the WGIP, Erica-Irene Daes.


\textsuperscript{12} ILO Convention No. 169 has been ratified by Argentina, Bolivia, Brazil, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Netherlands, Norway, Paraguay, Peru and Bolivarian Republic of Venezuela.
would decide ‘to defer consideration and action on the United Nations Declaration on the Rights of Indigenous Peoples to allow time for further consultations thereon’.\textsuperscript{13} This was despite the fact that the original draft resolution put before the Third Committee by the Human Rights Council had been modified—leaving the text of the Declaration unchanged—to include an explicit reference to the territorial integrity of States\textsuperscript{14} in order to accommodate the concerns expressed by some delegations. Furthermore, at the meeting of the Human Rights Council at which the Declaration had been adopted by that body, Algeria, speaking on behalf of the African Group, expressed support for the Declaration and called for States to withdraw their reservations so that the text could be adopted as it stood.\textsuperscript{15} More recently, in January 2007, the African Union Assembly adopted a Decision on the United Nations Declaration on the Rights of Indigenous Peoples,\textsuperscript{16} affirming the will to maintain a united position in the negotiations amending the Declaration and constructively work alongside other Member States of the United Nations in finding solutions to the concerns of African States.\textsuperscript{17} However, any further consultations will be limited in time as


\textsuperscript{14} Compared to the original version, the amended version of the resolution recommended by the Human Rights Council for adoption by the General Assembly (A/C.3/61/L.18/Rev.1) contains the following additional preambular paragraphs:

\begin{quote}
Guided by the purposes and principles of the Charter of the United Nations, in particular the principles of self-determination of peoples, respect for the territorial integrity of States and good faith regarding the fulfilment of the obligations assumed by States in accordance with the Charter,

Recognizing that the situation of indigenous peoples varies from country to country and region to region.
\end{quote}


\textsuperscript{17} Para. 8, ibid.
the General Assembly is ‘to conclude its consideration of the Declaration before the end of its sixty-first session’, which ends in September 2007. Moreover, so far, the text of the Declaration, as approved by the Human Rights Council, has remained unchanged.

This article aims to provide an overview of the Declaration, illustrating its rationale, object and aims in Section 2 and then moving on to describe and analyse its contents (Sections 3–6).

2. Rationale, Object and Aims

Most studies on the situation of indigenous peoples around the world show that their living conditions are generally deplorable and underscore that ‘this situation is closely related to the discrimination and other human rights abuses of which indigenous peoples are victims’. Significantly, these peoples, who account for only 5 percent of the world’s population, represent about 15 percent of the world’s poor. Moreover, as we will see later in this article, the current international race for unexplored sites in order to exploit natural resources is increasingly worsening their conditions.

Focusing on protecting the cultural distinctiveness of indigenous peoples, the Declaration is designed with current threats in mind to provide a tailored response to the plight of indigenous peoples by according them a set of basic rights, mainly framed as collective rights. Although on more than one occasion critics have objected to creating regimes for particular groups claiming that a category of ‘privileged’ citizens benefiting from ‘special’ rights is ultimately created, it is this author’s view that, on the contrary, the purposes of the Declaration are fully in accordance with the principle of equality. It may be useful to recall Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination which provides that special measures are permitted when they are taken for the purpose of ‘securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms’.

20 Article 8(2), Declaration provides a wide range of examples relating to some of the typical situations faced by indigenous peoples in their respective countries.
21 660 UNTS 195.
case of Garifuna Community of ‘Triunfo de la Cruz’ and its members v Honduras, referred to the need for 'special protection . . . for indigenous peoples and communities of African descent to enable them to exercise full and equal rights alongside the rest of the population'.

The term 'indigenous peoples' is not defined in the Declaration. However, Article 33 recognises the right of indigenous peoples to 'determine their identity or membership in accordance to their customs and traditions'. This follows the current approach adopted by most international institutions which have dropped any attempt at definition and generally rely on the so-called criterion of 'self-identification'. This development follows the difficulties met in drafting a common definition suitable to any general discussion about indigenous communities. Indeed, as highlighted by the Chairperson-Rapporteur of the WGIP, Erica-Irene Daes, the concept of indigenous peoples 'is not capable of a precise, inclusive definition which can be applied in the same manner to all regions of the world'. Furthermore, the African Commission's Working Group of Experts on Indigenous Populations/Communities has warned that a strict definition may offer governments an excuse for not recognising indigenous peoples within their territories.

However, it is clear from both statements included in the preamble and other provisions of the Declaration that it is directed towards the protection of groups displaying specific features as to their organisation, political and economic institutions, culture, beliefs, customs and language, other than those of

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22 Case 906:03, Report No. 29/06 (2006) at para. 44. See also Case 11:140, Mary and Carrie Dann v United States, Report No. 75/02 (2002); 10 IHRR 1143 (2003) at para. 126, where the Commission noted its 1972 resolution on 'Special Protection for Indigenous Populations. Action to combat racism and racial discrimination, in which it proclaimed that ''for historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of . . . states.”


dominant society, and further sharing a common experience of marginalisation and discrimination deeply rooted in historical events.\textsuperscript{26}

The Declaration aims to enhance ‘harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith’\textsuperscript{27} through a strategy based on both self-government and participation. The Declaration is understood to provide those ‘minimum standards’ necessary for the ‘survival, dignity and well-being of the indigenous peoples of the world’.\textsuperscript{28} However the inclusion of such standards in a mere declaration means that they are not legally binding on States unless they reflect customary international law. Accordingly, the Preamble presents the Declaration as a ‘standard of achievement to be pursued’.

3. Indigenous Peoples’ Rights to Self-Determination and Autonomy

The Declaration opens with the acknowledgement that ‘indigenous peoples are equal to all other peoples’\textsuperscript{29} and repeats this acknowledgement in Article 2. From this simple statement two observations can be made.

First, indigenous groups have the right to exist and to be different. In that respect, the Declaration provides that, in addition to the right to be free from any kind of discrimination, these peoples ‘shall not be subjected to any act of genocide or any act of violence’,\textsuperscript{30} and recognises that they have ‘the right not to be subjected to forced assimilation or destruction of their culture’.\textsuperscript{31}

Second, once indigenous groups are identified as ‘peoples’, they are equal to all other peoples and the principle of self-determination becomes relevant. Indeed, Article 3 confers on indigenous peoples the right of self-determination and (in language identical to common Article 1 of the UN Covenants on Human Rights) ‘by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’. It is noteworthy that the Declaration is the only instrument which makes explicit the link between indigenous groups as ‘peoples’ and the right of self-determination of peoples. Although both ILO Convention No. 169 and the Proposed American Declaration on the Rights of Indigenous Peoples employ the term ‘peoples’, they do not draw any particular conclusions from its use. On the contrary, both declare that the use of the term ‘peoples’ ‘shall not be construed as having any implications as regards the rights which may attach to the term under

\textsuperscript{26} See, in particular, paras 4, 5, 6 and 10, Preamble, Declaration.
\textsuperscript{27} Para. 18, Preamble, Declaration.
\textsuperscript{28} Article 43, Declaration [emphasis added].
\textsuperscript{29} Para. 1, Preamble, Declaration.
\textsuperscript{30} Article 7(2), Declaration.
\textsuperscript{31} Article 8(1), Declaration.
international law.\textsuperscript{32} It seems to be agreed that the concept of ‘people’ is not necessarily the whole population living in a State.\textsuperscript{33} Thus, in principle, there may be more than one ‘people’ living within the State’s territory, each entitled to exercise its right to self-determination, and the UN Human Rights Committee, in the context of the State reporting procedure under the International Covenant for Civil and Political Rights, has started considering the application of self-determination to indigenous peoples.\textsuperscript{34} It is vital therefore to clarify the extent of the self-determination provision included in Article 3 of the Declaration.

The Declaration does not provide indigenous peoples with special treatment regarding ‘external self-determination’. In light of the debates which took place during the sessions of the Working Group on the Draft Declaration and, more recently, the statements made at the Human Rights Council as well as at the Third Committee of the General Assembly, it seems evident that there is no intention to recognise, for the benefit of indigenous peoples, further hypotheses, other than those traditionally known, allowing independence and secession from existing States. Should indigenous peoples still be under conditions of colonial and alien domination or subjects of racist regimes,\textsuperscript{35} they will, of course, be entitled to the exercise of external self-determination, but beyond these cases they will not. Therefore, it was considered superfluous to insert in the Declaration a specific reference to safeguarding territorial integrity as proposed by some governmental delegations under a possible Article 45 \textsuperscript{bis}. Nevertheless, it should be mentioned that paragraph 17 of the Preamble of the Declaration clearly states that ‘nothing in this declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law’, which should give some reassurance to concerned States.

As a result, the right of self-determination that indigenous peoples may exercise has, essentially, an internal dimension. In the authoritative view of the Chairperson-Rapporteur of the WGIP, Erica-Irene Daes, indigenous peoples would have the right to freely negotiate their political status and representation in the States in which they live and that this right would rest on the consideration that ‘indigenous peoples were never part of state-building. They did not have an

\textsuperscript{32} Article 1, ILO Convention No. 169; and Article I(3), Proposed American Declaration on the Rights of Indigenous Peoples, supra n. 5. It should be noted, however, that during negotiations on the draft American Declaration Article I(3) has been removed.
\textsuperscript{33} The Supreme Court of Canada, in \textit{Reference re Secession of Quebec} (1998) 2 SCR 217 at para. 124, stated: ‘it is clear that a “people” may include only a portion of the population of an existing State’.
\textsuperscript{34} See, for example, Concluding Observations of the Human Rights Committee: Canada, 7 April 1999, CCRP/C/CAN/Add.10; Concluding Observations of the Human Rights Committee: Norway, 1 November 1999, CCRP/C/79/Add. 112; Concluding Observations of the Human Rights Committee: Brazil, 2 November 2005, CCRP/C/BRA/CO/2; and Concluding Observations of the Human Rights Committee: Canada, 27 October 2005, CCRP/C/CAN/CO/5.
\textsuperscript{35} On this see, for example, Iorns, ‘Indigenous Peoples and Self-Determination: Challenging State Sovereignty’, (1992) 24 \textit{Case Western Reserve Journal of International Law} 199 at 295, where the author cites the unpublished legal opinion of Professor Ian Brownlie.
opportunity to participate in designing the modern constitution of the states in which they live, or to share, in any meaningful way, in national decision-making. Indeed, paragraph 13 of the Preamble of the Declaration seems to confirm this analysis: ‘Recognizing that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect’. In other words, the right to self-determination in this context would imply constitutional formulae of different kinds through which States and indigenous peoples are called to accommodate the latter’s aspirations.

Against this background, stands Article 4 of the Declaration which provides 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’. However, unlike Article 31 of ‘Daes’s draft’, according to which indigenous peoples would have had the right to self-government with regard to ‘culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions’, the content and breadth of the right to self-government remain undefined in the final text. Yet, autonomy represents a practical solution—which ensures respect for indigenous peoples’ rights while being in compliance with the principle of territorial integrity—whose concrete realisation rests on a case-by-case assessment, as proved by the varied national experiences such as the establishment of the Sami Parliaments in the Nordic countries, the arrangement for the ‘comarca’ in Panama, the creation of the autonomous region of Nunavut in Canada and the self-governing territory of Greenland in Denmark.

Before moving on to a more in-depth analysis, it is important to highlight that autonomy is presented here as a right. This is an innovation. Autonomy has been referred to as a viable solution for the protection of the existence and identity of minorities, but, at the same time, it has been underlined that minority groups do not have a general right to autonomy and, correlatively, States have no obligation in that respect under international law. In any case, although autonomy is framed in the Declaration as a right, this does not mean that indigenous peoples

37 Article 31, Daes’s draft, supra n. 9. A similar approach is followed in Article XV, Proposed American Declaration on the Rights of Indigenous Peoples, supra n. 5.
38 Note that the UN Special Rapporteur, Jose Martinez Cobo, had already suggested the option of autonomy; see Cobo study.
can unilaterally exercise it. On the contrary, it should be grounded in negotiations and arrangements between States and indigenous peoples. The Nuuk Conclusions and Recommendations on Indigenous Autonomy and Self-Government provide that autonomy is based on ‘treaties, constitutional recognition or statutory provisions recognizing indigenous rights’. The provision on autonomy should be read in the light of the right of self-determination enshrined in Article 3 of the Declaration.

Despite the fact that there is no generally accepted definition of the concept of autonomy in international law, it could be held that autonomy consists of the devolution of a range of powers to a part of a State’s population so as to enable that population to manage its internal affairs. A distinction is generally drawn between two main forms of autonomy, that is territorial autonomy and cultural autonomy. Obviously, the first is only a feasible option in those cases where indigenous communities live in a geographically well-defined territory and constitute the majority in that area. Beyond these cases, attention is then focused on cultural autonomy, consisting of self-administration of linguistic and other cultural matters. Certain provisions of the Declaration can shed light on the content of cultural autonomy. For example, Article 14 sets out the right ‘to establish and control’ educational systems and institutions providing education in indigenous languages. Equally relevant is the right of indigenous peoples to establish their own media in their own languages (Article 16) as well as their right to traditional medicines and health practices (Article 24). Moreover, the right of indigenous peoples to determine the responsibilities of individuals to their communities has been recognised in the Declaration (Article 35).

Both of the forms of autonomy referred to above entail the recognition of autonomous indigenous institutions. A large number of indigenous groups have retained their own traditional institutions and the Declaration takes them into account in a wide range of provisions. Article 5, for example, affirms that

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44 See also Article 31(1), Declaration which provides: ‘Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures’.
indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions. Similarly, Article 20(1) provides that indigenous peoples have the right ‘to maintain and develop their political, economic and social systems or institutions’; Article 34 establishes the right to promote and maintain ‘juridical systems or customs’, provided that the latter are in accordance with international human rights standards; and Article 18 refers to the right to maintain indigenous decision-making institutions.

At this point, it should be noted that the provisions concerning autonomy do not exhaust the content of indigenous peoples’ right to self-determination. Indeed, as will be demonstrated in the following section, while making room for indigenous peoples’ self-government, the Declaration also focuses on the involvement of these peoples in the broader framework of a State.

4. Participation of Indigenous Peoples in the ‘Political, Economic, Social and Cultural Life of the State’

On the one hand, the Declaration provides for forms of allocation of power to autonomous indigenous institutions. On the other, it aims at ensuring the effective participation of indigenous peoples in the workings of the State. Participation represents the second aspect of indigenous peoples’ right to internal self-determination.

Article 5 summarises well the approach advocated in the Declaration to participation. After recognising that indigenous peoples have the right to maintain their own institutions, it further stipulates that they retain ‘their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State’. It is worth drawing attention to the expression ‘if they so choose’; by employing this formula it would appear that participation is given a secondary role in the quest for internal self-determination and thus is recognised as only an optional right.45

The Human Rights Committee has warned that the enjoyment of cultural rights on the part of indigenous peoples could require measures to ensure their effective participation in decisions affecting them.46 Similarly, the Committee on the Elimination of Racial Discrimination has called upon States to ensure that ‘members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent’.47 The Declaration includes

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46 Para. 7, Human Rights Committee General Comment No. 23: Article 27 (Rights of Minorities), 8 April 1994, HRI/GEN/1/Rev.7 at 158.
47 Para. 4(d), Committee on the Elimination of Racial Discrimination General Recommendation XXIII, supra n. 5.
a number of provisions which are in line with these recommendations. It provides that indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures (Article 18). Furthermore, Article 19 requires States to consult indigenous peoples in order to obtain their free, prior and informed consent 'before adopting and implementing legislative or administrative measures that may affect them'.

A large number of provisions concerning the issue of participation in relation to development and the exploitation of natural resources are also incorporated in the Declaration. These will be outlined in the following section.

5. Indigenous Peoples, Development, Land and Resources

As noted above, Article 3 of the Declaration stipulates that indigenous peoples should 'freely pursue their economic, social and cultural development'. In order to pursue this aim some forms of control and positive involvement of indigenous groups are required. The approach adopted in the Declaration with regard to economic matters seems to be the same dual approach described above resting, on the one hand, on forms of self-government and, on the other, on participation. For example, Article 23 affirms the right of indigenous peoples to determine and develop priorities and strategies for exercising their right to development, whilst Article 32(2) sets out the duty of States to consult and cooperate with indigenous peoples 'in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources'.

Participation is key to reconciling the interests of States in national development with respect for the rights of indigenous peoples, and conforms to the current approach taken by international development institutions when dealing with indigenous issues. In fact, these institutions have displayed a significant shift in attitude from an initial interest limited only to the mitigation of adverse effects flowing from development projects to an interest in the forms of participation available to indigenous communities affected by a development project so as to ensure that they may benefit from such a project. It should be

48 Emphasis added.
highlighted that the provisions of the Declaration will not be satisfied by mere consultation of indigenous peoples, rather there is an emphasis on the need for informed consent on the part of the indigenous communities involved.

Although these matters may be classified as economic, one should bear in mind the special meaning they have for indigenous peoples. As highlighted by the UN Special Rapporteur, José Martínez Cobo, there is a deeply spiritual relationship between indigenous peoples and their land which is ‘basic to their existence as such and to all their beliefs, customs, traditions and culture’.\textsuperscript{51} Accordingly, the Preamble of the Declaration declares that ‘control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions’.\textsuperscript{52} Moreover, Article 25 expressly affirms the right of indigenous peoples to maintain and strengthen their distinctive spiritual relationship with their lands. Consequently, the provisions on lands and resources are also inherently related to cultural autonomy. Based on the aforesaid considerations, a specific set of rules regarding indigenous peoples’ rights on lands and resources has been introduced in the Declaration. Such a set of rules is particular to legal regimes regarding indigenous peoples. Such a focus cannot be found in the regime concerning the protection of minorities; indeed, the maintenance of a culture closely linked to particular use of land and natural resources is generally referred to as one of the elements which distinguish indigenous peoples from minority groups.\textsuperscript{53}

Another reason why these matters are deemed so sensitive is that, at present, one of the major threats to the physical and cultural survival of indigenous peoples lies in the increasing focus on so-called ‘underdeveloped regions’, which overlap with indigenous areas, in order to extract natural resources, establish industrial plants and build dams and gas as well as oil pipelines.\textsuperscript{54} As stated by the Committee on the Elimination of Racial Discrimination, indigenous peoples ‘have lost their lands and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.’\textsuperscript{55}

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\textsuperscript{52} Para. 9, Preamble, Declaration.


\textsuperscript{55} Para. 3, Committee on the Elimination of Racial Discrimination General Recommendation XXIII, supra n. 5. A similar statement is made in para. 5, Preamble, Declaration.}
Articles 25–30 of the Declaration are dedicated to the protection of the rights of indigenous peoples over their traditional lands and resources. In particular, Article 26 provides indigenous peoples with a ‘right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired’. Correlatively, States are required to give legal recognition to these lands, territories and resources and this legal recognition shall be conducted with due respect to the ‘customs, traditions and land tenure systems of the indigenous peoples concerned’. However, the Declaration does not specify what are exactly the resources which indigenous peoples have the right ‘to own, use, develop and control’. Do they encompass sub-soil resources or are they rather to be understood merely as surface resources? This question was posed to the Supreme Court of the Philippines with regard to an analogous provision enshrined in the national legislation, namely the Indigenous Peoples Rights Act 1997. On that occasion, the Court clarified that such a provision has to be interpreted as only encompassing the right to surface resources due to a constitutional norm that affirmed State ownership of national resources. Similar constitutional provisions exist in the constitutions of most States and so this leads to the conclusion that Article 26 of the Declaration is bound to be interpreted fairly narrowly, restricting its meaning exclusively to surface resources. Thus those provisions of the Declaration that envisage the right of indigenous peoples to free, prior and informed consent in relation to the approval of any project affecting them, ‘particularly in connection with the exploitation of mineral, water or other resources’ are of vital importance.

6. Concluding Remarks

The Declaration, a product of over 20 years work, addresses the plight of indigenous peoples by focusing on their cultural distinctiveness and stressing the discrimination historically suffered by them. In order to protect indigenous

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56 Emphasis added.
57 Article 26, Declaration.
58 The analysis here is restricted to ‘natural’ resources. However, it should be noted that ‘cultural/intellectual’ resources are also important and these are dealt with in Article 31, Declaration.
59 This Act is based on ILO Convention No. 169.
61 Article 32(2), Declaration. Article 15(2), ILO Convention No. 169 contemplates such a hypothesis where States retain the ownership of sub-soil resources, providing that in such cases procedures aimed at the consultation of indigenous groups shall be established. See also Article XVIII(5), Proposed American Declaration on the Rights of Indigenous Peoples, supra n. 5.
peoples from a similar future, the Declaration relies on a twofold strategy. On the one hand, it aims at empowering indigenous groups by according them control over those issues which are internal to the communities. On the other, it refers to procedures of participation and consultation in order to ensure that these peoples are involved in the life of the larger society of a State. As highlighted by the Austrian delegation, on behalf of the European Union, during the first session of the Human Rights Council, the Declaration, as it is, represents the best achievable outcome owing to the positions taken by various States and the sensitive issues touched. Yet, it should be remembered that the Declaration itself provides only minimum standards and States could aspire to provide further protections for indigenous peoples.

Even though it is not legally binding on States, the Declaration could nevertheless be an important tool in protecting indigenous peoples. It could be used by human rights treaty bodies and international and national courts as a guide when interpreting the human rights obligations of States in respect of indigenous peoples. Furthermore, the Declaration could be an influential factor when drafting national legislation concerning indigenous peoples.62

Adoption of the Declaration by the General Assembly in the near future would represent a milestone in the protection of indigenous peoples throughout the world.