

Conference Report — Winnipeg, Canada, January 2019

Kiskinohamatowin

An International Academic Forum on the Human Rights of Indigenous Peoples

June L. Lorenzo





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Centre for International Governance Innovation

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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About the Author

June L. Lorenzo, Laguna Pueblo/Navajo (Diné), lives and works in her home community of Laguna Pueblo. She works with community organizations and Indigenous non-governmental organizations to address uranium mining legacy issues and resistance to new mining, sacred landscape protection and, more recently, on issues of repatriation of cultural patrimony. June advocates in tribal and domestic courts as well as before legislative and international human rights bodies. She also participated in negotiations for both the United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples. She holds a Ph.D. in justice studies from Arizona State University and a J.D. from Cornell University.

About the University of Manitoba

The University of Manitoba is Western Canada's first university, established in 1877, and located on original lands of Anishinaabeg, Cree, Oji-Cree, Dakota and Dene peoples, and on the homeland of the Métis Nation. It is Manitoba's only research-intensive university, and one of the country's top research institutions. The university has more than 29,000 undergraduate and graduate students, and more than 145,000 alumni living in 140 countries.

Acronyms and Abbreviations

AFN	Assembly of First Nations
American Declaration	American Declaration on the Rights of Indigenous Peoples
Docip	Indigenous Peoples' Centre for Documentation, Research and Information
ECOSOC	United Nations Economic and Social Council
Expert Mechanism	United Nations Expert Mechanism on the Rights of Indigenous Peoples
FPIC	free, prior and informed consent
IACHR	Inter-American Commission on Human Rights
ILO	International Labour Organization
LGBTQI	lesbian, gay, bisexual, transgender, queer and intersex
SDGs	Sustainable Development Goals
TRC	Truth and Reconciliation Commission of Canada
UN Declaration	United Nations Declaration on the Rights of Indigenous Peoples
UN DESA	United Nations Department of Economic and Social Affairs
UNGA	United Nations General Assembly
Permanent Forum	United Nations Permanent Forum on Indigenous Issues
WGIP	Working Group on Indigenous Populations
WIPO	World Intellectual Property Organization

Introduction

Kiskinohamatowin (Cree for “teaching and learning with each other”), a two-day academic forum, was held on January 18 and 19, 2019, at the University of Manitoba in Winnipeg, Canada, in the traditional territory of Treaty 1 Peoples and the homeland of the Métis Nation. Participants included international experts, Indigenous and non-Indigenous researchers, policy makers and advocates, as well as federal, provincial, municipal and Indigenous governments working to advance the rights of Indigenous peoples worldwide. The forum profiled research that states, Indigenous peoples, international mechanisms and other institutions can utilize to achieve further implementation of the United Nations Declaration on the Rights of Indigenous Peoples¹ (UN Declaration). The forum is part of an international project that seeks to compile a body of global research knowledge to inform the work of the United Nations Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism).²

Through case studies from all geopolitical regions of the world, the following thematic areas were discussed at the forum:

- international standards, norms, laws and mechanisms related to Indigenous peoples;
- the right to self-determination;
- rights related to lands, territories and resources, focusing on free, prior and informed consent (FPIC);
- economic, social, cultural and spiritual rights;
- civil and political rights; and
- equality and non-discrimination, focusing on gender, people with disabilities, and lesbian, gay, bisexual, transgender, queer and intersex (LGBTQI) rights.

1 United Nations Declaration on the Rights of Indigenous Peoples, GA Res 295, UNGAOR, 61st Sess, Supp No 49, UN Doc A/ RES/61/295, 46 ILM 1013 (2007) [UN Declaration].

2 UN, “Expert Mechanism on the Rights of Indigenous Peoples”, online: <www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx>.

Overview of UN Indigenous-specific Mechanisms

International experts provided overviews of four UN Indigenous-specific mechanisms: the United Nations Permanent Forum on Indigenous Issues (Permanent Forum),³ the Expert Mechanism, the United Nations special rapporteur on the rights of Indigenous peoples⁴ and the United Nations Voluntary Fund for Indigenous Peoples. This section outlines the mechanisms’ respective mandates and how they complement one another in the collective goal of advancing the rights of Indigenous peoples.

Although the first three mechanisms are generally referenced as the only Indigenous-specific mechanisms in the UN system, experts present at the forum agreed that the UN Voluntary Fund for Indigenous Peoples should be cited as the fourth mechanism. Since the fund was created to enhance Indigenous peoples’ participation during the drafting of the UN Declaration, Dalee Sambo Dorough, current chair of the Inuit Circumpolar Conference, urged participants to consider the UN Voluntary Fund for Indigenous Peoples as the fourth mechanism. Indigenous peoples were instrumental in both the creation of all four mechanisms and the definition of their mandates. Ideally, the mechanisms can work in a complementary manner on behalf of Indigenous peoples; discussions revealed that this is an ongoing process.

3 United Nations, Department of Economic and Social Affairs (UN DESA), “Studies and Reports by Members of the Permanent Forum”, online: <www.un.org/development/desa/indigenouspeoples/unpfi-sessions-2/reports-by-members-of-the-permanent-forum.html>.

4 UN DESA, “Reports by the Special Rapporteur on the Rights of Indigenous Peoples”, online: <www.un.org/development/desa/indigenouspeoples/reports-by-the-special-rapporteur-on-the-rights-of-indigenous-peoples.html>.

Permanent Forum

The Permanent Forum was established by a resolution of the United Nations Economic and Social Council (ECOSOC) in 2000.⁵ The forum serves as a high-level advisory body to ECOSOC, with a mandate to address Indigenous issues related to six areas: economic and social development; culture; the environment; education; health; and human rights. Creation of the Permanent Forum was encouraged in the 1993 Vienna Declaration⁶ as part of the framework of the First International Decade of the World's Indigenous People (1995–2004).

Sixteen members comprise the Permanent Forum. Eight members are nominated by member states and eight members are elected by ECOSOC, on the basis of broad consultations with Indigenous peoples and organizations. Seventeen sessions have been held since the first session in May 2002. The forum meets for two weeks each year at the UN headquarters in New York City. According to its specific mandates, the Permanent Forum: “provides expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through ECOSOC; raises awareness and promotes the integration and coordination of activities related to indigenous issues within the UN system; prepares and disseminates information on indigenous issues; [and] promotes respect for and full application of the provisions of the UN Declaration on the Rights of Indigenous Peoples and follow up the effectiveness of this Declaration.”⁷

The Permanent Forum also works on other cross-cutting topics that are of major significance to Indigenous peoples, such as gender and Indigenous women, children and youth; Indigenous

peoples and the 2030 Agenda for Sustainable Development;⁸ and data and indicators.

During the forum's first six sessions, a specific theme was discussed each year. Since 2008, it has adopted a biannual working method of one year with a specific theme and the following year focusing on review of implementation. The Permanent Forum has completed numerous thematic studies and reports on the mandated and cross-cutting areas,⁹ and has made innumerable recommendations to UN agencies, member states and Indigenous peoples alike.¹⁰ The theme of the eighteenth session in 2019 was “Traditional Knowledge: Generation, Transmission and Protection.”

Expert Mechanism

The Expert Mechanism resulted from Indigenous peoples' insistence on the need to create an Indigenous-specific mechanism as a subsidiary body of the Human Rights Council after the Working Group on Indigenous Populations (WGIP) ceased to exist in 2006. Before any of the mechanisms existed, the WGIP was a focal point of international action on Indigenous issues, with widespread participation by Indigenous peoples. The first draft of the UN Declaration was adopted by the WGIP in 1993, before it became the subject of negotiations under the intersessional Working Group of the Commission on Human Rights to elaborate a draft declaration. When the Human Rights Commission was reconstituted in the Human Rights Council in 2006, the WGIP came under review. States and Indigenous peoples

5 Establishment of a UN Permanent Forum on Indigenous Issues, ECOSOC Res 2000/22, ECOSOCOR, UN Doc E/2000/22 (2000).

6 Vienna Declaration and Programme of Action, UNHCROR, UN Doc A/CONF.157/24 (1993), Part I, c III, s II.B at para 32, which reads: “The World Conference on Human Rights recommends that the General Assembly proclaim an international decade of the world's indigenous people, to begin from January 1994, including action-oriented programmes, to be decided upon in partnership with indigenous people. An appropriate voluntary trust fund should be set up for this purpose. In the framework of such a decade, the establishment of a permanent forum for indigenous people in the United Nations system should be considered.”

7 See UN DESA, “Permanent Forum”, online: <www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2.html>.

8 In 2015, countries adopted the 2030 Agenda for Sustainable Development and its 17 Sustainable Development Goals (SDGs). These SDGs apply to all countries; the goal is to mobilize efforts to end all forms of poverty, fight inequalities and tackle climate change, while ensuring that no one is left behind. The SDGs build on the Millennium Development Goals, aiming to go further to end all forms of poverty. See UN, “The Sustainable Development Agenda”, online: <www.un.org/sustainabledevelopment/development-agenda/>.

9 See the list of studies and reports by theme and year at UN DESA, “Studies and Reports by Members of the Permanent Forum”, online: <www.un.org/development/desa/indigenouspeoples/unpfii-sessions-2/reports-by-members-of-the-permanent-forum.html>.

10 See UN DESA, “UNPFII Recommendations Database”, online: <https://esa.un.org/unpfii/UNPFII_Recommendations_Database_list.asp>.

met to discuss the manner in which the work of the working group should continue. Dorrough explained that some states argued the working group would duplicate the Permanent Forum, but Indigenous advocates made the distinction that it was the only body within the United Nations that specifically dealt with standard setting. Eventually, the WGIP was discontinued and, in 2007, the Expert Mechanism was established as a subsidiary body by the Human Rights Council.

The Expert Mechanism's initial mandate was limited to "provid[ing] the Council with thematic expertise on the rights of indigenous peoples in the manner and form requested by the Council" and "focus[ed] mainly on studies and research-based advice."¹¹ Advocacy of Indigenous peoples resulted in a broadening of its mandate by the Human Rights Council in 2016. The Expert Mechanism's mandate now includes the following duties: "[p]repare an annual study on the status of the rights of indigenous peoples worldwide in the achievement of the ends of the Declaration, taking into consideration the suggestions received from Member States and indigenous peoples, including challenges, good practices and recommendations; [i]dentify, disseminate and promote good practices and lessons learned regarding the efforts to achieve the ends of the Declaration; [u]pon request, assist Member States and/or indigenous peoples in identifying the need for and providing technical advice regarding the development of domestic legislation and policies relating to the rights of indigenous peoples; [and] [p]rovide Member States, upon their request, with assistance and advice for the implementation of recommendations made at the universal periodic review and by treaty bodies, special procedures or other relevant mechanisms."¹²

Erika Yamada, a current member of the Expert Mechanism, shared that, during negotiations on a renewed mandate, some states resisted any semblance of language that would make the Expert Mechanism another monitoring body. What resulted in 2016 was the expansion of the mandate to provide technical assistance to member states for concrete action and implementation of the UN Declaration. Precisely how the Expert

Mechanism would perform country engagement was a major issue after its mandate was expanded. In 2017, the Expert Mechanism adopted its methods of work on country engagement in order to operationalize the new mandate.¹³

The 2016 amended mandate also increased the number of Expert Mechanism members from five to seven independent experts. They are appointed by the Human Rights Council, giving due regard to recognized competence and experience in the rights of Indigenous peoples, experts of Indigenous origin and gender balance.

The Expert Mechanism holds an annual session, usually in July, in which representatives from states, Indigenous peoples and their representative organizations, civil society, intergovernmental organizations and academia take part.

Special Rapporteur on the Rights of Indigenous Peoples

Before the UN Declaration was adopted, the first special rapporteur on the rights of Indigenous peoples was appointed by the Commission on Human Rights, in 2001, as part of the system of thematic special procedures. The special rapporteur's mandate is renewed every three years, and individuals can serve a maximum of two terms.¹⁴ As a special procedure of the Human Rights Council, the special rapporteur is an independent human rights expert with a mandate to report and advise on human

11 Human Rights Council, *Expert mechanism on the rights of indigenous peoples*, HRC Res 6/36, UNHRCOR, UN Doc A/HRC/RES/6/36 (2007).

12 *Resolution adopted by the Human Rights Council on 30 September 2016*, GA Res 33/25, UNGAOR, 33rd Sess, UN Doc A/HRC/RES/33/25 (2016).

13 The Expert Mechanism's new methods of work with respect to country engagement activities are set out in its annual report. See Human Rights Council, *Annual report of the Expert Mechanism on the Rights of Indigenous Peoples*, UNGAOR, 36th Sess, UN Doc A/HRC/36/57 (2017), Annex I.

14 Note that the Commission on Human Rights renewed the mandate in 2004 (Res 2004/62), and the Human Rights Council has renewed the mandate since 2007 (A/HRC/RES/6/12).

rights.¹⁵ The last renewal of the mandate in 2016 includes, in particular, the following:

(a) To examine ways and means of overcoming existing obstacles to the full and effective protection of the rights of indigenous peoples,...and to identify, exchange and promote best practices;

(b) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous peoples and their communities and organizations, on alleged violations and abuses of the rights of indigenous peoples;

(c) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations and abuses of the rights of indigenous peoples;

...

(f) To develop a regular cooperative dialogue with all relevant actors, including Governments, relevant United Nations bodies, specialized agencies and programmes, and with indigenous peoples, national human rights institutions, non-governmental organizations and other regional or subregional international institutions, including on possibilities for technical cooperation at the request of Governments;

(g) To promote the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate;

(h) To pay special attention to the human rights and fundamental freedoms of indigenous children and women, and to take into account a gender perspective in the performance of the mandate;

(i) To consider relevant recommendations of the world conferences, summits and other United Nations meetings, and the recommendations,

observations and conclusions of the treaty bodies on matters regarding the mandate.¹⁶

The special rapporteur is to “enhance engagement with and to participate in the annual sessions of the Permanent Forum on Indigenous Issues and of the Expert Mechanism on the Rights of Indigenous Peoples to ensure complementarity between their work.”¹⁷ Every year, the special rapporteur submits a report to the Human Rights Council as well as to the UN General Assembly (UNGA).¹⁸ Current Special Rapporteur Victoria Tauli-Corpuz informed participants of the ways in which she has worked to advance the rights of Indigenous peoples; this is discussed below.

UN Voluntary Fund for Indigenous Peoples

The UN Voluntary Fund for Indigenous Peoples was established by a UNGA resolution during the consideration of the draft UN Declaration, in December 1985, in order to assist Indigenous representatives worldwide to participate in the negotiations.¹⁹ Funds are provided by voluntary contributions from governments, non-governmental organizations and other private or public entities. Dorough urged participants to recognize the UN Voluntary Fund for Indigenous Peoples as a mechanism, as “an amplified voice of Indigenous peoples.”

In 1985, the UNGA expanded the mandate of the UN Voluntary Fund for Indigenous Peoples to include financial assistance to participate in other UN mechanisms and fora. In 2001, it was expanded to include sessions of the Permanent

15 Currently the special rapporteur on the rights of Indigenous peoples is one of 57 special procedures; there are 44 thematic and 13 country-specific mandates. For more information, see United Nations Human Rights Office of the High Commissioner, “Special Procedures of the Human Rights Council”, online: <www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx>.

16 Resolution adopted by the Human Rights Council on 29 September 2016, GA Res 33/12, UNGAOR, 33rd Sess, UN Doc A/HRC/RES/33/12.

17 Resolution adopted by the Human Rights Council on 1 July 2016, GA Res 32/12, UNGAOR, 32nd Sess, UN Doc A/HRC/RES/32/12 at para 1(e).

18 For reports, see United Nations Human Rights Office of the High Commissioner, “Special Rapporteur on the rights of indigenous peoples”, online: <www.ohchr.org/EN/Issues/IPeoples/SRIIndigenousPeoples/Pages/SRIPeoplesIndex.aspx>.

19 Resolutions adopted on the reports of the Third Committee, United Nations Voluntary Fund for Indigenous Populations, GA Res 40/131, UNGAOR.

Forum.²⁰ In 2008, the UNGA adjusted the mandate to facilitate participation in the Expert Mechanism.²¹ In 2010, the UNGA further expanded the mandate to facilitate participation in the Human Rights Council and human rights treaty bodies.²² The latest expansion of the mandate occurred in 2015; the UNGA expanded the mandate to include the consultation process on participation of Indigenous peoples in meetings of relevant UN bodies on issues affecting them during its seventieth and seventy-first sessions.²³

A five-person board of trustees administers the UN Voluntary Fund for Indigenous Peoples, advising the Secretary-General on the use of funds through the Office of the High Commissioner for Human Rights. Board members must have relevant experience on Indigenous issues and serve in their personal capacity. They are appointed by the Secretary-General for three-year renewable terms (a term may be renewed once). At least one trustee must be a representative of an Indigenous peoples' organization.

International Standards, Norms, Laws and Mechanisms Related to the Rights of Indigenous Peoples

At the Kiskinohamatowin International Academic Forum, Indigenous experts who have served or are currently serving on Indigenous mechanisms led the discussion on ways in which the Indigenous-specific mechanisms advance the UN Declaration as well as on other instruments that advance the rights of Indigenous peoples. They provided

valuable perspectives on these mechanisms and related standards, norms and laws that they have worked to implement. While all panellists addressed implementation of the UN Declaration, they broadened the conversation with references to other relevant international instruments.

Standards, Norms and Instruments

Participants were reminded that, while instruments such as the UN Declaration, International Labour Organization (ILO) Convention No. 169 and the American Declaration on the Rights of Indigenous Peoples (American Declaration) adopted by the Organization of American States set forth standards and norms, their use can be bolstered or complemented with existing international conventions or treaties as interpretive instruments. For instance, the International Convention on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination, which existed before the UN Declaration, can now be interpreted by monitoring bodies using the standards provided in the UN Declaration and other instruments. The Convention on Biological Diversity and other fora, such as the UN Forum on Climate Change and the World Intellectual Property Organization (WIPO), provide entry points where Indigenous advocates are pushing for the use of standards contained in the UN Declaration and other instruments.

Dorough, also a former Permanent Forum member, emphasized that the initial goal, when Indigenous peoples began to engage seriously in the United Nations, was to “saturate the UN system with Indigenous peoples’ perspectives.” With this overarching goal, the development of the UN Declaration, ILO Convention No. 169, the American Declaration and other standard-setting instruments to advance the human rights of Indigenous peoples became absolutely critical. Indigenous peoples have been the objects and subjects of international law from the very beginning of contact with colonial powers, explained Dorough. Hence, the overall objective at the international level is to gain a place of respect in international law, international relations, international affairs and intergovernmental dialogues. The long-term goal is to bring Indigenous world views and perspectives into the world of human rights.

20 Resolution adopted by the General Assembly, GA Res 56/140, UNGAOR, 56th Sess, UN Doc A/RES/56/140.

21 Resolution adopted by the General Assembly on 18 December 2008, GA Res 63/161, UNGAOR, 63rd Sess, UN Doc A/RES/63/161.

22 Resolution adopted by the General Assembly on 21 December 2010, GA Res 65/198, UNGAOR, 65th Sess, UN Doc A/Res/65/198.

23 Resolution adopted by the General Assembly on 23 December 2015, GA Res 70/232, UNGAOR, 70th Sess, UN Doc A/RES/70/232.

Advancing the Right to Health for Indigenous Peoples

Mariam Wallet Med Aboubakrine, chair of the Permanent Forum, added to these standards an international framework on the right to health, with a focus on Indigenous definitions of health. Articles 21, 23 and 24 of the UN Declaration address rights related to health. The World Health Organization defines health as a state of psychological, physical and social well-being. Indigenous peoples add a spiritual dimension to health; for them, spirituality is at the centre of the definition of health. The definition also varies among Indigenous communities, since it depends on various determinants and different environments.

The right to health in UN treaties is defined as the right of every person to reach the best possible state of physical and mental health. What does this mean in reality? Aboubakrine shared some examples to elucidate the needs of Indigenous peoples, noting that they often live in remote areas and are forced to travel to urban areas for medical care with no family support. The right to health ensures everyone's ability to access health services where they live; the right to have control over their body and not be subjected, without their consent, to any form of treatment; and the right to access a system that provides everyone, on an equal basis, with access to health care.

To advance the rights of the UN Declaration is to promote Indigenous peoples' efforts to exercise their sovereignty and the right to self-determination. By and large, Indigenous peoples are not seeking new systems in the way that post-colonial countries did; Indigenous peoples are revitalizing traditional systems of governance and ways of being. They are doing this using their own knowledge systems, which served them well in the past. It is important to understand that Indigenous knowledge is contemporary knowledge, not simply historical, old or outdated knowledge. With these thoughts in mind, the presenting experts discussed below explained the ways in which they seek to advance the rights of Indigenous peoples using these standards and norms.

Advancing Rights through Special Procedures

Victoria Tauli-Corpuz, special rapporteur on the rights of Indigenous peoples, shared the many ways in which she works to advance the rights of Indigenous peoples around the world. As one of 57 rapporteurs under the Human Rights Council, she serves as an independent expert. The instruments she primarily relies upon are the UN Declaration, ILO Convention No. 169, and all other UN treaties and relevant instruments, as well as regional human rights instruments such as the American Declaration.

The special rapporteur makes country visits to monitor the human rights situations; the United Nations funds only two official country visits per year. Thus far, all three special rapporteurs on the rights of Indigenous peoples have visited a total of 41 countries. After each visit, Tauli-Corpuz prepares an end-of-mission report, which she presents to the country's government, followed by a country report for the Human Rights Council.

Thematic reports are another way in which the special rapporteur advances the rights of Indigenous peoples. For instance, in 2018, Tauli-Corpuz prepared a report on criminalization, which examined the ways in which Indigenous peoples are criminalized, how these violations are addressed and the protection measures available to avoid criminalization. She found that many of the protection measures are highly inadequate, due to a lack of resources and the failure of many bodies to understand the collective nature of human rights abuses facing Indigenous individuals in this context. For many Indigenous peoples, criminalization is a collective experience in the sense that the community itself is the one being criminalized; their traditional livelihoods are criminalized, and they are displaced without impunity if the government decides they are trespassing on their own lands. Through thematic reports, the special rapporteur can make important observations about human rights as experienced by Indigenous peoples. Topics of other thematic reports include climate change finance; conservation and impacts on Indigenous peoples; international trade agreements and the impact on Indigenous peoples; Indigenous justice and how

it has been recognized, or not, and how it is being used; and, most recently, Indigenous governance.

The special rapporteur also frequently prepares country-specific communications; these communications call to a state's attention allegations of human rights violations. In 2018, Tauli-Corpuz made 49 communications to different governments on various issues. The aim is to stop violations. However, communications are also used when a violation is anticipated, as well as to investigate a case, to prevent future violations from happening and to call upon the government to provide redress or reparations toward victims of violations.

Advancing Rights in the Courts

Claire Charters, chair of the UN Voluntary Fund for Indigenous Peoples, shared insights about the use of the UN Declaration in Supreme Court cases in New Zealand, where the executive government and the legislature are less enthusiastic about the UN Declaration, according to her observations. In this context, it is the courts that are embracing the UN Declaration. This can be a positive step and can help to enhance the legitimacy of the UN Declaration by embedding the declaration in New Zealand's legal systems.

Charters discussed four cases in which the UN Declaration was referenced. In the *Wakatū*²⁴ case, the declaration was used to support a generous understanding of standing; the court allowed a contemporary or modern Indigenous organization to represent former customary owners of land. In the *Takamore*²⁵ case, the declaration was used to support references to and reliance upon *tikanga* customary law, a very important use of the declaration. In the *New Zealand Maori Council Freshwater Camp*²⁶ case, the declaration was used to support a generous interpretation

of the Treaty of Waitangi and the principle of the Treaty of Waitangi. In *Paki* (No. 2),²⁷ the declaration was used in *obiter dictum* — not in the main holding of the case — to state that restitutionary remedies should be provided where possible.

The UN Declaration was not determinative in these cases in the sense of being used as a matter of New Zealand domestic law. Charters opined that while the UN Declaration, by itself, would not be enough, it could assist Indigenous advocates to bolster or advance rights. Similar to some other common law jurisdictions, international law cannot be determinative in New Zealand unless it has been incorporated into domestic legislation. Nevertheless, recognition in the courts serves to establish customary international law.

However, it can be problematic for a state court to become the primary decider or adjudicator of what the declaration means in a New Zealand setting. A robust interpretation of self-determination by state courts that takes into account the substance of the UN Declaration, for example, may challenge state authority or state sovereignty. Thus, it is ultimately difficult for the state courts to come up with a strong interpretation of self-determination without undermining the authority of the state. An important role of Indigenous advocates in this context can be to argue in domestic courts for an interpretation of the UN Declaration that supports Indigenous peoples' self-determination, to counter any dangerous state bias against recognition of the rights of Indigenous peoples. There is a need for consistency, or at least awareness of other interpretations, domestically and internationally. For instance, different interpretations of FPIC could prove problematic. The Expert Mechanism's study on FPIC could be helpful in this regard, as could reports of treaty bodies.

24 *Proprietors of Wakatū & Rore Stafford v New Zealand* (AG) [2017] NZSC 17, [2017] 1 NZLR 423.

25 *Takamore v Clarke* [2012] NZSC 116, [2013] 2 NZLR 733.

26 *New Zealand Maori Council v New Zealand* (AG) [2013] NZSC 6, [2013] 3 NZLR 31.

27 *Paki v New Zealand* (AG) (No 2) [2014] NZSC 118, [2015] 1 NZLR 67.

Case Studies on Achievements and Lessons Learned in the Implementation of the UN Declaration

The Kiskinohamatowin International Academic Forum featured two panels of Indigenous experts who presented case studies on implementation of the UN Declaration. Although self-determination was featured in all of the case studies, the panels were organized into thematic areas as set out below. In her opening keynote, Dorrough quoted a Saami colleague's statement on what self-determination means to Indigenous peoples in its simplest terms: "Indigenous peoples have a right to the past, a right to the present and a right to the future." It can fairly be said that all of the case studies presented involve these three aspects of self-determination for Indigenous peoples.

Lands and Territories

Yanomami People of Brazil and Their Land Rights

Erika Yamada, Member of Expert Mechanism (Latin America and the Caribbean)

The case of Yanomami²⁸ land demarcation is an illustration of how worldwide advocacy can effect change in land policies for Indigenous peoples, but it is also a demonstration of how difficult it is for countries such as Brazil to advance collective land rights. Demarcation of Yanomami land, an area of more than 96,000 km², was completed in 1992 after years of international clamour over human rights violations. Yet today, the Yanomami still suffer challenges to their land autonomy from multiple sources, including private parties and government actors.

As of 2011, the population of Yanomami people in Brazil was nearly 35,000. They are a people of recent contact. Policies of protection have been considered of utmost importance for people living

in voluntary isolation. The Brazilian government has recognized 26 Indigenous peoples who live in voluntary isolation in the Amazon. The Yanomami claim for demarcation arose after numerous deaths were caused by intruders on their land, beginning in the 1960s. The Yanomami took their case against Brazil to the Inter-American Commission on Human Rights (IACHR) in 1985.²⁹ It was a landmark case, as it was the first case involving Indigenous peoples' rights to land brought to the inter-American system. This case contributed to significant change in the Brazilian constitution in 1988, when, for the first time, Indigenous land was recognized in a broader manner. The commission found that Brazil violated the American Declaration of the Rights and Duties of Man³⁰ because of its treatment of the Yanomami and the de facto lack of recognition of their land rights. Brazil received a recommendation from the IACHR to demarcate and protect the Yanomami Indigenous lands. The Yanomami case also received great international attention (including during the Brazilian military dictatorship). Thus, demarcation was celebrated with the hope to re-establish standards for Indigenous peoples in demarcating land.

In 1998, Brazil's commitment to demarcate and protect was reaffirmed. Brazil reviewed its constitution and incorporated social and cultural aspects into the definition of Indigenous lands. Article 231 of the constitution states that "[l]ands traditionally occupied by Indians are those on which they live on a permanent basis, those used for their productive activities, those indispensable to the preservation of the environmental resources necessary for their well-being and for their physical and cultural reproduction,"³¹ and gives Indigenous peoples "exclusive usufruct of the riches of the soil, the rivers and the lakes" on this traditional land.

The first conviction in Brazil for genocide occurred in 1997, in a case involving the massacre of 16 Yanomami people in the Haximu community in the Venezuelan Amazon by 22 Brazilian gold miners. The IACHR recognized the massacre as an act of genocide, and five of the seven defendants were convicted in the Brazilian

28 Jasmine Plummer, "The Yanomami: Illegal Mining, Law, and Indigenous Rights in the Brazilian Amazon" (2015) 27 *Geo Intl Envtl L Rev* 479.

29 *Yanomami v Brazil*, Case No 7615, IACHR Res No 12/85 (1985).

30 Organization of American States, *American Declaration of the Rights and Duties of Man*, OAS Res XXX (1948), online: <www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm>.

31 *Constitution of the Federative Republic of Brazil 1988, as amended to 2014*, art 231.

criminal justice system. This case became a symbol of the recognition of Indigenous peoples' rights. By then, nearly 2,000 Yanomami had died (between 1980 and 1990) from disease or had been shot by intruders on their territory.³²

Today, however, the Yanomami continue to suffer attacks and invasions on their territory from miners and others whose actions are met with impunity. Mere demarcation of land is not enough to re-establish a people's autonomy, nor to fight against illegal mining and attacks at the national political level. The nature of land rights has historically been defined in Brazil only through the civil rights aspect of the right to property and not as a human right. A colonial view pervades and persists, with an implicit expectation that Indigenous culture and peoples will eventually fade away. However, Indigenous peoples' loss of identity has never been a reality in Brazil, and Indigenous peoples have actively resisted such policies. The effort to achieve land demarcation in Brazil continues to grow as well: more than 150 Indigenous peoples are currently awaiting land demarcation by the government.

Unlike the case in New Zealand, there are no references to standards of international law in the few cases that have been considered by Brazil's Supreme Court. As of 2009, there have been no references to ILO Convention No. 169, the UN Declaration or international human rights instruments. Outside of the UN Human Rights Council, Brazilian state authorities rarely make reference to the UN Declaration.

The Yanomami, by necessity, have learned the value of taking their plight to the international arena and including Indigenous mechanisms as an important aspect of their advocacy. In 2017, the Yanomami people submitted a shadow report to the Universal Periodic Review of Brazil, which triggered 32 recommendations regarding Indigenous rights and lands to Brazil. They have also learned the value of documentation by international human rights bodies, and that relationship building can be a strength. The Yanomami now have representatives travelling to the United Nations as part of their association with this organization.

Sacred Sites and Human Rights

Kristen Carpenter, Member of Expert Mechanism (North America)

Kristen Carpenter offered a case study on sacred-site protection as an example of a realm of the law that is in deep need of legal reform and for which implementing the UN Declaration offers promise of a better approach.

Numerous sacred sites in North America are imbued with meaning. Although these sites may have an inanimate existence for many people, for many Indigenous peoples in North America, these sites are living things that hold great value in their cultures. Sacred sites are often connected to creation stories, are places of governance and, in many cases, give rise to understanding about living in today's world.

Unfortunately, due to colonization, many sacred sites are now located outside their respective communities' territory. For example, the San Francisco Peaks in Arizona are sacred to most Indigenous peoples in the Southwest. The world view/cosmology of these peoples is deeply connected to the mountains. One might say the mountains are constituent landscapes of their peoplehood, defining elements of geographical territory, and are places where Indigenous peoples continue to direct prayers, gather medicines and carry on other activities with deep meaning.

The US government, which controls national forest lands, often uses sacred sites for purposes at odds with Indigenous spirituality.³³ In the case of San Francisco Peaks, a ski resort located there is using treated sewage water for snowmaking. For the Indigenous peoples who challenged the ski resort, this practice amounted to desecration, especially due to the fact that human excrement and waste were present in the sewage water being used. The US Forest Service held consultations with a number of Indigenous peoples, who clearly voiced their concerns. However, in a lawsuit that followed, the federal court held that the protections of the First Amendment in the US Constitution did not apply to the Navajo Nation and other Indigenous peoples because the government's actions did not

32 Laurie Goering, "Invasion of Gold Miners Threat to Brazilian Tribe", *Chicago Tribune* (3 September 1996), online: <www.chicagotribune.com/news/ct-xpm-1996-09-03-9609030156-story.html>.

33 See e.g. Danielle Knight, "Environment Rights: Sacred Native American Sites Threatened", *Inter Press Service News Agency* (15 June 1999), online: <www.ipsnews.net/1999/06/environment-rights-sacred-native-american-sites-threatened/>.

substantially burden their exercise of religion.³⁴ Thus, Carpenter stated, the US Supreme Court held that states can desecrate and degrade American Indian lands without running afoul of the law.

Another example involving a ski area in North America impacted the Ktunaxa Nation in British Columbia.³⁵ There, too, consultations took place, but did not give the Ktunaxa Nation the right to terminate the process. The Supreme Court of Canada affirmed the duty to consult, but held that the process of consultation was enough to discharge the duty and there was no right to a particular determination of how lands are to be used.

In the United States, domestic law has not been interpreted to protect American Indian religious freedoms. The US Supreme Court has repeatedly held that the First Amendment does not apply to protect the lands of Indigenous peoples and does not require their consent. The US government may develop sacred sites without violating the First Amendment, even if it will “destroy” Indigenous peoples’ religion.³⁶ Spiritual beliefs that are “purely subjective” are not protected by the Religious Freedom Restoration Act.³⁷ Furthermore, statutes requiring “consultation” are procedural, not substantive, in nature, so they do not require consent.³⁸

In seeking a better approach, Carpenter highlighted four UN Declaration articles that have particular relevance: articles 11, 19, 25 and 28. Article 11 provides that Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to “maintain, protect and develop... historical sites.”³⁹ Article 19 requires that states consult with Indigenous peoples to obtain their

FPIC before adopting or implementing legislative or administrative measures. Article 25 sets out Indigenous peoples’ right to maintain their spiritual relationship with their traditionally owned or otherwise occupied lands. Article 28 provides the right to redress for lands taken from Indigenous peoples, including spiritually significant land.

Going forward, Carpenter proposed some concrete strategies to advance the rights of Indigenous peoples relating to sacred sites and made the following recommendations:

- present arguments in US courts that the First Amendment should be interpreted consistently with articles 11 and 25 (precedent interpreting the Eighth Amendment could be used as interpretive methodology);
- push US Congress, US government and agencies to administer Indigenous spiritual sites consistent with FPIC, article 19 of the UN Declaration in particular;
- prioritize restitution of lands of spiritual value to Indigenous peoples; and
- use co-management models to afford Indigenous peoples’ rights to participate in planning and treatment of lands.

Economic, Social, Cultural and Spiritual Rights

New Zealand Royal Commission of Inquiry into the Treatment of Children in Institutions and the Role of the UN Declaration

Andrew Erueti, Professor, University of Auckland

Andrew Erueti presented a case study involving historical abuse of Māori children in New Zealand residential institutions. In November 2018, he was appointed as a commissioner on the Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions.⁴⁰ This process started with survivors of residential institutions calling for an inquiry, with the initial focus on the postwar period from the 1960s to the 1980s. During those years, residential

34 *Navajo Nation v United States Forest Service*, 535 F (3d) 1058, 1070 (9th Cir 2008).

35 *Ktunaxa Nation v British Columbia*, 2 SCR 386 (2017).

36 *Lyng v Northwest Indian Cemetery Protective Association*, 485 US 439, 451–453 (1988).

37 See *Religious Freedom Restoration Act*, 42 USC §§ 2000bb et seq. The act, passed by the US Congress in 1993, created a cause of action for persons whose exercise of religion is substantially burdened by a government action, regardless of whether the burden results from a neutral law of general applicability. See 103rd Congress, “H.R.1308 – Religious Freedom Restoration Act of 1993”, online: <www.congress.gov/bill/103rd-congress/house-bill/1308>.

38 See *Standing Rock Sioux Tribe v United States Army Corps of Engineers*, 205 F Supp (3d), No 16-1534 (2017).

39 UN Declaration, *supra* note 1, art 11.

40 See *Royal Commission of Inquiry into Historical Abuse in State Care and in the Care of Faith-based Institutions Order 2018* (LI 2018/223), online: <www.legislation.govt.nz/regulation/public/2018/0223/latest/LMS118772.html>; Royal Commission of Inquiry, “Abuse in Care”, online: <<https://abuseinstatecare.royalcommission.govt.nz/>>.

institutions were filled with Māori children, yet overrepresentation of Māori children still persists in the present system. Moreover, there is a clear correlation between overrepresentation of Māori in residential institutions and in the prison system. Currently, more than 60 percent of women in New Zealand prisons are Māori and more than 53 percent of all prisoners in New Zealand are Māori. Thus, it is imperative for the commission to uncover the reasons why Māori were absorbed into the state system in such large numbers over this period.

Terms of reference for the tribunal were directed to questions of institutional racism targeting minorities and Indigenous peoples, and the need to document and investigate the impact this had on Māori communities, not just in relation to children, but also to young adults. The commission will investigate the reasons that led to children being taken into state care, how they were treated, and impacts on survivors, families and communities. There are similarities between this situation and the issues facing Indigenous children in residential schools in Canada, where a similar “scooping” policy was enforced by state authorities.⁴¹

The UN Declaration was critical to the establishment of the Royal Commission. Indigenous peoples made submissions to the UN Committee on the Elimination of Racial Discrimination and the Human Rights Council, asking for an independent inquiry. They relied on specific UN Declaration provisions, including article 3 (self-determination), article 19 (FPIC) and article 40 (access to justice and effective remedies).

While there is a process for reparations for survivors, it has been strongly criticized by survivors and others. Erueti explained that the role of culture is not taken into account and highlighted the troubling fact that the process was established without any engagement with Māori. When contemplating a reparations plan, face-to-face engagement between the Crown and affected communities is crucial.

The terms of reference refer to treatment, but the commission must determine how to give meaningful effect to treatment. They are establishing the evidence-gathering process through truth commissions, private processes and public inquiries. The commission must develop a research plan and a historical narrative and needs to have a fully developed outreach plan so that it can engage fully and effectively with Indigenous communities, including Indigenous women and the Indigenous LGBTQI community. Going forward, it will be important to develop an outreach plan to engage effectively with communities and, especially, with survivors of the state care system.

Truth and Reconciliation Commission of Canada: Calls to Action

Grand Chief Wilton Littlechild, International Chief for Treaties 6, 7 and 8

Grand Chief Wilton Littlechild presented a case study on the *Truth and Reconciliation Commission of Canada: Calls to Action* report issued by the Truth and Reconciliation Commission of Canada (TRC) to promote reconciliation following Canada’s abysmal history of residential schools and the impact they have had on Indigenous peoples in Canada. He discussed the Calls to Action as they related to four different target groups: the federal government, provincial and territorial governments, Indigenous peoples and the private sector.

Chief Littlechild highlighted the use of the seven sacred teachings as themes in the TRC’s national events. Métis Elder Norman Meade shared these teachings — respect, love, courage, truth, humility, honesty and wisdom — with the forum participants in the opening addresses. At the close of the TRC, the commission reached conclusions as to what Canada needs to do to repair the harm. Following the dissemination of the Calls to Action, then Prime Minister Stephen Harper apologized on behalf of Canada to the residential school survivors.

As the first call to action, the TRC called on Canada to use the UN Declaration as the framework for reconciliation. Chief Littlechild set out ways to accomplish this, first referring to Charters’s presentation on the use of the UN Declaration by domestic courts. During education conferences, Canadian judges are now discussing Indigenous law and questioning how they can inform themselves and take these laws into consideration. Chief Littlechild also discussed how

⁴¹ The term “Sixties Scoop” is used to describe a national phenomenon in which status Indian children in Canada were taken from their homes and communities by provincial child welfare authorities to be placed in non-Aboriginal foster homes for adoption, without the consent of their families. See Government of Canada, Indigenous and Northern Affairs Canada, “Sixties Scoop Agreement in Principle”, online: <www.canada.ca/en/indigenous-northern-affairs/news/2017/10/sixties_scoop_agreementinprinciple.html>.

the UN Declaration can be used when drafting and amending legislation. Today, virtually every resolution that comes to the floor of the Assembly of First Nations (AFN) references one or two articles of the UN Declaration. As there are more than 600 chiefs that comprise the AFN, this process of using the UN Declaration is an important teaching mechanism. Universities and colleges are teaching students about the UN Declaration, and schools across Canada teach students about Indigenous peoples and the history of residential schools (although this is neither mandatory nor extensive in all provinces and territories).⁴²

Another call to action was directed at corporations and investors, calling on them to ensure that their business practices fully incorporate the standards of the UN Declaration, especially those related to FPIC. Chief Littlechild also referenced the concept of economic reconciliation: How do we use the UN Declaration in business? What are the Calls to Action for private industry, pipelines, or oil and gas?

Ten main teachings emerged from the TRC's work process, which likely involved the most engagement ever with Indigenous peoples in Canada. Three of these teachings were noted by Chief Littlechild as being especially relevant to this forum: use the UN Declaration as the framework for reconciliation; "reconciliation requires political will, joint leadership, trust building, accountability, transparency, and investment of resources"; and "reconciliation requires sustained public education, dialogue, and youth engagement about history and the legacy of residential schools, Treaties and aboriginal rights, and past and present contributions of Indigenous peoples to Canadian society."

What is the common thread in all of this work? All relations with Indigenous peoples must be conditioned on their right to self-determination, including the inherent right to self-government. We should now be asking how to do this effectively. In line with another principle, treaty agreements and other constructive agreements between Indigenous peoples and the Crown must be based on mutual

respect. Meaningful engagement is crucial to securing FPIC from affected Indigenous peoples.

Chief Littlechild recalled Dorrough's earlier emphasis on national implementation of the UN Declaration and a corresponding need for monitoring. The TRC also made a call to action for a national council to be established for this purpose.

Chief Littlechild summed up his presentation by urging that, in going forward, "we have to look to a hopeful future." He concluded his presentation with a short video in which hockey was used as a medium to support reconciliation.⁴³ An important message was conveyed to the people watching the game — one of resilience despite the major assault of residential schools. Sport was used to showcase Indigenous language and culture, and language was used to promote healing.

Civil and Political Rights

Civil and Political Rights of Indigenous Peoples in Asia

Edtami Mansayagan, Member of Expert Mechanism (Asia)

Expert Mechanism member Edtami Mansayagan's presentation on civil and political rights focused on his advocacy for Indigenous peoples in the Philippines. He shared that in Asia, Indigenous peoples continue to suffer the consequences of colonization. The reality on the ground must change for Indigenous peoples. As in the past, colonizers continue to prescribe what the future must be for Indigenous peoples, rather than respecting Indigenous peoples' right to make these decisions for themselves. In the past, prescribing the future for Indigenous peoples was done in the name of religion or education, and Indigenous children were separated from their parents for these reasons.

Mansayagan shared his observation about the need to protect the civil and political rights of Indigenous peoples in Asia. Unfortunately, Asian states have not been very receptive and have not been particularly active participants in the Expert Mechanism. Over much of Asia, Indigenous peoples are excluded from decision making and are not regarded as self-determining peoples.

42 See Jasmine Kabatay & Rhiannon Johnson, "Charting progress on Indigenous content in school curricula", CBC News (2 October 2019), online: <www.cbc.ca/news/indigenous/indigenous-content-school-curriculum-trc-1.5300580>; see also KAIROS, "Winds of Change: 2018 report card" (last modified 9 October 2018), online: <www.kairoscanada.org/what-we-do/indigenous-rights/windsofchange-report-cards>.

43 See RiisMedia.org, "Residential School Hockey" (22 August 2014), online (video): YouTube <www.youtube.com/watch?v=u1FMb31Tslw>.

In the Philippines, the Indigenous Peoples' Rights Act was adopted in 1997.⁴⁴ Article 9 recognized the rights to land and ancestral domain. The act created a National Commission for Indigenous Peoples. Mansayagan was appointed to serve on the commission for two terms, totalling six years. The commission's mandate is to create policy, serve a quasi-judicial function and, in particular, recognize ancestral domains of Indigenous peoples. The act was intended to be an acknowledgement that Indigenous peoples have their own land that is held collectively and cannot be sold by the government.

However, having been part of the first and second commissions, Mansayagan felt that recognition of Indigenous rights has yet to happen. The Philippine state still adheres to the notion that Indigenous peoples are just cultural communities that host cultural performances; this gives the appearance that they are accepted as distinct, separate peoples. Furthermore, the Indigenous Peoples' Rights Act failed to recognize all of the territory of the more than 33 Indigenous nations in the Philippines.

Indigenous peoples in the Philippines designed a framework for how to express the right to self-determination, emphasizing the concept of "one tribe, one territory, one governance." They believe that they must return to Indigenous political structures. Each tribe knew their traditional boundaries with other tribes historically, and boundaries were often natural geographical features (rivers, mountains and so forth) that had names in their own languages.

Mansayagan closed his presentation with a description of his work with Indigenous peoples in the Philippines to rebuild self-governance. In the context of ascertaining the right to self-determination, he stated that it is important to be clear about defining the "collective self." According to Mansayagan, lobbying the government has not led to much of a response; therefore, he suggested that, if engaging with the government is not effective, Indigenous peoples must establish their own governments. The challenge is to support Indigenous peoples to stand independently. The right to self-

determination is meaningless if Indigenous peoples have to rely on others for resources and a political structure. Indigenous peoples must build their own strength from their own people. Indigenous communities in the Philippines are now redefining their Indigenous governments within a self-determination framework.

Cultural and Linguistic Rights of Karelian People

Alexey Tsykarev, Member of Expert Mechanism (Central and Eastern Europe, the Russian Federation, Central Asia and Transcaucasia)

Expert Mechanism member Alexey Tsykarev addressed the rights contained in article 13 (right to transmit languages to future generations), article 14 (right to establish and control education systems) and article 15 (right to dignity and diversity of cultures, histories and traditions) of the UN Declaration. In doing so, he referred to the Expert Mechanism study on the right to education,⁴⁵ which contained recommendations that would help to promote all Indigenous languages and the development of teaching methods. He discussed how these recommendations have been implemented in his region.

There are 18 republics in the Russian Federation. Many republics have two or more state languages, usually Russian, and other state languages that are mostly Indigenous languages spoken by Indigenous minorities. Karelia is the only republic that has been struggling to keep its Indigenous language as a state language, since Karelian is a Latin-script language, not Cyrillic, and amendments to the federal law in 2002 required use of the Cyrillic script. Tsykarev explained that federal deputies saw usage of the Latin script as a threat to national security and, therefore, the federal law has prevented Karelian from becoming a state language. This implicates UN Declaration rights to language.

In January, the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities published

⁴⁴ The full title of the Indigenous Peoples' Rights Act of 1997, approved by the Philippine president in October 1997, is *An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes* (RA 8371), online: <www.chanrobles.com/republicactno8371.htm#.XHvx64hKg2w>.

⁴⁵ *Study on lessons learned and challenges to achieve the implementation of the right of indigenous peoples to education*, UNGAOR, 12th Sess, UN Doc A/HRC/12/33 (2009), online: <<https://undocs.org/A/HRC/12/33>>.

a report that addressed this situation.⁴⁶ The report indicated that there is a need for the Indigenous peoples of Karelia to control their writing systems and use their own writing system. The Russian Federation responded to the report,⁴⁷ stating that advisory committee statements on the violation of citizens' right to learn their mother tongues were "ungrounded."

The failure to recognize Indigenous languages can also effectively impact the right of Indigenous peoples to participate in elections. The federal law states that Indigenous peoples, and all peoples, can use their own languages in federal elections. However, the local commission on elections decided that the federal law should not apply in the Republic of Karelia, asserting that all Karelians understand Russian. The commission disregarded areas previously identified by law as areas of Karelian traditional residence. Unfortunately, Indigenous language rights are often seen not as human rights but simply as part of cultural heritage. Thus, the Russian government only strives to protect and develop different festivals and the use of language in cultural activities, rather than to protect Indigenous language use in areas where they are most crucial, such as in media, education and administration.

The UN proclamation of 2019 as the International Year of Indigenous Languages presented an important opportunity for Karelia. In 2018, the Russian Federation was among the first to join the steering committee for the international year. However, Karelian proposals for the international year, which included cross-border activities with Karelian-speaking peoples in Finland, were not accepted by the government.

Indigenous peoples in Russia are very active in maintaining their languages to encourage language acquisition and retention. For example, in Karelia, there is a designated building (a "language house") where Indigenous representatives of all ages can gather and exchange language skills. This project has provided a dynamic way for

Indigenous peoples to speak their language while exchanging thoughts and practices. This building also houses a "language nest" (an immersive language-acquisition program for children that was refined in New Zealand and is used in multiple countries around the world). Unfortunately, the Karelian people encounter a national government perspective that children who are schooled in a minority language, such as Karelian, will not be competitive with other children who speak only Russian. Tsykarev shared that studies have found that the more languages a child speaks, the better equipped they are for academic studies. This language nest remains popular among Karelian speakers and continues to thrive.

Tsykarev then connected linguistic and cultural rights to economic rights and the question of how to compensate Indigenous peoples for the loss of language related to government action. His community had an ethnological impact assessment done to assess the correlation between loss of land from oil and gas development and loss of language. According to Tsykarev, the Russian state continues to claim that Indigenous languages should not be supported because they are dying. However, the fact that the UN Declaration, a complex document, has been translated into the Karelian language speaks to the reality that Indigenous languages are not "dying out" and should be fully supported so that they can be revitalized and continue to thrive for generations to come.

Equality and Non-discrimination

Innovative Jurisdictional Models for First Nations Child Welfare

Naiomi Metallic, Professor, Schulich School of Law, Dalhousie University

Naiomi Metallic's presentation focused on the discriminatory treatment of Indigenous children in the Canadian child welfare system. The First Nations Child and Family Caring Society, together with the AFN, filed a complaint against Ottawa with the Human Rights Commission in February 2007. On January 26, 2016, the Canadian Human Rights Tribunal issued a watershed decision stating that the federal government discriminates against First Nations children on reserves by

⁴⁶ See *Fourth Opinion on the Russian Federation* – adopted on 20 February 2018, ACFC/OP/IV(2018)001 at para 107, online: <<https://rm.coe.int/4th-advisory-committee-opinion-on-the-russian-federation-english-lang/1680908982>>.

⁴⁷ See *Comments by the Russian Federation on the draft opinion of the Council of Europe Advisory Committee on the Framework Convention for the Protection of National Minorities*, GVT/COM/IV(2018)006, online: <<https://rm.coe.int/government-comments-on-the-4th-acfc-opinion-on-switzerland-english-lang/1680908a1b>>.

underfunding and failing to provide the same level of child welfare services that exists off-reserve.⁴⁸

Metallic described how the structure of child welfare services for children on reserves is problematic and “very convoluted.” Off-reserve, services are provided by the provinces. On-reserve, the division of powers results in a disjointed situation where the federal government provides funding for child welfare services, the provincial government determines how these funds and services are to be applied, and the First Nations communities deliver the services. Although community members are the ones providing these services, the terms are dictated, there is not much flexibility and the reporting requirements are onerous. First Nations communities spend more time completing reporting requirements than delivering these crucial services. The system gives the government too much discretionary power, so that it can change things on a whim, with very little accountability. This structure prevents Indigenous peoples from holding the government accountable and taking the government to court. Underfunding of the child welfare system on reserves exacerbates poverty, which stems from years of colonial policies. It is a system that actively discriminates against Indigenous peoples.

In its decision, the Human Rights Tribunal looked at the UN Declaration, and although specific provisions of the UN Declaration were not cited, the discussion suggested references to rights contained in article 4 (autonomy and self-government), article 21 (right without discrimination to improvement of economic and social conditions, and state obligations), and article 22 (rights and special needs of Indigenous children with disabilities).

The tribunal found that the federal funding regime for First Nations children and families living on reserves was discriminatory because it has resulted in their distinct needs not being met. Canada was providing less money per child than what was provided to other children under provincial jurisdictions. However, even if the funding levels were strictly comparable, this would not be sufficient. What is required by law is not formal equality but substantive equality. First Nations are

entitled to services that meet their specific needs. All Indigenous peoples are entitled to the right to be different and to funding to meet differing needs.

Implementing this decision, however, has been a challenge; it took four non-compliance orders for Canada to take action. Canada is now proposing new child welfare legislation, Bill C-92,⁴⁹ but there are still a number of outstanding issues in implementing the decision. Metallic asserted that while the legislation has the potential to be extremely valuable, the federal government has a history of acting in a prescriptive manner when dealing with Indigenous peoples, and such an approach would lead to less effective laws in this circumstance.

Metallic presented different mechanisms through which Indigenous peoples can gain more control over child welfare services. She referenced Dorrough’s statement that if states would recognize Indigenous peoples’ right to make decisions for themselves, these decisions would have better outcomes. Self-determination, including the concept of self-government, offers the greatest amount of autonomy for Indigenous peoples. In contrast, the process of self-administration involves external parties making key decisions that the communities are to administer, but with little or no control when it comes to decision making.

Metallic observed that, for all models, it is necessary to have a government in Canada that is receptive to giving up control, rather than guiding self-governance in a paternalistic manner.

Key Learnings and Recommendations

This section elucidates the key points shared by participants and presenters on achievements and lessons learned in the advancement of Indigenous peoples’ human rights, through the implementation of the UN Declaration and other international human rights standards, norms and law.

48 Tim Fontaine, “Canada discriminates against children on reserves, tribunal rules”, CBC News (26 January 2016, last modified 2 August 2016), online: <www.cbc.ca/news/indigenous/canada-discriminates-against-children-on-reserves-tribunal-rules-1.3419480>.

49 Bill C-92 has since received royal assent as *An Act respecting First Nations, Inuit and Métis children, youth and families*, SC 2019, c 24.

The forum was designed to encourage participation and interaction by presenters and attendees alike. In addition to the time allowed for Q&A, all participants shared coffee breaks and meals together and participated in breakout sessions after the panel discussions. Recommendations presented herein are a result of these collaborations. While the recommendations are organized by different entities, participants agreed that there is considerable overlap.

Expert Mechanism and Other UN Bodies

- The Expert Mechanism, the special rapporteur and other UN bodies should consider visiting Indigenous nations in addition to nation-states, for consultations to reinforce the self-determination of Indigenous peoples.
- The Expert Mechanism can play an important role in making states aware that domestic courts (which interpret the UN Declaration) operate within a larger international arena in the interpretation of the UN Declaration, and that they are participating in a transnational dialogue.
- In order to give more voice and articulation to what self-governance is, Indigenous peoples are encouraged to share self-governance experiences with the Permanent Forum.
- Given the need to have Indigenous voices in more fora,⁵⁰ the UN Voluntary Fund for Indigenous Peoples should seriously consider expanding the number of fora to include in the mandate, such as the UN Forum on Business and Human Rights and the UN sessions on a binding instrument for transnational corporations.

Indigenous Peoples

- Participants shared a common view that there is a need for more education on the United Nations, in general, for Indigenous nations. There appears to be a need for more education on how international treaty bodies may be used.
- It is one thing to demand self-determination and quite another to exercise it; this suggests the need for Indigenous governments

to actively explore and articulate their own governments and systems. For instance, there is a difference between self-administration and self-governance.

- Consider one working definition of self-government: the ability of Indigenous peoples to enforce their own rules, resolve disputes, problem-solve and establish their own governing institutions to carry out these tasks.
- Similarly, Indigenous peoples are encouraged to articulate their own legal traditions and systems, for example, by redesigning environmental governance processes to better incorporate Indigenous approaches.
- Intertribal institutions are one way to build alliances, both traditionally and in modern times. Examples given were the Northwest Intertribal Alliance and the Iron Confederacy.
- In addition to formal alliances, Indigenous peoples can collaborate with other peoples to exchange ideas and share programs. One example is the Standing Tall program that the Métis adapted from a similar program started by the Māori during a visit to New Zealand.
- In using the UN Declaration to support Indigenous rights, it is important to bear in mind that there is a balance between rights and responsibilities.
- Along the same lines, analysis of Indigenous rights and use of human rights conventions should include a broader look at systems and include an analysis of structural racism and violence in legal systems. For example, use of the Convention on the Rights of the Child can be bolstered with the kind of systemic analysis used in the Canadian case on child welfare.

- Language is a great source of knowledge. Indigenous knowledge is embedded in language and, in many cases, stories are actually laws that should be investigated, recognized and implemented.
- Consider the creation of databases to share information on issues critical to Indigenous nations, such as Indigenous child welfare within nations. For example, there is extensive empirical data on children who end up in the criminal justice system. Manitoba

⁵⁰ The Indigenous Peoples' Centre for Documentation, Research and Information (Docip) follows Indigenous participation in a number of international fora. See Docip, online: <www.docip.org/en/>.

has a unique data repository; the database is modelled on the 2009 BC study.

- Translate the UN Declaration into Indigenous languages as part of further education.

Nation-states

- Nation-states must recognize Indigenous legal traditions and law in community consultation processes.
- Nation-states need to acknowledge the history and imposition of colonial borders on Indigenous/Aboriginal territories and communities.
- Nation-states need to enhance the use of the UN Declaration as a framework for treaty discussions with Indigenous peoples.
- Nation-states need to address issues of federal versus provincial relationships with Indigenous peoples using the UN Declaration.
- In the wake of the WIPO negotiations on an instrument to protect traditional knowledge and genetic resources, nation-states need to conduct consultations with Indigenous peoples on issues of intellectual property; this affects spiritual rights as well.

Academic Institutions

- Academic institutions need to respect the value of Indigenous knowledge holders and treat them as other “experts” in academia.
- There is a clear need to move out of “silos” and support and encourage more cross-disciplinary, cross-cultural work.
- Partnering with Indigenous peoples to provide education on international mechanisms has already been demonstrated as a powerful way to implement the UN Declaration; more partnerships are encouraged. The idea of creating liaison positions should also be considered.
- The history and imposition of colonial borders on Indigenous/Aboriginal territories are an important part of education for all.
- Academic institutions should support further research and case studies on subnational efforts, for example, at the provincial or municipal level.

- Academic institutions should initiate and support efforts to increase the number of Indigenous professionals carrying out research.

- A related concern is the potential role of institutions as “facilitators” for Indigenous peoples who seek rights recognition, using the UN Declaration as a guide.

- Conduct case studies on the relationships between Indigenous peoples and recent immigrants through the lens of the UN Declaration.

Civil Society Organizations

- While civil society organizations have provided valuable support, it is now important that they support more direct participation of more Indigenous peoples in international mechanisms.

National Human Rights Institutions

- Insofar as national human rights institutions become involved in discussions and consultations on treaties, the UN Declaration is an important framework for discussions.

Other Recommendations

- Participants agreed on the importance of networking beyond this academic forum.
- In general, it is important for participants to work outside of their respective disciplines and build bridges.
- “Ally-ship” is very important. As we become savvier with the internet and social media, these tools can be used to tap into community and grassroots levels; independent media can also support these goals.

Conclusion

The Kiskinohamatowin International Academic Forum was part of a larger international project, which focused on compiling a body of global research knowledge to inform the work of the Expert Mechanism. The organizers thus hoped to generate new research collaborations

and ways to continue networking among the various participants. One of the goals was to generate specific recommendations for the Expert Mechanism. In view of the key learnings and recommendations from participants, the culmination of the forum exceeded its goals. Participants produced recommendations for the Expert Mechanism as well as other entities that can play important roles in the international arena.

In the closing session, Al Benoit, chief of staff for the Manitoba Metis Federation, asked participants to continue thinking about how to move from the international level to the local level. He identified gaps that must be closed in order to move forward: gaps in knowledge, gaps in support and gaps in funding. Part of the answer, he reminded participants, is that Indigenous peoples must do their own organizing, rather than waiting for state action to implement the rights contained in the UN Declaration and other human rights instruments. June L. Lorenzo stated that with rights come responsibilities, and this is expressed clearly in article 25 of the UN Declaration, that is, to uphold our responsibility to future generations regarding our “lands, territories, waters and coastal seas.” Chief Littlechild, a long-time advocate and a former member of both the Permanent Forum and the Expert Mechanism, agreed with the need for community organizing and stated that a responsibility-based approach is the Indigenous way.

The academic forum provided a venue for Indigenous leaders, experienced advocates in the UN system, academic faculty, students and representatives from local and federal governments to learn together, share questions and reflections, and teach one another. The hope is that the forum has stimulated ideas and connections for new research collaborations and ways to continue networking. One of the first steps will be the dissemination of the forum report nationally and internationally.

Author's Note

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Agenda

January 18, 2019

- 9:00 a.m.** **Welcome by Elders of the Territory**
Norman Meade
- 9:10 a.m.** **Welcoming Remarks**
Grand Chief Edward John, Kiskinohamatowin Conference Chair
- 9:20 a.m.** **Welcoming Remarks from the Faculty of Law, University of Manitoba**
Jonathan Black-Branch, Dean of the Faculty of Law
- 9:30 a.m.** **Opening Remarks by Indigenous Leaders**
Regional Chief Kevin Hart, Assembly of Manitoba Chiefs
Minister Will Goodon, Manitoba Metis Federation
- 10:15 a.m.** **Keynote Address: An Overview of the United Nations Indigenous-specific Mechanisms**
Dalee Sambo Dorough, Chair of the Inuit Circumpolar Council
- 11:00 a.m.** **Nutrition Break**
- 11:15 a.m.** **Panel One: International Standards, Norms, Laws and Mechanisms Related to the Rights of Indigenous Peoples**
This panel provides participants with an overview of the current status of international standards, norms and laws that are utilized to advance the rights of Indigenous peoples. It provides examples of how the Indigenous-specific mechanisms of the United Nations have advanced these standards, norms and laws.
- Speakers:**
- Grand Chief Wilton Littlechild, Confederacy of Treaty Six First Nations
 - Mariam Wallet Med Aboubakrine, Chair of the Permanent Forum
 - Claire Charters, Chair of the UN Voluntary Fund for Indigenous Peoples (Pacific) (by video link)
- 12:30 p.m.** **Lunch Break**
- 1:30 p.m.** **Panel Two: Case Studies from Four Regions**
The topics covered are self-determination; rights related to lands, territories and resources, focusing on FPIC; economic, social, cultural and spiritual rights; civil and political rights; and equality and non-discrimination (gender, people with disabilities and LGBTQI community).
- Speakers:**
- Erika Yamada, Member of Expert Mechanism (Latin America and the Caribbean)
 - Edtami Mansayagan, Member of Expert Mechanism (Asia)
 - Kristen Carpenter, Member of Expert Mechanism (North America)
 - Andrew Erueti, Associate Professor, University of Auckland (by video link)

- 3:00 p.m. Nutrition Break**
- 3:15 p.m. Small Group Discussions:**
- How can the standards, norms and laws in this area be applied to your work?
 - What is needed from academics, governments, Indigenous peoples and UN agencies, bodies and programs to complete this work?
 - How can conference participants continue to network or collaborate in this area in the future?
- 4:30 p.m. Closing Comments**
Grand Chief Edward John

January 19, 2019

- 9:00 a.m. Panel Three: Cases Studies from Four Regions**
The topics covered are self-determination; rights related to lands, territories and resources, focusing on FPIC; economic, social, cultural and spiritual rights; civil and political rights; and equality and non-discrimination (gender, people with disabilities and LGBTQI community).
- Speakers:**
- Naomi Metallic, Assistant Professor, Schulich School of Law, Dalhousie University
 - Alexey Tsykarev, Member of Expert Mechanism (Central and Eastern Europe, the Russian Federation, Central Asia and Transcaucasia)
 - Victoria Tauli-Corpuz, UN Special Rapporteur on the Rights of Indigenous Peoples
- 10:15 a.m. Nutrition Break**
- 10:30 a.m. Small Group Discussions (to Follow Topics from Panel Three):**
- How can the standards, norms and laws in these topics be applied to your work?
 - What is needed from academics, governments, Indigenous peoples and UN agencies, bodies and programs to complete this work?
 - How can conference participants continue to network or collaborate in this area in the future?
- 11:30 a.m. Lunch Break**
- 12:30 p.m. Closing Panel**
- Al Benoit, Chief of Staff, Manitoba Metis Federation
 - Grand Chief Edward John
 - June Lorenzo, Attorney and Consultant
- 2:00 p.m. Closing Prayer by Elders of the Territory**
Norman Meade

**Centre for International
Governance Innovation**

67 Erb Street West
Waterloo, ON, Canada N2L 6C2
www.cigionline.org

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