Understanding and Implementing the UN Declaration on the Rights of Indigenous Peoples:

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Background to the UN Declaration

The UN Declaration on the Rights of Indigenous Peoples

- Was adopted by a resolution of the United Nations General Assembly on September 13, 2007
- Took over 20 years to negotiate with the participation of Indigenous peoples, nation-States and UN agencies/bodies
- Sets out minimum standards – floors not ceilings
- Recognizes both individual and collective rights
- Does not define Indigenous peoples
- Recognizes that the rights are inherent and grounded in Indigenous peoples’ own customs, laws and traditions
Sources of International Law

• Hard law – binding on States:
  – Treaties/covenants/conventions – countries must take steps to sign/ratify
  – Customary international law – applies to all countries
  – General principles of law

• Soft law – not directly binding on their own:
  – General assembly resolutions
  – Declarations
  – Reports/comments of UN committees, councils, special rapporteurs, treaty-monitoring bodies
  – Previous decisions/views of international bodies/courts/tribunals

International Law operates in 2 realms:

• International arena: international courts, tribunals, commissions, committees
• As part of domestic law: depending on type of international law and rules of reception
Relevant International Instruments & Bodies

International Human Rights Instruments (Treaties and Declarations)
- International Labour Organization Convention 169
- Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic and Social Rights (ICESCR)
- Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Universal Declaration of Human Rights
- American Declaration on the Rights and Duties of Man

International Bodies
- UN Expert Mechanism on the Rights of Indigenous Peoples
- UN Permanent Forum on Indigenous Issues
- UN Human Rights Council (Universal Periodic Review)
- UN Special Rapporteur on the Rights of Indigenous Peoples
- Inter-American Commission (and Court) of Human Rights
Once international law has been received domestically, it applies in Canada as Canadian law

- **Treaties**: must be implemented through domestic legislation (*Labour Conventions*). Implementation may be implicit – intention derived from hansard or legislative history. Unimplemented treaties may still have legal effect (*Baker*)

- **Customary international law**: generally held to apply directly, unless law expressly states otherwise (*Hape*)

**Presumption of conformity**: courts will strive to avoid constructions of domestic law pursuant to which the state would be in violation of its international obligations, unless the wording of the statute clearly compels that result (*Baker*)

- Charter: *Slaight Communications Inc. v. Davidson*
- Statutes: *Canadian Foundation for Children, Youth and the Law*
- Common law: federal court applied in *Jose Perriera E Hijos, SA v Canada (AG)*
- Soft law can also inform Canadian law: *Reference re Public Service; Spraytech*
  - *Baker*: legislature is expected to respect values and principles enshrined in international law
“The Declaration is an aspirational document which speaks to the individual and collective rights of Indigenous peoples, taking into account their specific cultural, social and economic circumstances.

Although the Declaration is a non-legally binding document that does not reflect customary international law nor change Canadian laws, our endorsement gives us the opportunity to reiterate our commitment to continue working in partnership with Aboriginal peoples in creating a better Canada.”
The UN Declaration & International Law

- The UN Declaration became part of international law when the majority of the UN General Assembly voted in favour of the Declaration.
- As a resolution of the General Assembly, the UN Declaration is not technically binding in and of itself.
- Declarations have **solemn, legal effects** and reflect the commitment of countries to abide by certain principles.
- All UN members are required under the UN Charter to fulfill all their obligations in good faith, including those in the Declaration.
- The UN Declaration builds upon and explains how existing human rights instruments apply to Indigenous peoples, which may be binding on Canada.
- Some provisions of the Declaration may reflect customary international law – those provisions (as representative statements of international law) would be binding on all countries.
- The **presumption of conformity** means that the courts will interpret Canadian law to uphold Canada’s international obligations, including those in the UN Declaration – especially given its highly persuasive value.
The Road to the UN Declaration

- 1984: UN Working Group on Indigenous Populations starts drafting UN Declaration
- 1994: Sub-Commission on the Prevention of Discrimination and Protection of Minorities approves the text
- 1995: Commission on Human Rights reviews text & creates working group
- 1995-2006: UN Inter-Sessional Working Group on the Draft Declaration elaborates and clarifies text
- June 2006: text submitted to Human Rights Council for vote
- General Assembly Third Committee (social, humanitarian and cultural issues) reviews text
- June 2007: President of UNGA appoints facilitator for final negotiations
- September 13, 2007: General Assembly majority vote
The UN Declaration should be interpreted in line with other international human rights instruments (ICCPR, ICESCR, CERD, CEDAW, CRC, CBD, ILO 169)

The preamble provides a general background to the UN Declaration and informs the interpretation of the articles

The articles and thematic sections of the UN Declaration work together and therefore articles should not be interpreted in isolation from one another
• **Aboriginal organizations** can adopt the UN *Declaration* and ensure all their policies and procedures uphold the standards

• **Non-Aboriginal & non-governmental organizations** can work with Aboriginal organizations to lobby government and industry to use the UN *Declaration*

• **Governments and companies** can use the UN *Declaration* as the framework to guide their work with Aboriginal communities

• **Lawyers litigating and negotiating** on behalf of Aboriginal people can argue for Canadian law to be interpreted in line with the UN *Declaration*

• **Courts, tribunals and human rights commissions** can cite the UN *Declaration* when making decisions relating to Aboriginal people and ensure Canadian law upholds the rights set out in the UN *Declaration*

• **Teachers, professors and other educators** can include information on the UN *Declaration* in their classes to help educate all Canadians on the UN *Declaration* and its significance in Canada
The Rights in the UN Declaration

• Right to equality
• Right to self-determination
• Right to Life, Integrity and Security
• Right to Culture, Religious and Linguistic Identity
• Right to Education, Public Information and Employment
• Right to Participate in Decision Making and FPIC
• Right to the Improvement of Social and Economic Conditions
• Right to Lands, Territories and Resources
• Right to Fulfillment of Treaties, Agreements and Other Constructive Arrangements
• Indigenous Women’s Rights
A declaration that specifically addresses the rights of Indigenous peoples was necessary because of the persistent denial of Indigenous peoples’ rights.

The UN Declaration begins by recognizing that Indigenous peoples are entitled to the same human rights and fundamental freedoms as all humans.

This includes the right to equality and the right to be free from discrimination.

With this starting point, the UN Declaration can be view as not creating new or special rights for Indigenous peoples, but reiterating that existing human rights standards apply to Indigenous peoples – albeit in a potentially modified way.
Right to Self-Determination

• Self-determination is a foundational right, from which all other rights flow
• Self-determination may be exercised differently among Indigenous peoples around the world, according to their own needs and aspirations
• Self-determination has internal and external aspects, both of which are incorporated into the UN Declaration
  – the right of peoples to choose how to express their own political aspirations – both within their own communities and their relationship to the Canadian state
  – Self-determination does not mean that every Indigenous people has a free standing right to form its own state
• Self-determination is not just an end result, but it is about a process and about political legitimation
• Implementing self-determination is about belated nation-building – where Indigenous peoples are equal partners in confederation
• Women, in appropriate circumstances elders and youth, must be included within the self-determination process
• The UN Declaration recognizes that Indigenous peoples have the right to life and physical and mental integrity, and also the right to live in freedom, peace and security as distinct peoples
• These rights include the right to belong to an Indigenous nation
• Genocide, dispossession, forced assimilation, cultural destruction, forced population transfers, and racist propaganda are practices that violate Indigenous peoples rights as distinct people
• States are obligated to provide mechanisms to prevent and redress such activities
One of the ways the UN Declaration protects against assimilation is protecting Indigenous peoples’ culture, religious and linguistic identity.

Indigenous peoples have a right to practice and revitalize their cultural traditions and customs.

Indigenous peoples have the right to access cultural and ceremonial sites and objects.

Indigenous languages are recognized to be key to the preservation of Indigenous cultures.

Cultural protection extends to traditional knowledge and cultural expressions.
Right to Education, Public Information & Employment

• While education in Western institutions has not always been a positive experience for Indigenous peoples, the UN *Declaration* recognizes that education can be key to empowerment and development.

• The UN *Declaration* recognizes that Indigenous peoples have a right to education, including in their mother tongue and using traditional methods of teaching and learning.

• The UN *Declaration* obligates countries to ensure that curriculum and public information accurately portray Indigenous peoples.

• The UN *Declaration* also promotes inclusive media which represents Indigenous cultures in an appropriate fashion.
Right to Participate in Decision Making & FPIC

• Indigenous peoples have a right to participate in all decisions that may affect them and their rights
• The emerging international standard on Indigenous peoples’ participate in decision-making is free, prior and informed consent:
  – **Free**: without coercion or divide and conquer tactics
  – **Prior**: with sufficient lead time for information exchange and decision making processes to occur
  – **Informed**: with the information necessary to understand the ramifications of their decision
  – **Consent**: with the aim of arriving at an agreement
• These consultations should be undertaken according to Indigenous peoples’ own decision making processes
• Decision making should include women and where appropriate elders and youth
• Indigenous people have the right to improvements in the areas of health, education, employment, housing, vocational training and retraining, sanitation and social security
• Indigenous peoples have the right to develop and administer social programs for their communities
• Indigenous peoples have the right to determine their own development priorities
• Indigenous peoples have the right to continue hunting, fishing and other traditional means of earning a living
• The protection over economic development is not limited to traditional activities, Indigenous peoples have a right to engage in new forms of economic development
Right to Lands, Territories & Resources

• Indigenous people have a right to their lands, territories, and natural resources including the rights to:
  – Own
  – Use
  – Develop
  – Control
  – Strengthen the relationship with the lands

• This applies to the lands they currently live on and use, as well as their traditional territories

• These rights also apply to lands Indigenous peoples have acquired in other ways like treaty land entitlements, modern treaties or purchase

• Canada is required to work with Indigenous people to set up a process that identifies and protects these lands under Canadian law

• Governments must consult with Indigenous people before allowing any activities on Indigenous people’s lands, territories and resources
Treaties, Agreements & Other Constructive Arrangements

- The UN Declaration provides protection of
  - Treaties: peace and friendship, historic and modern
  - Agreements: impact benefit agreements, land use agreements, etc
  - Other constructive arrangements: any legal text or other documents that are evidence of consensual participation by all parties to a legal or quasi-legal relationship

- States are obligated to respect and honour treaty obligations

- Treaties, agreements and other constructive arrangements provide a way forward in strengthening and developing the relationship between Indigenous peoples and Canadian governments

- Treaties, agreements and other constructive arrangements are recognized as being an international responsibility and as having an international character, in some situations
Indigenous Women’s Rights

• Indigenous women are entitled to all the rights contained in the UN Declaration
• When implementing policies and programs, it is important to make sure Indigenous women’s particular needs are addressed
• Violence against Indigenous women is one of the greatest barriers for the realization of Indigenous women’s rights
• To fully implement Indigenous women’s rights, including ending violence against women, social, economic and political rights of Indigenous women must be addressed
Discussion Questions

• In what areas do you think Canada is especially falling short of the standards set out in the UN Declaration?
• How can we work to encourage all Canadians, governments and courts to use the UN Declaration as the standard by which to work with Indigenous communities?
• What challenges do you foresee to using the UN Declaration in your work?
• How can we overcome obstacles to implementing the standards set out in the UN Declaration?
• What future support/connections do you need to use the UN Declaration in your work?
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