

Enhancing Indigenous Peoples' Participation in the United Nations on Issues Affecting Them

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Introduction

The United Nations General Assembly is currently considering how to enhance Indigenous peoples' participation in United Nations meetings on issues affecting them.² The initiative is ground breaking in that it contemplates the opening up the General Assembly to non-state actors that are not international organisations.

This essay outlines first the historical and normative background to this initiative before detailing the process, substantive issues and areas of agreement and divergence to date.

Background

Indigenous peoples have been seeking to influence international state deliberations and international oversight of their situations domestically for almost a century now. As is well documented, in the 1920s, on separate occasions Haudenosaunee Chief Deskaheh, representative of the Iroquois people in Ontario (Canada), and T.W. Ratana, Maori from Aotearoa/New Zealand, approached the League of Nations to voice their concerns as representatives of indigenous peoples.³

While the International Labour Organisation has addressed Indigenous peoples' issues since the 1930s, it was not until the 1970s that the United Nations began in earnest to accommodate Indigenous peoples' issues. Since then, Indigenous peoples have been pioneering participants in the international institutional order, opening doors and ensuring their inclusion in international legal and policy decisions impacting on them in ways that non-state actors had not been permitted to do before. This was most evident in the negotiations of the then draft declaration on the rights of Indigenous peoples when Indigenous peoples participated on an equal footing as states in crucial moments such as during its drafting in the Working Group on the Draft Declaration. It is also reflected in unique participatory rights for Indigenous peoples in the United Nations Permanent Forum on Indigenous Issues and the Expert Mechanism on the Rights of Indigenous Peoples.

The Declaration and Normative Justifications

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² GA Resolution 70/232 23 December 2015.

³ Office of the High Commissioner for Human Rights *Indigenous Peoples and the United Nations Human Rights System* (Factsheet No 9(2)) (OHCHR, Geneva, 2013) available <http://www.ohchr.org/Documents/Publications/fs9Rev.2.pdf>.

The justifications for Indigenous peoples' participation in matters affecting them at the international legal and political level are numerous and are reflected today in the United Nations Declaration on the Rights of Indigenous Peoples (Indigenous Declaration).

During negotiations on the Indigenous Declaration, Indigenous peoples argued strongly and successfully for recognition of their right to participate in decision-making affecting them, including, as mentioned, in the negotiations themselves. The overlapping justifications ranged from the essential, associated with Indigenous peoples' sovereign and self-determining character, to the instrumental, including the realisation of democratic principles, to the pragmatic, that better decision-making results from inclusive processes, especially the inclusion of the potential rights holders when drafting a rights-based instrument. Indigenous participation is also consistent with growing practice in international institutions as well as jurisprudence, which supported Indigenous arguments to a right to participation in decision making in Declaration negotiations.⁴

Many of the articles in the Indigenous Declaration express Indigenous peoples' rights to participate in decision making that impacts in them. The most fundamental of those articles is the right to self-determination in article 3. Other relevant articles include 5, 19, 20, 32, 33 and 42, with articles 18 and 41 providing clear support for Indigenous peoples participation in the United Nations. Article 18 states,

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

and article 41:

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

The Issue

Despite states' acceptance of an Indigenous peoples' right to participate in decision making and the duty to establish ways and means of ensuring participation of Indigenous peoples on issues affecting them, Indigenous peoples do not enjoy participatory rights on par with the right to self-determination within the United Nations. Indigenous do not have participatory rights equivalent to, or specific processes to enable their participation

⁴ For a description of both practice and jurisprudence, see Claire Charters "A Self-Determination Approach to Justifying Indigenous Peoples' Participation in International Law and Policy Making" (2010) 17(2) Int'l J Minority and Group Rights 215.

like, non-governmental organisations in institutions especially relevant and important to them such as the General Assembly, the Human Rights Council and the Economic and Social Council. Moreover, as the Secretary General has explained, it is difficult for Indigenous peoples to qualify as non-governmental organisations given that they are often in fact, to the contrary, governing in nature and, also, typically organise themselves differently as peoples compared to issue-focused organisations.⁵

Building Momentum

The Expert Mechanism on the Rights of Indigenous Peoples in its 2-year study in 2010 and 2011 on Indigenous peoples and the right to participate in decision making took the first steps to initiate the current process, recommending that the United Nations “establish a permanent mechanism or system for consultations with indigenous peoples’ governance bodies, including indigenous parliaments, assemblies, councils or other bodies representing the indigenous peoples concerned, to ensure effective participation at all levels of the United Nations.”⁶

In response to the Expert Mechanism’s study, the Human Rights Council requested the Secretary General to prepare the abovementioned paper on “the ways and means of promoting participation at the United Nations of recognized indigenous peoples’ representatives on issues affecting them.”⁷ The Human Rights Council, in its request, explicitly recognised that Indigenous peoples are not always organized as non-governmental organizations. After reviewing the Secretary General’s report, the Human Rights Council requested the General Assembly to consider the issue in 2012.⁸

Around this same period, in 2013, Indigenous peoples were preparing for the UN World Conference on Indigenous Peoples, drafting what is known as the Alta Outcome Document. In it, Indigenous peoples recommended,⁹

that the UN recognize Indigenous Peoples and Nations based on our original free existence, inherent sovereignty and the right of self determination in international law. We call for, at a minimum, permanent observer status within the UN system enabling our direct participation through our own governments and parliaments. Our own governments include inter alia our traditional councils and authorities;

States then committed themselves in the Outcome Document to the World Conference to considering, at the seventieth session of the General Assembly, *ways to enable the*

⁵ United Nations Secretary-General *Ways and means of promoting participation at the United Nations of indigenous peoples’ representatives on issues affecting them* (A/HRC/21/24)

⁶ Expert Mechanism on the Rights of Indigenous Peoples *Progress report on the study on Indigenous peoples and the right to participate in decision making* A/HRC/15/35 (2010) and *Final report of the Study on indigenous peoples and the right to participate in decision-making, Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/18/42 (2011), Advice para 36.

⁷ Human Rights Council resolution 18/8 (2011).

⁸ Human Rights Council resolution 21/24 (2012).

⁹ *Alta Outcome Document* from Indigenous Preparatory Conference to the World Conference on Indigenous Peoples (2013).

participation of indigenous peoples' representatives and institutions in meetings of relevant United Nations bodies on issues affecting them” and requested to Secretary General to report to the General Assembly with “specific proposals to enable the participation of indigenous peoples’ representatives and institutions”.

Like the 2012 Secretary General’s report on Indigenous peoples’ participation, the 2015 Secretary General’s report notes the difficulties Indigenous peoples face in participating in UN bodies of importance to them and their rights including the Human Rights Council and the inappropriateness of classifying Indigenous peoples as non-governmental organisations.¹⁰

Then, authorizing the current processes, the General Assembly resolved in December 2015 to request the President of the General Assembly to conduct consultations with states, Indigenous peoples and relevant mechanisms, such as the Permanent Forum, the Expert Mechanism and the Special Rapporteur to enable participation of Indigenous peoples in UN meetings on issues affecting them and to prepare a compilation of views to form the basis of a text to be considered by the General Assembly.¹¹

The General Assembly Process During Its 70th Session

The President of the 70th session of the General Assembly, with the support of many states and Indigenous peoples, appointed four advisors to assist him in conducting consultations and preparing the compilation: the permanent representatives to the United Nations from Finland and Ghana, and Professor James Anaya and I in February 2016. After consultations were launched in New York the advisors conducted an electronic consultation, requesting written inputs from states and Indigenous peoples between March and April 2016, followed by face-to-face consultations in May and June. After each consultation the advisors published a draft of the compilation to reflect progress and assist in further discussions.

The July 2016 Compilation

The final compilation, presented during the July 2016 annual meeting of the Expert Mechanism on the Rights of Indigenous Peoples, is organized around 4 principal issues: the location for enhanced Indigenous participation; the modalities of such participation; the method to identify Indigenous peoples’ organisations; and the possible criteria to assist in determining whether an Indigenous peoples’ organization should be accredited. The compilation gives an overview of the views expressed but in a way that indicates the views that have greater support and those which are more isolated. It also includes an annex setting out some of the elements that might be included in any resulting General Assembly resolution.

¹⁰ Secretary-General report *Progress made in the implementation of the outcome document of the high-level plenary meeting of the General Assembly known as the World Conference on Indigenous Peoples* (A/70/84-E/2015/76).

¹¹ GA Resolution 70/232 23 December 2015.

The compilation records the overall consensus that Indigenous peoples have the right to participate in the UN in matters affecting them, consistently with the right to self-determination. It also expresses the clear agreement that the process does not and should not undermine states' membership in the United Nations or their territorial integrity as reflected in the Declaration and the UN Charter.

There was considerable, but not uniform, support expressed for a separate category of participation in the United Nations for Indigenous peoples, including in the General Assembly. It is based upon an appreciation that the current procedures and practices, such as those applicable to ECOSOC-accredited non-governmental organisations, do not naturally or sufficiently accommodate the participation of Indigenous peoples as Indigenous peoples in UN bodies. A minority of states suggested that only a strengthening of existing participation in existing mechanisms is required. Others relatively tentatively suggested that the focus should first be on enhancing Indigenous peoples' participation in the Human Rights Council and/or the Economic and Social Council.

In the context of the General Assembly there is some agreement that this should include speaking and seating rights although there was room for more consideration of the exact modalities for Indigenous participation.

Some expressed concern about the potential practical implications of enlarging the General Assembly to include Indigenous peoples' representative organisations' observers although others noted that this should not be an obstacle to enhancing Indigenous peoples' participation and can be addressed practically.

There was considerable support for a recommendation by the General Assembly that Indigenous participation be enhanced in the Economic and Social Council and subsidiary and associated bodies and in the Human Rights Council and all subsidiary and associated bodies. There was also the suggestion that Indigenous participation in these bodies might be different and possibly greater when compared to modalities for participation in the General Assembly. Equally there was considerable support for a recommendation by the General Assembly that Indigenous participation be enhanced in UN programmes, funds and specialized agencies as well as in conferences to the parties to UN treaties. The advisors have noted that, however, the General Assembly in practice does not usually regulate procedure in other institutions.

Some states were concerned about difficulties in determining who is Indigenous, motivated in part by a perception that the process might incorrectly accredit some groups as Indigenous. Consequently, the view was expressed that the clearer and stricter the rules and procedures to identify an Indigenous peoples' organization, the more likely there would be agreement on enhanced levels of Indigenous institutions' participation in the higher-level UN bodies such as the General Assembly.

Most proposals recommended the establishment of a new body to identify indigenous peoples' organisations, including that the new body consist of both Indigenous peoples' representatives and states or, alternatively, Indigenous and state-appointed independent experts. Some also suggested that the Permanent Forum on Indigenous Issues might fulfill the role of identification body. A minority of states argued that the General Assembly final approval be necessary before an Indigenous peoples' organization be selected or that the selection body be made up of states. A number of contributors recommended that membership on the identification body should be balanced by geographic area – including equality in membership of individuals from the global North and global South - and gender representation.

There was a coalescence of opinion that selection should focus on Indigenous peoples organisations that represent Indigenous peoples, albeit with an appreciation that Indigenous peoples organize themselves in a myriad of ways globally. There was considerable agreement that Indigenous peoples' representative organisations need to be distinguished from non-governing organisations, organisations composed of Indigenous voluntary members or non-Indigenous peoples' organisations. On the other hand, questions remained at that point as to whether, for example, Indigenous women's organisations or organisations representing Indigenous individuals who are not resident on Indigenous territories should qualify for a new category of participation as Indigenous peoples' representative institutions.

With respect to determining whether an institution is genuinely representative of an Indigenous people, a few called for a definition of Indigenous peoples' representative institutions. Others rejected the need for a definition, although there was some agreement to criteria that might be relevant, albeit flexibly applied. These would include self-identification, possibly as an essential factor, as well as, possibly, state recognition. However, there was some consensus that state recognition should not be the determining factor. Other factors cited as relevant include that the institution represent peoples who have ancestral connections with their lands, territories and resources, who share history, language and culture, who exercise the collective rights of the people and who have the authority to practice Indigenous peoples' self-government and, where relevant, who have entered into treaties, agreements or other constructive arrangements with states.

The General Assembly Process During the 71st Session

At the beginning of his tenure, in September 2016, the new President of the General Assembly reappointed the state and Indigenous co-advisors to continue the consultations. These consultations are ongoing with the first held in December 2016 and the remaining scheduled throughout January to May 2017. The objective is to narrow down points of divergence on issues of substance so to facilitate the adoption of the resolution by the General Assembly during its 71st session, which ends in September 2017.

There is some divergence of opinion as to how the process should progress. Some, albeit a minority, would like the process to move quickly into an exclusively inter-governmental negotiation. Other states and Indigenous peoples would like the consultation process to continue in the interests of seeking as much agreement as possible between states and Indigenous peoples before the resolution is finalized in an exclusively inter-governmental process. It is usual practice within the General Assembly that resolution negotiations are exclusively inter-governmental. Nonetheless, there is precedent, including in the negotiations on the World Conference Outcome Document, for Indigenous peoples to be included for as long as possible in so-called informal consultations with the inter-governmental process approving any agreement reached. Currently, Indigenous-friendly states and Indigenous peoples are seeking to find agreement during the consultations in the hope that the resolution negotiation and adoption phase will simply approve agreement reached between Indigenous peoples and states.

December 2016 Consultation

The December 2016 consultation clarified the issues on which there is considerable agreement and highlighted, and narrowed down, the issues on which further discussion is needed to secure the passage of any resulting resolution through the General Assembly.

To assist progress, the President of the General Assembly's advisors updated the annex to the compilation, referred to as the "Elements for Discussion" document. While it is not formally a draft of a resolution, the advisors attempt to confine the document to those issues that will be included in the resolution, incorporate those elements that have the greatest level of consensus or agreement and set out potential options on those issues on which there is not yet uniform agreement.

At the time of writing, it is hoped that bilateral meetings and plenary consultations will assist in further finding consensus in the interests of expediting General Assembly approval of a resolution enhancing Indigenous peoples' participation in the United Nations.

December 2016 Elements Paper (the Elements Paper)

In the introductory parts of the Elements Paper there are a number of statements that seek to assuage states' concerns that enhanced Indigenous peoples' participation might undermine states' territorial integrity or the fundamentally state-centric nature of the United Nations. It also cites Indigenous peoples' right to self-determination.

The Elements Paper reflects that there appears to be agreement that the issue in this process is focused on Indigenous peoples' participation in the General Assembly and that the General Assembly will only encourage the Human Rights Council and the Economic and Social Council to enhance Indigenous peoples' participation. It reflects

implicitly the autonomy of the other institutions while also encouraging improved participation of Indigenous peoples in those institutions.

With respect to the forms of Indigenous peoples' participation, the Elements Paper reflects the growing agreement that generally it should include opportunities to speak and to provide written contributions, albeit with flexibility to enable adaptations to accommodate different meetings. It also seeks to ensure that there is adequate scope to ensure equity between Indigenous peoples from different regions in terms of opportunities to participate.

In the Elements Paper, there are some options for the selection mechanism to identify eligible Indigenous peoples' organisations including a new body made up of 7 each Indigenous and state representatives or appointed experts. Reflecting some calls for an all-state body, it also includes that option, as well as the option for a small body made up of only chairs of the Permanent Forum on Indigenous Issues, the Expert Mechanism on the Rights of Indigenous Peoples and the Voluntary Fund for Indigenous Peoples. Options for the selection process are also presented including that it should be open and transparent and that the General Assembly potentially have the right to approve selections of Indigenous peoples' organisations.

The selection criteria identified in the Elements Paper emphasise that the objective is to identify Indigenous peoples' organisations that are genuinely representative of Indigenous peoples, albeit, also, that some flexibility is required in how that might be assessed given the myriad of ways in which Indigenous peoples organize around the globe. On the question of who is Indigenous, self-identification is included as a potentially essential factor and state recognition is cited as a relevant but not essential factor. Representativeness is to be illustrated and some relevant factors suggested include authority under Indigenous law and custom and democratic election as a representative body.

[Question: should I include some comments on which states hold which positions e.g., RF, China, Indonesia, India etc being more conservative and the Nordics, USA, Canada etc being more progressive? Should I mention some of the Indigenous dynamics e.g., that the Saami and Nth Americans are particularly active – and we are uncertain of Africa's approach? We are concerned that there is insufficient participation by Latin American and Asian Indigenous peoples?]

Conclusion

The process to enhance Indigenous peoples' participation in the United Nations draws on almost a century of Indigenous peoples' efforts to ensure that the international legal and political system is responsive to their concerns. More recently, it builds upon states' recognition of Indigenous peoples' rights, international institutional practice and international and domestic jurisprudence supporting Indigenous peoples' right to

participate in decision making that impacts on them. It reflects Indigenous peoples' right to self-determination.

[anything you'd like me to emphasise in particular here?]