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A New Era for Indigenous Peoples

The United Nations Permanent
Forum on Indigenous Issues

BY HADI KHOSRAVI LILE

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Preface

Very little has been written about the UN Permanent Forum for Indigenous Issues. This edition of *Gáldu čála* is one of the very first academic works on the Permanent Forum. This institution, more than any other international organization, has created a voice for indigenous peoples internationally. If there is one thing that all indigenous peoples in the world have in common it is that they have been oppressed by their own government and they do not want the government to speak on their behalf. International institutions that can voice the indigenous peoples own concerns and provide pressure on the governments is essential for indigenous peoples. This paper puts the Permanent Forum in an historical context that underlines the significance of this institution. One might conclude that the establishment of the Permanent Forum constitutes the start of a new era for indigenous peoples internationally. We are now visible for the first time. For the first time we have seat of our own in the chambers of power in the United Nations. For the first time we can voice our own concerns through our own experts – not just like spectators, booing and cheering on the sideline. This paper analyses the mandate and structure of the Permanent Forum and it raises many critical questions related to inter alias funding, decision making, human rights and the election process. Some government representatives of the Permanent Forum seem to think that they have a veto-power on certain issues. They are supposed to function as independent experts on indigenous issues. However if they refuse to talk about certain issues, how independent are they? Should not an expert on indigenous issues be willing to talk about all issues and share their perspective? This is but one of the questions in this paper.

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Introduction

Global events, like the cartoons of Mohammed, have shown that the whole human kind is truly becoming a tightly knit community like never before. All human societies, nations, states and cultures are struggling to cope with this new reality. The agony and pain of the birth of a new world is visible everywhere. The process of globalisation is increasing in speed every day. In this new world human beings have to form new institutions of governance and decision-making. The United Nations is the only real step towards a global governance system that attempts to embrace the whole human race. Ever since the start of “the global age” in which the League of Nations and the International Labour Organisation (ILO) was founded, indigenous peoples were treated as if they did not exist. Governments all around the world have systematically, on a large scale, worked to extinguish indigenous peoples, their cultures and way of life. They have arbitrarily assumed property of indigenous peoples land and waters. And governments have systematically ignored indigenous peoples call for autonomy and an independent voice, both domestically and internationally. If there is one thing all indigenous peoples have in common it is that they do not trust governments and they want to speak for themselves.

On 28 July 2000, at its 45th plenary meeting, the Economic and Social Council (ECOSOC) adopted, by general consensus, the establishment of the UN Permanent Forum on Indigenous Issues (UNPFII).¹

This has been described as one of the most significant historical events for indigenous peoples and an unprecedented event for the United Nations. In a speech on 24 May 2002, the UN Secretary-General, Kofi Annan, celebrated the Permanent Forum in these words:

On the first day of your session last week, the President of the Economic and Social Council greeted you with the words, “Welcome to the United Nations family”. I would like to reiterate that sentiment, and say to all the world’s indigenous peoples: “You have a home at the United Nations”... We begin a new chapter in the history of indigenous peoples at the United Nations... I have no doubt that as new members of the United Nations family, you will make an immense contribution to the Organization’s mission of peace and progress.²

What made the Secretary-General speak with such powerful words about this new institution? How is it that the United Nations Permanent Forum for Indigenous Issues is nothing less than a new chapter in the history of indigenous peoples at the United Nations? Have indigenous peoples really become “new members” of the UN? Most people are oblivious to the importance of the Permanent Forum. Even human rights experts have little or no knowledge of it, and almost nothing is written about the Forum. Was the Secretary-General perhaps exaggerating and only trying to be nice? In this article I will look briefly

¹ From here on I will refer to the UN Permanent Forum for Indigenous Issues either as UNPFII, the “Permanent Forum” or simply as the “Forum”. For more information on the establishment of the Permanent Forum see: Economic and Social Council Resolution 2000/22: Establishment of a Permanent Forum on Indigenous Issues, 45th plenary meeting, 28 July 2000, UN Doc. E/RES/2000/22, available 3 August 2004 at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.22.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.22.En?Opendocument)

² See UN Press Release; ‘You Have A Home At The United Nations’ Says Secretary-General, AS Indigenous Forum Concludes First Session, UN Doc. SG/SM/8249, HR/4603, 24 May 2002, available 9 September at: <http://www.un.org/rights/indigenous/sgsm8249.doc.htm>

at the history of indigenous peoples in an international context prior to the establishment of the Permanent Forum. The reader will then be introduced to the processes that led to the establishment of the Permanent Forum. I will continue by describing in detail the mandate and structure of the Permanent Forum. Lastly, I will look more specifically at the role of human rights and the future of the Permanent Forum. What I can say now is that I have no doubt that the Permanent Forum will become one of the most influential UN organisations of our time. The only question is how rapidly it will gain significance.

The international historical context

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent. - United States Government, July 13, 1787.

Indigenous peoples were protected under international treaties at the beginning of the 19th century. However, concurrently with an increased focus on foreign policy and international cooperation in many countries, indigenous peoples became domesticated and ignored. They disappeared from the map and were treated as if they did not exist. Instead of being treated as a subject for international law, they were treated as a domestic problem – a disease on the sovereignty of national states. The question is how this trend was reversed and how indigenous peoples have regained a role in the international community.

A new era in International Law

In 1899 and 1907 two significant events marked the start of a new era for international law and cooperation. The Hague Peace Conferences, the first initiated by Tsar Nicholas and the second by President Theodore Roosevelt, were attempts to create universal standards for the law of land warfare, the law of sea warfare and the peaceful settlement of disputes, which led to the establishment of the Permanent Court of Arbitration in The Hague. At the second Peace Conference forty-three countries participated. All continents except Africa were represented.³

Interesting to note is that this focus on more universal cooperation and standard-setting came only a few years after an American shift “domestically” toward a more hardline non-negotiation policy toward the Indians. For much of the 19th century most Indian tribes in North America were able to maintain a high level of political autonomy. This was achieved partly by armed resistance and partly by entering into “treaties” on a so-called “nation to nation” basis. These treaties were entered into long after the Declaration of Independence of 1776. On July 13, 1787, the United States passed the North-West Ordinance, which stated, *inter alia*:

The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they shall never be invaded or disturbed, unless in just and lawful wars authorised by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.⁴

Today the Indians and the Inuits of the USA and Canada describe themselves as “the first nations”. The Indians can do this because the tribes were traditionally called “nations” by the various authorities and because the agreements that were entered into took as their starting point the principles of international law, an inherit-

³ See Malanczuk, Peter. *Akerhurst's Modern Introduction to International Law*, Seventh edition, London: published by Routledge, 1997, pp. 22-23.

⁴ From an Ordinance for the Government of the Territory of the United States Northwest of the River Ohio, 32 J. Continental Congress pp. 340-341 (July 13, 1787). A quotation made by: Wiessner, Sigfried. *Rights and Status of Indigenous Peoples: a Global Comparative and International Legal Analysis*, in ed. James S. Anaya: *International Law and Indigenous Peoples*, Burlington (USA): Published by Ashgate Publishing Company, 2003, pp. 296-297

ance from Las Casas and de Victoria.⁵ A series of events, however, brought an end to the first nation's ability to operate as independent actors, whilst respect for the obligations of international law, as regards them, reached a low ebb. The old mode of negotiating with the Indians – nation to nation – was redundant, in terms of power politics, and was ended by Congress in 1871. The 370 agreements that had been entered into between 1778 and 1871 were no longer recognised as being within international law. The matters referred to in these agreements became part of domestic jurisdiction and so the political authorities thought of them as irrelevant.⁶ This shift in focus can also be detected in Norway and Scandinavia. The Sámi peoples (especially the reindeer herders) were protected by laws based on customary use of land; the Lappekodicille of 1751, which was a law regulating the reindeer herders' right to move freely across the borders of Norway and Sweden, was an expression of the reindeer herders' customary right to use the land they had traditionally used from time immemorial. The mood of the authorities and the judgments of the Supreme Court changed towards the end of the 19th century. Reindeer herding was seen as uncivilized and damaging to the environment. In addition the land was looked upon as the exclusive property of the State, which kindly tolerated a certain use by its citizens. By the end of the 1930s, the reindeer herders had no rights at all to use the land: they were totally at the mercy of the State.⁷ Worth noting is that many other indigenous groups were not even regarded as human beings, let alone nations.

In Australia the whole territory was simply considered as *terra nullius* when the white settlers arrived.⁸ The amazing fact is that this terrible notion remained unchanged right until 1992, when the High Court of Australia finally recognised the “human potential” of the Aboriginal peoples. The Mambo judgment states that:

The Common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of *terra nullius* and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in scale of social organization to be acknowledged as possessing rights and interests in land.⁹

The League of Nations

The Hague Peace Conferences failed to address the issues of real tension in the world and were unable to prevent the outbreak of the First World War. After the First World War, as part of the European Peace Treaties negotiated at the Paris Peace Conference in 1919, two new revolutionary international organisations for the promotion of peace were established. The 26 articles constituting the League of Nations were entered into Part I while the constitution of the International Labour Organisation (ILO) was included in Part XIII. Subsequently, indigenous peoples in a number of countries made their first attempts to organise themselves. The first organisation with a pan-Indian goal was the Society of American Indians (SAI) founded in 1911. The first local organisation in USA was the *Alaska Native Brotherhood* founded in 1912. Attempts to organise were also made

5 For more information about the early international agreements, see article by: Sanders, Douglas. The Re-Emergence of Indigenous Questions in International Law, in ed. Anaya, James: *International Law and Indigenous Peoples*, Burlington: published by Ashgate Publishing Company, 2003, pp. 56-63. See also Fadden, John Kahionhes. *The Six Nations: The Oldest Living Participatory Democracy on Earth*, including many links to other internet sources on Native American history, available 19 July 2004 at: http://www.ratical.com/many_worlds/6Nations/index.html

6 This, according to Henry Minde (1995), was finally established in a Supreme Court judgment of 1903 in the case of Lone Wolf v. Hitchcock. See Minde, Henry. *The International Movement of Indigenous Peoples: a Historical Perspective*, in ed. Terje Brantenberg et al. *Becoming Visible; Indigenous Politics and Self-Government (Proceedings of the Conference on Indigenous Politics and Self-Government in Tromsø, 8-10 November, 1993)*, Tromsø: published by Centre for Sámi Studies at the University of Tromsø, 1995, pp. 10-13. See also Pruncha, Francis Paul. *The Great Father: The United States Government and the American Indians*, Lincoln: published by University of Nebraska Press, 1986, pp. 155ff. According to Sanders (2003) the U.S Supreme Court established Congressional jurisdiction already in 1886 in the judgment: *U.S v. Kagama*, 118 U.S. 375. See: Sanders, Douglas. *The Re-Emergence of Indigenous Questions in International Law*, in ed. Anaya, James: *International Law and Indigenous Peoples*, Burlington: published by Ashgate Publishing Company, 2003, p. 63.

7 For more details (in Norwegian) about customary rights and the changing practice of the Supreme Court in Norway see: Bull, Kirsti Strøm: *Samiske sedvaner som rettsgrunnlag for medbestemmelse? Muligheter og begrensninger innenfor norsk offentlighet*, in ed. Bjørn Bjerkli and Per Selle: *Samer, makt og demokrati: Sametinget og den samiske offentlighet*, Trondheim: Published by Gyldendal Akademiske, 2003, pp. 202-218. For more information on the domestication of indigenous peoples see Sanders note 6, pp. 63-71.

8 *Terra nullius* is a concept to describe a territory belonging to nobody, like that of The North Pole. See Eide, Asbjørn, *Legal and Normative Bases for Saami Claims to Land in the Nordic*, in ed. Gudmundur Alfredson et al. *The International Journal on Minority and Group Rights*, volume 8 Nos. 2-3, Netherlands: published by Kluwer Law International, 2001, p.127

9 See *The High Court of Australia: Mambo et al. v. State of Queensland*, 1992, 107 A.L.R. 1 p. 52

by the Sámi in Scandinavia and the Maori in New Zealand.¹⁰

The League of Nations was the international organisation in which one would have expected to raise indigenous issues. President Wilson himself had argued strongly for the right of nations to self-determination. And the protection of the rights of minorities was a matter of priority for the League while it was functioning at its best.¹¹ However, with the exception of a few cases, indigenous leaders did not approach the League of Nations. A significant exception referred to on the home pages of the Permanent Forum and mentioned by the Secretary-General, Kofi Annan, in his address to the third session of the Permanent Forum, is the story of Haudenosaunee Deskaheh, chief of the Younger Bear Clan of the Cauaga Nation and spokesman for the Six Nations of the Grand River Land near Brantford, Ontario. This was the largest and richest indigenous group in Canada. They had been allied with the British in their fight against the French in the colonial wars and against the Americans during the War of Independence. As they were on the losing side in the American War of Independence, they were given no autonomy. When, nevertheless, the demand for such status was raised in 1890, the government in Ottawa responded with a demand that an elected body should replace the traditional tribal government. This produced a split in the Six Nations between the traditionalists and the modernists. In the end it was the traditionalists who won, under the leadership of Chief Deskaheh.¹² In opposition to the modernists, Deskaheh stepped up the demand for full self-government. In 1920 matters came to a head, resulting in both legal battles and violent confrontation. When the Secretary General of the League of Nations brought this matter onto

the agenda in 1923, Deskaheh came to Geneva with a delegation from the Six Nations to defend their case. The Six Nations had the support of Ireland, Estonia, Panama and Persia. However, as Britain was the victor in the First World War, it was in a position to remove the Six Nations from the agenda, insisting that it was an internal matter for the British Empire. Thus Chief Deskaheh was refused permission to speak and had to return home without accomplishing his mission. All other attempt by indigenous representatives to approach the League of Nations suffered the same fate.¹³ In a way Chief Deskaheh's vision to speak on behalf of his people and articulate their concerns in an international forum constitutes the essence of what UNPFII is about. However, long before the whole United Nations structure existed, the International Labour Organisation (ILO) started to work on indigenous issues in 1921.

The International Labour Organisation

ILO was one of the two international organisations established at the end of the First World War. According to Swebstone and Alfredson¹⁴ the League of Nations was responsible for political and military peace, while ILO was more concerned with "social peace", as reflected in the first sentence of the preamble to its constitution:

Whereas universal and lasting peace can be established only if it is based upon social justice¹⁵

One important feature that distinguishes ILO from other international organisations even today is that it is tripartite in character, that is to say the representatives of employers' and workers' organisations are allowed to participate in the proceedings on an equal footing with governments.

¹⁰ See; Minde, Henry. The International Movement of Indigenous Peoples: a Historical Perspective, in ed. Terje Brantenberg et al. *Becoming Visible; Indigenous Politics and Self-Government* (Proceedings of the Conference on Indigenous Politics and Self-Government in Tromsø, 8-10 November, 1993), Tromsø: published by Centre for Sámi Studies at University of Tromsø, 1995, pp. 15-16

¹¹ See Østerud, Øyvind. *Nasjonenes selvbestemmelsesrett*, Oslo: published by Universitetsforlaget, 1984, p. 93

¹² According to Ronald Niezen (2003) the Department of Indian Affairs deliberately tried to impose an elected council on the Indian communities without due regard to the existing traditional governments in order to create the division and break their unity. For more about this see Niezen, Ronald. *The Origins of Indigenism: Human Rights and Politics of Identity*, Los Angeles: published by the University of California Press, 2003, pp. 31-36.

¹³ See Sanders, Douglas. *The Re-Emergence of Indigenous Questions in International Law*, in ed. Anaya, James: *International Law and Indigenous Peoples*, Burlington: published by Ashgate Publishing, 2003, p.66

¹⁴ See Swebstone, Lee and Gudmundur Alfredson, *The Rights of Indigenous Peoples and the Contribution of Erica Daes*, in ed. Gudmundur Alfredson and Maria Stavropoulou: *Justice Pending: Indigenous Peoples and Other Good Causes*, The Hague: published by Martinus Nijhoff Publishers, 2002, p. 70

¹⁵ International Labour Organisation: *Constitution of the International Labour Organisation*, Geneva: Published by ILO, February 1998

The governments have two representatives, while the employers and workers have one representative each. From a human rights perspective this tripartism represents an interesting departure from the general principle obtaining in International Law, namely that only States may take part in the process of creating new rules of International Law.¹⁶ According to *Roy and Kaye 2002*, ILO was established as a consequence of the industrial revolution. During this period of economic expansion, working conditions were harsh and often inhumane, and workers laboured under conditions amounting to exploitation, with no social or economic security.¹⁷ ILO was thus concerned with indigenous people primarily in their role as workers. Protection was granted in cases where these people were expelled from their ancestral domains to become seasonal migrants, or bonded or home-based labourers, thus being exposed to the forms of labour exploitation covered by the ILO mandate. Within this context ILO began to address the situation of the “native workers” in the overseas colonies of European powers as early as in 1921. One outcome of this, in 1930, was the adoption of the ILO Forced Labour Convention (No. 29). Following the creation of the UN in 1945, ILO widened its examination of indigenous workers, to address issues pertaining to indigenous peoples in general. From 1952 to 1972, ILO led an inter-agency, multi-disciplinary development programme, the Andean Indian Program, which is estimated to have assisted more than 250,000 people. Carrying out the Andean Indian Program gradually led ILO and other parts of the UN system to look at the situation of these people world-wide, beginning with a detailed study published in 1953.¹⁸ It was around this time the UN turned to ILO

and asked it to develop an international convention on the subject. ILO had been adopting conventions on working conditions and basic human rights long before the UN came into being. In 1948 and 1949, ILO adopted two conventions on freedom of association and collective bargaining, just before and after the adoption of the Universal Declaration of Human Rights. Before the next ten years had passed ILO had adopted a further two conventions: one on discrimination in employment and work and another on forced labour. Both of these were closely relevant to the situation of indigenous people. During this period of intense human rights activity, ILO began work on what was to become the first *Indigenous and Tribal People Populations Convention*, 1957 (No. 107).¹⁹

ILO Convention No. 107

ILO Convention No. 107 *Concerning Indigenous and Tribal Populations* was the first international legal treaty on indigenous issues and it was to stand unrivalled for 32 years. It addresses many issues important to indigenous people such as land rights, customary laws, labour and education. The convention had a fundamental flaw, however, which became increasingly evident as the UN started work on the convention and the number of indigenous people participating at international meetings increased. The convention took a patronising attitude towards indigenous and tribal peoples, referring to them, for instance, as “less advanced”, and it promoted eventual integration as a solution to the problem caused by their continued existence.²⁰ The presumption was that the indigenous would eventually disappear once they had an opportunity to participate in and become fully part of national society. The convention was meant to ease that transition period.²¹

¹⁶ See: Oppenheim, L. F. L. and Hersch Lauterpacht: *International Law: a treatise*, 8th ed. London: published by Longmans, 1955, pp. 713-732

¹⁷ See Roy, Chandra and Mike Kaye: *The ILO: a Handbook for Minorities and Indigenous People*, Geneva: published by Minority Rights Group International and Anti-Slavery International, May 2002, p. 4

¹⁸ See International Labour Organisation: *Indigenous People: Living and Working Conditions of Aboriginal Populations in Independent Countries*, Geneva: published by ILO, 1953

¹⁹ See Roy, Chandra and Mike Kaye: *The ILO: a Handbook for Minorities and Indigenous People*, Geneva: published by Minority Rights Group International and Anti-Slavery International, May 2002, p. 71

²⁰ ILO Convention No. 107, article 1(1): This Convention applies to- (a) members of tribal- or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.

²¹ See Swepstone, Lee. *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, in ed. James S. Anaya: *International Law and Indigenous Peoples*, Burlington (USA): Published by Ashgate Publishing Company, 2003, p. 334

In 1982 the UN Sub-commission on Prevention of Discrimination and Protection of Minorities²² established the United Nations Working Group on Indigenous Populations (WGIP). WGIP allowed representatives from indigenous NGOs to participate as observers regardless of ECOSOC status. This expert group, together with a few other international organisations and NGOs, played a significant role in pushing forward the changes that had to be made to ILO Convention No. 107.²³ The ILO Governing Body eventually responded to the criticism by convening a Meeting of Experts in Geneva in September 1986, to advise on whether and how to revise Convention No. 107. This meeting was essentially tripartite, composed of delegates from employers' and workers' organisations as well as governments. In a break from tradition, however, the Governing Body also appointed two experts from NGOs to represent the interests of indigenous peoples. One expert came from the World Council of Indigenous Peoples, the oldest and at the time largest international indigenous organisation. The other came from Survival International, the most pre-eminent indigenous NGO in the field. This was the first time indigenous representatives had been appointed as experts in such an international meeting. Other indigenous representatives, also for the first time, were observers at this meeting. The meeting prefigured the battles of ideals and aspirations that were to become familiar to those working in standard-setting in this area. Agreement was reached without dissent that the integrationist and patronising language of Convention No. 107 must be removed and replaced with an attitude of dignity and respect.²⁴ Between 1987 and 1989, ILO revised Convention No. 107. During this process a large group of indigenous people were consulted and actively

participated at the meetings either through their own organisations or as representatives of employers' and workers' organisations or of governments. After two years of lively debate and intense discussion, the Indigenous and Tribal Peoples Convention (No. 169) was adopted in June 1989.²⁵

ILO Convention No. 169

This convention is one of the most comprehensive instruments in the field of international law, touching on many aspects of indigenous peoples' lives, such as bilingual education, customary law, the environment, land rights, property rights, the right to be consulted, the right to participate in decisions, self-identification and spiritual values.²⁶ One of the areas of particular importance to indigenous peoples is the provision on land rights. The convention had to be framed in such a way as to provide for the possibility of separate land rights regimes within the context of the national legal system. This subject touches upon some of the most difficult and controversial areas of every country's laws. And, in addition, these rights touch upon major economic interests. It was clear to the drafters of this convention that governments would not ratify an instrument if it would require them to change their entire constitution. In addition to the land rights the convention also had extensive provisions for the participation of indigenous peoples in decision-making bodies. Article 6 (b) emphasises that, in applying the provisions of the Convention, governments shall:

(b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;²⁷

22 From here on only referred to as the "Sub-commission".

23 See Minde, Henrik Urfolksoffensiv, Folkerettsfokus og styringskrise: Kampen for en ny samepolitikk 1960-1990, in ed. Bjørn Bjerkli and Per Selle. Samer, makt og demokrati, Oslo: published by Gyldendal Norsk Forlag, 2003, p. 117

24 See Swepstone, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989, in ed. James S. Anaya: International Law and Indigenous Peoples, Burlington (USA): Published by Ashgate Publishing Company, 2003, p. 334

25 International Labour Organisation: ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual. Geneva: published by ILO, 2003, p.4, available 19 March 2004 at: <http://www.ilo.org/public/english/indigenous/standard/index.htm>

26 See Brownlie, Ian and Guy S. Goodwin-Gill, Basic Documents on Human Rights, fourth edition, New York: published by Oxford University Press, 2002, pp. 364-376

27 For the text of the Convention see: Brownlie, Ian and Guy S. Goodwin-Gill, Basic Documents on Human Rights, fourth edition, New York: published by Oxford University Press, 2002, p. 364

It is clear that the UN is also a body responsible for policies and programmes that concern indigenous peoples. One might thus have thought that the UN itself would establish means by which indigenous peoples could participate at all levels of decision-making that concerns them. However, the Convention has not been popular among the UN member states and only 17 countries have ratified the Convention so far.²⁸ Despite this, the Convention, together with the broad participation of indigenous peoples in the drafting process, was an important recognition of the “principle of participation of indigenous peoples in all matters that affect them.”²⁹

The UN Working Group on Indigenous Populations (WGIP)

When the United Nations was created it began quite early on, as part of its overall human rights work, to address some situations that affected indigenous peoples. ILO played an important role, as mentioned above. However, it was not until the establishment of the UN Working Group on Indigenous Populations that the indigenous peoples themselves became actively involved and consulted.³⁰ In 1970 the Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a comprehensive study be made of the problem of discrimination against indigenous populations. In 1971, Mr. José R. Martínez Cobo (Ecuador) was appointed Special Rapporteur for the study, which was to propose national and international measures for eliminating such discrimination. His final report was submitted to the Sub-Commission during the

«It is clear that the UN is also a body responsible for policies and programmes that concern indigenous peoples»

years 1981-1984.³¹ The study by Mr. Martínez Cobo, the interest generated in the Sub-Commission, and the support of non-governmental organisations, led in 1982 to the creation by ECOSOC of the Working Group on Indigenous Populations.³² WGIP soon became one of the largest UN forums dealing with human rights issues, with participation in annual meetings growing from some thirty people at its first session in August 1982 to over eight hundred in 2001.³³ This is partly due to the fact that WGIP is open to all representatives of indigenous peoples and their communities and organisations. The openness of WGIP's sessions also includes the participation of representatives of governments, non-governmental organisations and United Nations agencies. It meets annually in Geneva, usually during the last week of July. WGIP consists of five independent experts and members of the Sub-Commission - one from each of the geopolitical regions of the world. There are no indigenous representatives in WGIP as such.³⁴ Their mandate is twofold:

- To conduct studies: To review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples
- To formulate new international standards: To give attention to the evolution of international standards concerning indigenous rights.³⁵

28 For the countries that have ratified Convention No. 107 and not Convention No. 169, Convention No. 107 is still in force (18 countries). However, for those countries which had ratified Convention No. 107, but later ratified Convention No. 169, Convention No. 107 has been replaced by Convention No. 169.

29 For more information on the drafting process and the ILO Convention see: Sweptstone, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989, in ed. James S. Anaya: International Law and Indigenous Peoples, Burlington (USA): Published by Ashgate Publishing Company, 2003, pp. 329-366

30 See Office of the High Commissioner for Human Rights: Fact Sheet No.9: The Rights of Indigenous Peoples, available 9 August 2004 at: http://www.unhcr.ch/html/menu6/2/fs9.htm#*

31 See Cobo, Matines: Study of the problem of discrimination against indigenous populations, UN Doc. E/CN.4/Sub.2/1986/7, and paragraph 379. For another description of who the indigenous are, see article 1 in: Indigenous and Tribal peoples Convention (169), adopted 27 June 1989 by the General Conference of the International Labour Organisation at its 76th session, accessible in: Brownlie, Ian and Guy S. Goodwin-Gill, Basic Documents on Human Rights, fourth edition, New York: published by Oxford University Press, 2002, pp. 364-376

32 According to Henrik Minde (2003), Asbjørn Eide together with the Greek human rights expert, Erica-Irene Daes, proposed the establishment of the Working Group. Asbjørn Eide was the first chairman of the Working Group, followed by Erica-Irene Daes. See: Minde, p. 117; supra note 23

33 See Niezen, Ronald. The Origins of Indigenism: Human Rights and Politics of Identity, Los Angeles: published by the University of California Press, 2003, p. 46

34 The members of the Working Group are today: Mr Miguel Alfonso Martinez (Cuba), Mr. El Hadjè Guissé (Senegal), Mr. Yozo Yokota (Japan), Mr. Gáspár Biró (Hungary) and Mrs. Francoise Hampson (United Kingdom).

35 For more information about the basic facts concerning the Working Group, see: Office of the High Commissioner for Human Rights: Working Group on Indigenous Populations, available 6 July 2004: <http://www.unhcr.ch/indigenous/mandate.htm>

However, WGIP is not a body with the authority to receive and investigate complaints, nor to make recommendations to governments.³⁶

The significance of the Working Group

WGIP has, more than any other international body before it, made it possible for indigenous peoples to speak and be heard by the international community. Every year it reports on violations of basic human rights and freedoms. WGIP also gives States, NGOs, and indigenous peoples the opportunity to present their positions and views concerning developments within the UN. The presence of an international press corps means that statements are, on some rare occasions, also made public “at home” through local and national media, giving speakers a high-profile opportunity to engage in the “politics of embarrassment”. Equally important, however, are the activities outside the main room, in the hallways, foyers and cafeterias where people meet among themselves. Here, documents and comments are exchanged and formal statements reinforced. According to Niezen (2003):

The annual two-week meetings of the Working Group, more than any other kind of gathering in the United Nations or any other forum, are responsible for the coalescing of an international indigenous identity.³⁷

The Draft Declaration

Part of the mandate of WGIP is to formulate new international standards. In this respect WGIP worked from 1985 to 1993 on a UN Draft Declaration on the Rights of Indigenous Peoples. The first version, in resolution 1994/45, was a text based on seven “basic principles” and it specified in Article 3 that indigenous peoples have

a right to self-determination.³⁸ This draft declaration was unanimously approved by the Sub-Commission and submitted to the Commission on Human Rights. In 1995 the Commission established an open-ended inter-sessional working group on the draft declaration.³⁹ The Open-ended Inter-sessional Working Group is composed of the member states of the Commission on Human Rights. NGOs and indigenous organisations with consultative status in the Economic and Social Council may take part in the proceedings. And, just as in WGIP, indigenous organisations without consultative status may also participate.⁴⁰

The sole purpose of the Open-ended Inter-sessional Working Group is to elaborate a draft declaration on the rights of indigenous peoples, considering the draft adopted by the Sub-Commission, with a view to making it acceptable for consideration and adoption by the General Assembly. The initial goal was that the General Assembly was to be handed the draft declaration by the end of the International Decade of the World’s Indigenous Peoples (1995-2005). Unfortunately, after almost ten years, very little progress has been made and the discussions between governments and indigenous representatives seem to have reached deadlock. So far only two articles, 5 and 43, have been adopted. A number of governments (USA, Canada, New Zealand, Australia and Great Britain) have serious problems with the original text. They are opposed to the recognition of collective rights and in particular Article 3 of the declaration, which gives indigenous peoples the right to self-determination.⁴¹

The Special Rapporteur

In 2001, the Commission on Human Rights appointed a Special Rapporteur on the situation of the human rights and funda-

36 See Roulet, Florencia. *Human Rights and Indigenous Peoples: a Handbook on the UN System*, Copenhagen: published by the International Work Group for Indigenous Affairs, 1999, IWGIA Document No. 92, p. 41

37 See Niezen, p. 46; supra note 33

38 See the text of the Draft Declaration in Brownlie, pp. 72-83; supra note 31

39 See Economic and Social Council Resolution 1995/32: Establishment of a working group of the Commission on Human Rights to elaborate a draft declaration in accordance with paragraph 5 of General Assembly resolution 49/214, 25 July 1995, available 2 August 2004 at: <http://www.un.org/documents/ecosoc/res/1995/eres1995-32.htm>

40 For more facts about the Open-ended Inter-sessional Working Group: Office of the High Commissioner for Human Rights: Open-ended Inter-sessional Working Group on the Draft Declaration on the Rights of Indigenous Peoples, available 8 July 2004: <http://www.unhchr.ch/indigenous/groups-02.htm>

41 See García-Alix, Lola. *The Permanent Forum on Indigenous Issues*, Copenhagen: published by IWGIA in 2003, pp. 52-53

mental freedoms of indigenous people: Mr. Rodolfo Stavenhagen, from Mexico.⁴² His mandate is:

- (a) To gather, request, receive and exchange information and communications from all relevant sources, including Governments, indigenous people themselves and their communities and organizations, on violations of their human rights and fundamental freedoms;
- (b) To formulate recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous people;
- (c) To work in close relation with other special rapporteurs, special representatives, working groups and independent experts

of the Commission on Human Rights and of the Sub-Commission on the Promotion and Protection of Human Rights, taking into account the request of the Commission contained in resolution 1993/30.⁴³

The main type of communications sent by the Special Rapporteur are «urgent appeals» in cases of imminent danger of violation of the human rights of individuals, or even entire indigenous communities. He also transmits «allegations letters» to Governments on matters of a less urgent nature, which they have to respond to. Both urgent appeals and letters of allegation remain confidential until published in the annual report of the Special Rapporteur to the Commission on Human Rights.⁴⁴

⁴² See Office of the High Commissioner for Human Rights: Information Note on the mandate of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, available 10 July 2004: <http://www.unhcr.ch/indigenous/rapporteur.htm>

⁴³ See Commission on Human Rights resolution 2001/57: Decision to appoint, for a three-year period, a special rapporteur on the situation of human rights and fundamental freedoms of indigenous people, 76th meeting, 24 April 2001, article 1, available 10 July 2004 at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.RES.2001.57.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.RES.2001.57.En?OpenDocument)

⁴⁴ For more facts about the Special Rapporteur see: OHCHR, supra note 42

The Establishment of the Permanent Forum

Some Governments - and happily they are very few - argue that a clear definition of the term «indigenous peoples» is required before a meaningful discussion about the establishment of a permanent forum can take place. They talk about «true» and «false» indigenous peoples, and say that Governments should retain the exclusive right to designate and judge who the «true» indigenous peoples are. – The Saami Council.

How was the Permanent Forum created? How were indigenous peoples consulted and involved throughout the whole process? And why is there a need for a Permanent Forum within the United Nations?

The idea of a Permanent Forum

The idea of a Permanent forum emerged for the first time at a UN Human Rights Experts Seminar on the Experience of Countries in the Operation of Schemes of Internal Self-Government for Indigenous Peoples held in September 1991 in Nuuk, Greenland. Although WGIP provided an opportunity for a large number of indigenous to participate as observers, WGIP is at the lowest possible level in the UN system. The first time an indigenous person was invited to make presentations at the highest levels of the United Nations was at the United Nations Conference on Environment and Development, in Rio de Janeiro, June 1992. At the World Conference on Human Rights in Vienna, 14-25 June 1993, a number of indigenous from many regions were given an opportunity to speak at the

plenary session, and at a special session of the General Assembly at the inaugurations of the International Year and the International Decade of the World's Indigenous People.⁴⁵ The World Conference in Vienna became the first UN body that supported the establishment of a Permanent Forum. The Vienna Declaration recommended that the General Assembly proclaim an international decade of the world's indigenous people, to begin in January 1994, including action-oriented programmes, to be decided upon in partnership with indigenous people. In addition, as part of the action-oriented goals, the declaration proclaimed that:

In the framework of such a decade, the establishment of a permanent forum for indigenous people in the United Nations system should be considered.⁴⁶

The Vienna Declaration was followed up by the General Assembly. In its resolution 48/163, it requested the Commission on Human Rights (at its fiftieth session) to give the proposal its priority consideration. The Commission adopted resolution 1994/28 (4 March 1994), which requested the Assistant Secretary-General for Human Rights to invite Governments and indigenous organisations to give their views on this matter and transmit contributions received to WGIP. In addition the secretariat was to submit a technical note addressing institutional issues.⁴⁷

⁴⁵ For information about the birth of the Permanent forum see article by: Tauli-Corpuz, Victoria. The Birth of the UN Permanent Forum on Indigenous Issues, available 10. May 2006 at: http://www.tebtebba.org/tebtebba_files/unpf/pfi/pf.htm For more information about the indigenous peoples at the highest level of the UN see: Report of the Secretary-General: Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people, UN Doc. A/51/493, 14 November 1996, paragraph 36, available 27 July 2004 at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.51.493.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.51.493.En?OpenDocument)

⁴⁶ See World Conference on Human Rights: The Vienna Declaration: Program of Action, 12 July 1993, UN Doc. A/CONF.157/23, paragraph 32, available 11. July 2004: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En?OpenDocument)

⁴⁷ See Working Group on Indigenous Populations: Provisional Agenda for the Twelfth of the Sub-Commission, UN Doc. E/CN.4/Sub.2/AC.4/1994/L.1, paragraph 18, available 11 July 2004 at: <http://www.cwis.org/fwdp/international/agenda12.txt>

The Expert Workshops

The first workshop to review existing mechanisms within the UN and consider the possible establishment of a permanent forum was hosted by the Government of Denmark and the Home Rule Government of Greenland in June 1995. Twenty-one governments, 21 representatives of indigenous organisations and two independent experts participated.⁴⁸ The participants discussed the main issues relating to the establishment of this new body, such as its mandate, structure, participation, etc. In general the majority agreed that the Forum should have a broad mandate and equal membership between government and indigenous representatives. However, there was some disagreement on whether there was a need for a Permanent Forum at all. Thus the only consensus that was reached was on the need to evaluate existing UN mechanisms, procedures and programmes on indigenous peoples to see how far they could be effectively used, before continuing to discuss the establishment of a Forum.⁴⁹

In accordance with the Commission on Human Rights resolution 1997/30 of 11 April 1997, the second expert workshop was held in June 1997, in Santiago de Chile. Twenty-six governments, 29 indigenous organisations, 5 UN bodies and 3 NGOs with consultative status at ECOSOC attended the meeting. This seminar helped considerably to define the nature of the Permanent Forum and to broaden the consensus on the main issues, such as the need for the Permanent Forum to be placed at a high level within the UN structure (preferably reporting directly to ECOSOC), the need for it to have a broad mandate, equal membership between governments and indigenous peoples, and open participation procedures equal to those of the UN Working Group on Indigenous Populations. The progress at this seminar was, to a large degree, reached because of the Secretary General's Review of existing mechanisms

concerning indigenous peoples within the UN (see the next paragraph). There were some conflicting views on the need for a clear definition of indigenous peoples. The indigenous representatives expressed the clear view that there is no need for such a definition. A statement by the Sámi Council points out that:

Some Governments - and happily they are very few - argue that a clear definition of the term «indigenous peoples» is required before a meaningful discussion about the establishment of a permanent forum can take place. They talk about «true» and «false» indigenous peoples, and say that Governments should retain the exclusive right to designate and judge who the «true» indigenous peoples are. The Saami Council does not agree with this position. A definition cannot be a pre-requisite to the establishment of the permanent forum, because we do not see any reason why we indigenous peoples, among all peoples, alone need to be defined.⁵⁰

However, some governments thought it was inappropriate to refer to the indigenous as 'peoples' because it suggested a right to self-determination and sovereignty over natural resources.⁵¹

The Secretary-General's Review

Following the recommendations of the first workshop held in Copenhagen, the General Assembly requested the Secretary-General to produce a review of the existing mechanisms, procedures and programmes within the UN concerning indigenous people.⁵² On 5 June 1996, the Assistant Secretary-General for Human Rights wrote to the United Nations organisations and specialised agencies and other relevant United Nations departments and committees as well as interested intergovernmental organisations, enclosing a questionnaire on existing mechanisms, procedures and pro-

48 Erica-Irene Daes and Rodolfo Stavenhagen were the two independent experts

49 See García-Alix, p. 58; supra note 41

50 See Saami Council: Written statement to the second workshop on a permanent forum for indigenous peoples, UN Doc. HR/STGO/SEM/1997/CRP.3, paragraph 5 and 6

51 For more information on the second workshop see: Permanent Forum on Indigenous Issues: Report of the Second Session (New York 12-23 May 2003), UN Doc. E/2003/43, E/C.19/2003/22

52 See General Assembly resolution 1995/157: Programme of activities for the International Decade of the World's Indigenous People, 97th plenary meeting, 21 December 1995, UN Doc: A/RES/50/157, paragraph 8

grammes within the United Nations concerning indigenous people. More than 75 such bodies were invited to provide information. He also sent a letter to indigenous and other relevant organisations, in which they were invited to provide any relevant information for inclusion in the review. The questionnaire formulated and sent to the United Nations organs, programmes and agencies covered the following areas:

- (a) indigenous participation in the general or legislative bodies of the organisation or agencies;
- (b) specific meetings on indigenous issues;
- (c) research, policy planning, or internal policy guidelines related to indigenous people;
- (d) specific programmes or projects for indigenous people; and
- (e) future activities in connection with indigenous people.⁵³

The review demonstrated firmly that indigenous issues have become an important topic for a number of UN bodies. Besides emphasising the work of the UN bodies themselves, it also highlights the commitments made in declarations and programmes of action by high level conferences indicating, sometimes in detail, directions that could be taken by the international system and Governments. These included:

- The United Nations Conference on Environment and Development (Rio de Janeiro, June 1992) and in particular its Agenda 21, Chapter 26, "Recognizing and strengthening the role of indigenous people and their communities";
- The Vienna Declaration and Programme of Action (World Conference on Human Rights, June 1993);
- The International Conference on Population and Development (Cairo, September 1994);

- The World Summit for Social Development (Copenhagen Declaration and Programme of Action, April 1995);
- The Fourth World Conference on Women (Platform of Action and the Beijing Declaration, September 1995) and;
- Habitat II (UN Conference on Human Settlements, Istanbul, June 1996).⁵⁴

The review concluded that:

The fact that there are now a number of indigenous-related programmes and projects being implemented and planned by United Nations agencies only underlines the striking absence of a mechanism to ensure regular exchange of information among the concerned and interested parties - Governments, the United Nations system and indigenous people - on an ongoing basis.⁵⁵

The review further concluded that there were almost no internationally accepted guidelines on indigenous rights, although ILO Convention No. 169 was used as a reference by certain United Nations bodies and was a framework for governmental policy in those countries which had ratified it to date (ten countries at the time). But 'above all', it concludes that there are no adequate mechanisms within the UN system that make effective participation of indigenous peoples possible in the work of the UN:

Above all, there are virtually no mechanisms in the United Nations organizations which give the nominated representative of indigenous organizations or peoples an opportunity to provide expert advice or take part in decision-making. In most instances referred to in the report, United Nations agencies select from their own list of indigenous organizations or experts.⁵⁶

Emphasising the importance of this, the review makes references to commitments

53 For more information on the questionnaire and the responding parties see: Report of the Secretary-General: Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people, 14 November 1996, UN doc. A/51/493, available 27 July 2004 at: [http://www.unhcr.ch/huridocda/huridocda.nsf/\(Symbol\)/A.51.493.En?Opendocument](http://www.unhcr.ch/huridocda/huridocda.nsf/(Symbol)/A.51.493.En?Opendocument)

54 See report of the Secretary-General, paragraph 165; supra note 53

55 See report of the Secretary-General, paragraph 166; supra note 53

56 Report of the Secretary-General, paragraph 165; supra note 53

«The declarations from these meetings asked for the establishment of a UN organisation giving the indigenous peoples' own voices the widest possible realistic influence in the UN»

made by the General Assembly, stating that:

In this respect it is fitting to recall the commitment of the General Assembly to the principle of full and effective involvement of indigenous people in the planning, implementation and evaluation of projects affecting them.⁵⁷ The information provided by the United Nations agencies does not indicate that adequate procedures are already in place to accommodate the General Assembly's recommendation.⁵⁸

This review by the Secretary-General, drafted by the secretariat⁵⁹, was a momentous milestone for the work on the establishment of the Permanent Forum. It demonstrated, without a shadow of doubt, that the Permanent Forum was greatly needed.

The International Indigenous Peoples' Conferences

Parallel to the official UN meetings on the establishment of UNPFII, indigenous organisations initiated their own seminars and conferences. Six international indigenous conferences were held: 6-7 May 1997 in Temuco (Chile), 4-6 March 1998 in Kuna Yala (Panama), 23-25 September 1998 in Indore (India), 18-22 January 1999 in Arusha (Tanzania), 28-32 January 2000 in Chang Mai (Thailand), and the Arctic indigenous declaration from December 1998 in Geneva (Switzerland). These meetings and declarations were important for two reasons. Firstly, they made it possible for indigenous peoples to organise and form a strategy for the establishment of the

Permanent Forum. Secondly, the declarations resulting from these meetings had a decisive impact on the official UN debates. The declarations were included as official documents to the UN meetings and were also annexed to some of the UN official reports.⁶⁰ The declarations from these meetings asked for the establishment of a UN organisation giving the indigenous peoples' own voices the widest possible realistic influence in the UN.⁶¹ They called for a broad mandate, equal membership between governments and indigenous, a high position in the UN (no lower than a body reporting directly to ECOSOC) and a possibility for indigenous organisations without ECOSOC status to participate as observers.⁶²

The Ad Hoc Working Groups

In 1998, on the basis of the workshops organised in Copenhagen and Santiago, the Commission on Human Rights adopted resolution 1998/20 of 9 April, establishing an open-ended inter-sessional ad hoc working group to elaborate and consider further proposals for the establishment of a Permanent Forum. The Ad Hoc Working Group was asked to take into account the work of the two workshops and any contributions by governments, UN bodies, indigenous organisations, WGIP, as well as the High Commissioner in her role as coordinator for the Decade. It was decided that participation in the ad hoc working group would be according to the same procedures as agreed upon for the working group established in accordance with Commission on Human Rights resolution 1995/32, which in its paragraph 4:

Invites applications from organizations of indigenous people not in consultative status with the Economic and Social Council that are interested in participating in the Working Group;⁶³

57 See General Assembly resolution 1994/214: the International Decade of the World's Indigenous People, 17 February 1995, UN doc. A/RES/49/214

58 See report of the Secretary-General, paragraph 166; supra note 53

59 One of those who worked actively on the drafting of the Review was John Bernard Henriksen, an indigenous man from Kautokeino in Norway.

60 García-Alix, Lola. *Indigenous Rights*, ed. IWGIA: The Indigenous World 2000-2001, Copenhagen: published by IWGIA, 2001, p.449

61 I add the word 'realistic' here, because one might have thought that indigenous peoples would have wanted a UN body with only indigenous members. But such a body would in reality have no influence within the UN structure.

62 For more information about the indigenous conferences see García-Alix, Lola. *The Permanent Forum for Indigenous Peoples: The Struggle for New Partnership*, IWGIA Doc. 91, Copenhagen: published by IWGIA, 1999, pp. 82-111. This book is also available on a PDF file, 19 July 2004: <http://www.iwgia.org/sw289.asp>

63 See Economic and Social Council Resolution 1995/32, supra note 39

The working group held meetings from 15-19 February 1999. A total of 211 people attended these meetings, including representatives from 44 Governments, five specialised agencies, one regional body and 54 indigenous and non-governmental organisations. The meetings were highly successful and concrete, going into detail concerning the mandate, composition and work of the Permanent Forum and, most importantly, consolidating the idea of establishing a permanent forum. The Chairman-Rapporteur noted that:

After many years of good intentions and abstract debate, the working group had been able to start to address concrete and detailed questions pertaining to the establishment of a permanent forum. The creation of a new and permanent United Nations body obviously had many technical, financial, organizational and political implications. The working group had been able to cover quite a number of those issues. Moreover, the working group had been able to converge largely on a majority of the many outstanding problems. The working group had made great progress, both substantively and substantially.⁶⁴

Based on the results of the first session, the Commission on Human Rights decided to renew the Ad Hoc Working Group's mandate with a view to completing its task and submitting a report to the Commission, at its 56th session, with one or more

concrete proposals on the establishment of a permanent forum.⁶⁵ The working group held 18 plenary meetings during the period 14-23 February 2000. A total of 315 people attended these meetings, including representatives of 47 Governments, 3 specialised agencies and 59 indigenous and non-governmental organisations. The final meeting of the Ad Hoc Working Group managed to achieve the long-awaited consensus on the fundamental questions for the establishment of the Permanent Forum.⁶⁶

The establishment of the Permanent Forum

Based on the agreements reached at the second meeting of the Ad Hoc Working Group, the Danish Government sponsored a resolution on the establishment of a Permanent Forum at the 56th session of the Commission on Human Rights. On 27 April 2000, the resolution to establish the Permanent Forum was adopted in its entirety by a roll-call vote of 43 in favour to none against, with nine abstentions.⁶⁷ On 28 July 2000, at its 45th plenary meeting, the Economic and Social Council adopted by general consensus the establishment of the UN Permanent Forum on Indigenous Issues.⁶⁸ This was a significant historical day for indigenous peoples all over the world and a unique and unprecedented event for the United Nations. The General Assembly endorsed ECOSOC's decision at its Millennium Session in December 2000, officially establishing UNPFII within the UN.⁶⁹

64 See Open-ended Inter-sessional Ad hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations system. First Report, 25 March 1999, UN Doc. E/CN.4/1999/83, paragraph 29

65 See Commission on Human Rights resolution 1999/52: A permanent forum for indigenous people in the United Nations system, Chap. XV, 56th meeting, Geneva, 27 April 1999, adopted without vote, available 14 September 2004 at: <http://www.hri.ca/fortherecord1999/documentation/commission/1999-52.htm>

66 See Open-ended inter-sessional ad hoc working group on a permanent forum for indigenous people, Second Report, UN Doc. E/CN.4/2000/86, 28 March 2000

67 See Commission on Human Rights resolution 2000/87: Establishment of a Permanent Forum on Indigenous Issues, draft resolution 3, 28 April 2000, 68th meeting, adopted by a roll-call vote of 43 votes to none, with 9 abstentions, UN Doc. E/CN.4/RES/2000/8

68 See Economic and Social Council Resolution 2000/22: Establishment of a Permanent Forum on Indigenous Issues, 45th plenary meeting 28 July 2000, UN doc. E/RES/2000/22, available, 3 August 2004: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.RES.2000.22.En?Opendocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/E.RES.2000.22.En?Opendocument)

69 See García-Alix, Lola. Indigenous Rights, ed. IWGIA: The Indigenous World 2000-2001, Copenhagen: published by IWGIA, 2001, p. 450

The mandate and structure of the Permanent Forum

We are meant to keep abreast of the activities on all the other UN bodies with regard to indigenous issues and to promote coordination. That is what it says on paper.
– Former chairman Ole Henrik Magga

The most striking and unique thing about the Permanent Forum is that, for the first time since ILO became part of the UN, non-governmental experts have been included as members of a UN organisation on equal footing with the government members. The general rule is that only states are subjects of international law and can be members of international organisations. There are very few limitations on the mandate of the Permanent Forum. They are meant to coordinate all the activities of indigenous issues within the UN. They have the power to put tremendous pressure on governments. At the second session of the Permanent Forum in May 2003, the chairman, Ole Henrik Magga, requested a meeting with the chairman of the Security Council, urging the Security Council to do everything in its power to stop violence against the indigenous in Congo. The Security Council responded directly to the call from Ole Henrik Magga, providing a powerful signal that the United Nations, at the highest level, was willing to work with the Permanent Forum. The main limitation on the Permanent Forum is funding and, potentially, the decision-making process. All the members of the Permanent Forum need to be in agreement before it can make a decision.

Membership

A vast number of indigenous peoples have, ever since Chief Haudenosaunee Deskaheh visited the League of Nations (and long before that), claimed equal status to governments and nations. Since 1850, governments have insisted that the indigenous are part of their jurisdiction and that they must submit to their authority. Indigenous peoples have always had a different view. Dr. Ted Moses puts it like this:

We the indigenous peoples are the victims of a theft – one of history's greatest crimes. Our lands – entire territories – were taken; we were dispossessed, our means of subsistence were denied; our peoples and our lands were despoiled. Our peoples are victims of extermination and genocide in the most terrible and explicit meaning of those ideas... The whole world knows that the sovereignty, legitimacy, and territorial integrity of these States is tainted and fundamentally impaired because of the unjust, immoral and murderous means employed in the establishment upon indigenous lands. How can thieves go about legalising and legitimising possession of their stolen spoils? ⁷⁰

Indigenous peoples want to speak for themselves (often against their governments); they do not really trust their own governments. Up until now indigenous peoples have only been able to express their views as observers on the sideline – like spectators cheering or booing. When UNPFII was created indigenous peoples were, for the first time, included as mem-

70 See Moses, Ted. *Renewal of the Nation*, in ed. Gudmundur Alfredson and Maria Stavropoulou: *Justice Pending: Indigenous Peoples and Other Good Causes*, Hague: published by Martinus Nijhoff Publishers, 2002, p.60

bers of a UN body with the same status as governments. No other UN organs, besides ILO, are composed of non-governmental members. The decision of ECOSOC, on 28 July 2000, was truly an historical event. Article 1 of the resolution 2000/22 reads as follows:

1. (ECOSOC) *Decides* to establish as a subsidiary organ of the Council; a permanent forum on indigenous issues, consisting of sixteen members, eight members to be nominated by Governments and elected by the Council, and eight members to be appointed by the President of the Council following formal consultation with the Bureau and the regional groups through their coordinators, on the basis of broad consultations with indigenous organizations, taking into account the diversity and geographical distribution of the indigenous people of the world as well as the principles of transparency, representativity and equal opportunity for all indigenous people, including internal processes, when appropriate, and local indigenous consultation processes, with all members serving in their personal capacity as independent experts on indigenous issues for a period of three years with the possibility of re-election or reappointment for one further period; States, United Nations bodies and organs, intergovernmental organizations and non-governmental organizations in consultative status with the Council may participate as observers; organizations of indigenous people may equally participate as observers in accordance with the procedures which have been applied in the Working Group on Indigenous Populations of the Sub-commission on the Promotion and Protection of Human Rights;⁷¹

It is important to note that the members are not representatives of either governments or indigenous peoples, but must serve in their personal capacity as '*independent*' experts. The Permanent Forum does not have the mandate to promote the

interests of indigenous peoples as such, but must deal with indigenous '*issues*' objectively; it ensures broad participation of indigenous peoples, not only as members on equal footing with governments, but indigenous people may also participate as observers in accordance with the same procedures which have been applied by WGIP (namely, they do not need to belong to an NGO with ECOSOC consultation status). According to the Secretary-General's Review on Existing Mechanisms Within the UN Concerning Indigenous Peoples, WGIP was regarded by the indigenous as having successfully followed up initiatives raised by indigenous peoples, and it was said that WGIP was aware of indigenous peoples' concerns, unlike several other UN bodies. However:

Participants also felt that the Working Group allowed Governments more time to speak than indigenous participants. Some people interviewed said that they found the Working Group members intimidating and that indigenous people were too frequently cut off during their speeches.⁷²

The number of statements that are made both at the WGIP sessions and those of UNPFII are exhausting. The chairperson leading the meetings has to be very strict with regard to time and is frequently obliged to cut off those who are not able to express themselves within the minutes allocated to the speakers. However, because eight experts of the Permanent Forum are nominated by the indigenous organisations themselves and the current chair is an indigenous person, the indigenous speakers that are cut off are more likely to accept it and more likely to trust the judgement of the members.

The nomination procedure

Although Resolution 2000/22 refers to nominations of indigenous members based on broad consultation between the

⁷¹ See Economic and Social Council Resolution 2000/22, Article 1, *supra* note 68

⁷² See Report of the Secretary-General: Review of the existing mechanisms, procedures and programmes within the United Nations concerning indigenous people, 14 November 1996, UN Doc. A/51/493, paragraph 138, available 27 July 2004 at: [http://www.unhcr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.51.493.En?OpenDocument](http://www.unhcr.ch/huridocda/huridoca.nsf/(Symbol)/A.51.493.En?OpenDocument)

President of ECOSOC and the indigenous organisations, it specifies no criteria by which to define what is meant by “broad consultation”. Indigenous organisations have emphasised that the only way to ensure “broad consultation” is to organise regional consultation processes, organised by indigenous peoples themselves. In this way indigenous peoples can meet and find consensus for the most appropriate indigenous candidates. During 2001, indigenous organisations held various meetings with the Vice-President of ECOSOC and the High Commissioner for Human Rights, Mary Robinson, on how to organise the nomination. In spite of a lack of official funding to support the process, those organisations that had been most active in establishing the Permanent Forum set up regional committees to organise regional consultations for the nomination of candidates. Regional consultations were held in Asia, Central America, South America, Russia, the Pacific and the Arctic during the second half of 2001. At the Substantive ECOSOC Session in Geneva, 2-27 July, ECOSOC decided that the eight indigenous experts should be announced no later than 15 December 2001. They also decided on the venue and the date for the first Permanent Forum session to be held in New York from 13-24 May 2002.⁷³ The President did not appoint all the candidates nominated by the indigenous regional consultations, although six of the eight representatives were nominations made by the regional indigenous consultations. This could be seen as a significant recognition of the indigenous peoples’ right to identify their own experts.⁷⁴ The indigenous peoples at the regional consultations quickly adopted a number of qualifying criteria for their experts. The experts had to speak their own indigenous language, they had to have been brought up in an indigenous culture, and they needed to have extensive experience of indigenous politics, prefera-

bly at international level. The governments created no such criteria.⁷⁵

The hierarchical placement of UNPFII

UNPFII was placed very high up in the UN structure, directly beneath ECOSOC. The closest UN body in terms of participation of indigenous peoples is WGIP. But WGIP is at the lowest possible level in the UN, and it is a long way up to the General Assembly.⁷⁶ By the time the indigenous peoples’ concerns have trickled through all the administrative levels, and been adjusted and changed, little is left of what the indigenous peoples themselves think. In WGIP the indigenous peoples do not participate as decision-makers and their voices are filtered through, firstly, the members of WGIP, then the Sub-commission and the Human Rights Commission, before they reach ECOSOC. Because the Permanent Forum reports directly to ECOSOC, the numbers of “government filters” are greatly reduced and the concerns of the indigenous peoples are thus more likely to reach ECOSOC and the General Assembly.

The Mandate

In line with the wishes of the indigenous peoples during the discussions on the establishment of the Permanent Forum, the mandate became very broad. Articles 2 and 8 of Resolution 2000/22 spell out the duties of the Permanent Forum, emphasising that ECOSOC:

2. *Also decides* that the Permanent Forum on Indigenous Issues shall serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights; in so doing the Permanent Forum shall:
 - (a) Provide expert advice and recommendations on indigenous issues to the Council, as

73 For more information on the ECOSOC decisions in Geneva in July 2001 see: UN Press Release: First Permanent Forum on Indigenous Issues to meet in New York in May 2002, UN Doc. ECOSOC/5991, PI/1368

74 For more information on the indigenous concerns and the regional consultation process see: García-Alix, pp.63-65; supra note 41

75 See Lile, Hadi Khosravi. The United Nations Permanent Forum on Indigenous Issues, Master’s dissertation, Norwegian Centre for Human Rights, University of Oslo, 15 September 2004, p. 38

76 For more information on WGIP in Chapter One

well as to programmes, funds and agencies of the United Nations, through the Council;

(b) Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system;

(c) Prepare and disseminate information on indigenous issues;

8. *Also decides*, once the Permanent Forum has been established and has held its first annual session, to review, without prejudging any outcome, all existing mechanisms, procedures and programmes within the United Nations concerning indigenous issues, including the Working Group on Indigenous Populations, with a view to rationalizing activities, avoiding duplication and overlap and promoting effectiveness.⁷⁷

UNPFII is mainly an advisory body to ECOSOC; however, it shall also *promote the integration and coordination of activities relating to indigenous issues within the United Nations system*. The mandate says that the Forum shall discuss *economic and social development, culture, the environment, education, health and human rights*. It is not specified exactly how it should discuss human rights or which role it has in relation to the other issues. The Permanent Forum is not specifically given any mandate to set new standards in international law, but it is specifically asked to review the work of WGIP, *with a view to rationalizing activities, avoiding duplication and overlap and promoting effectiveness*. The most important difference between WGIP and UNPFII is that WGIP has a mandate to set new standards in international human rights law.

The coordinating role of UNPFII

Article 2 (b) of ECOSOC Resolution 2000/22 states that the Forum shall:

Raise awareness and promote the integration and coordination of activities relating to indigenous issues within the United Nations system;⁷⁸

This is not so much an advisory task as an executive leadership task. Basically it means that the Permanent Forum is intended to control and coordinate all the activities within the UN system related to indigenous issues currently taking place. In addition it shall promote awareness; meaning that it shall make all the other UN bodies, which have a mandate that affects indigenous peoples, develop a policy on indigenous issues and report back to the Forum. This is an enormous task and, according to the chairman, Ole Henrik Magga:

We are meant to keep abreast of the activities on all the other UN bodies with regard to indigenous issues and to promote coordination. That is what it says on paper, but so far we have only been able to make individual UN organisations focus more on indigenous issues; we have not been able to facilitate a lot of cooperation yet. Through the Inter-Agency Support Group for the Permanent Forum on Indigenous Issues we have been able to achieve some coordination. But the most important element of coordination so far is that we provide an opportunity for the different bodies of the UN involved with indigenous issues to come together and discuss their work once every year.⁷⁹

The Permanent Forum calls upon and brings together representatives from all the UN agencies, funds, programmes and organisations which have a potential mandate that can affect indigenous peoples. UN bodies working on indigenous issues (UNESCO, UNDP, WHO, WIPO, The World Bank, ILO, OHCHR, WGIP, the Special Rapporteur, etc.) present their work to UNPFII members and to some 1,000 indigenous leaders and representatives from indigenous organisations. If their reports are erroneous or their work is not good enough, they are heavily criticised. Presenting nice glossy pamphlets with nice words about their “wonderful work” to the Forum,

⁷⁷ ECOSOC resolution 2000/22, supra note 68

⁷⁸ ECOSOC resolution 2000/22, supra note 68

⁷⁹ See interview with the former chairman, Professor Ole Henrik Magga, in Oslo, 29 April 2004, supra note 75, p. 40.

when those who are affected or supposed to be affected are themselves there to testify, will not help much. The perspective of the indigenous leaders and representatives from every corner of the world gives the UN bodies a good indication of how their work is benefiting the indigenous peoples in real life. It brings the local people into the UN; not merely reports and statistics. If a UN body's work is good and appreciated, it will be used by the indigenous as an example to push forward changes within other UN bodies that are lagging behind. The Inter-Agency Support Group for the Permanent Forum on Indigenous Issues is a group of representatives from 27 different UN bodies. They are referred to as "friends of the Permanent Forum". Their task is to help the Permanent Forum promote awareness and coordinate activities related to indigenous issues within the UN system and to provide advice to the members of the Permanent Forum. At each session they meet with the members of the Forum and discuss what to do.⁸⁰

Decision-making

The way in which the Permanent Forum makes decisions is highly important because it determines the threshold on what issues the Forum can effectively deal with. And since there is often a split between governments and indigenous peoples on key issues, the rules relating to governance is a very important question. The mandate given by ECOSOC in Article 3 in Resolution 2000/22 reads as follows:

3. *Further decides* that the Permanent Forum shall apply the rules of procedure established for subsidiary organs of the Council as applicable, unless otherwise decided by the Council; the principle of *consensus* shall govern the work of the Permanent Forum;

The Permanent Forum is given no freedom to decide matters by voting. All members

have to agree on every decision based on the principle of consensus.⁸¹

Meetings and reports

The Permanent Forum meets annually for ten days. More than 1,200 participants attended the fourth session of UNPFII, 16-27 May 2005.⁸² It is a spectacular gathering that has quickly grown into one of the largest annual events at UN Headquarters in New York. According to the mandate UNPFII may decide to meet in Geneva or somewhere other than New York. Resolution 2000/22:

4. *Decides* that the Permanent Forum shall hold an annual session of ten working days at the United Nations Office at Geneva or at United Nations Headquarters or at such other place as the Permanent Forum may decide in accordance with existing financial rules and regulations of the United Nations;⁸³

After these ten days of plenary meetings, special caucus meetings, workshops, lunch meetings, dinner meetings, lobbying in hallways, prayer meetings and a variety of other side events, the members of UNPFII gather information, sit and talk in closed meetings and produce a report to ECOSOC. The Permanent Forum Special Rapporteur drafts the report. This report is distributed to all relevant UN bodies. Resolution 2000/22 says the following about the report:

5. *Also decides* that the Permanent Forum shall submit an *annual report* to the Council on its activities, including any recommendations for approval; the report shall be distributed to the relevant United Nations organs, funds, programmes and agencies as a means, inter alia, of furthering the dialogue on indigenous issues within the United Nations system;⁸⁴

⁸⁰ Complete list of the members of the Inter-Agency Support Group for the United Nations Permanent Forum on Indigenous Issues, available on 11 September 2004 at: http://www.un.org/esa/socdev/unpfii/links_unsystem/inter_agency_1.htm

⁸¹ For more about the principle of consensus, see next chapter

⁸² See Internet information about the: Fourth session of the United Nations Permanent Forum on Indigenous Issues, available 25th February 2006, at: http://www.un.org/esa/socdev/unpfii/en/session_fourth.html

⁸³ ECOSOC Resolution 2000/22, Article 4; supra note 68

⁸⁴ ECOSOC Resolution 2000/22, Article 5; supra note 68

Financing

The Permanent Forum is financed from the UN regular budget and from voluntary contributions. Article 6 of Resolution 2000/22 reads:

6. *Further decides* that the financing of the Permanent Forum shall be provided from within existing resources through the regular budget of the United Nations and its specialized agencies and through such voluntary contributions as may be donated;⁸⁵

Since the Permanent Forum was established in-between budget periods, there were no posts in the UN budget specifically allocated to the Permanent Forum for its first session. The secretariat could not be established because of lack of funding and the lack of finances made it difficult for the first session to draw up a real plan of work. The only budget granted by the UN to the Permanent Forum was that which was strictly necessary to hold the first and second sessions.⁸⁶ Even the chairman, Ole Henrik Magga, received no payment for his work and had to work on a voluntary basis, which basically meant that the University College in Kautokeino, where he is employed as a professor, had to pay for his work for the UN.⁸⁷ Today the budget includes the financing for the Secretariat and money allocated for preparing and carrying out one session each year. In addition, the General Assembly has established a voluntary fund for the Permanent Forum for the purpose of funding the implementation of recommendations made by the Permanent Forum through the Economic and Social Council.⁸⁸ It is also worth noting that the UN has a Voluntary Fund for Indigenous Populations for the purpose of funding the participation of indigenous peoples in WGIP. In December 2001 the General Assembly decided that this voluntary fund

should also fund indigenous participation at the Permanent Forum.⁸⁹ However, there is no money for indigenous peoples to organise regional consultation processes in order to nominate new members. Nothing is provided for the members to conduct study-trips and arrange meetings with indigenous peoples. And the Forum cannot afford to establish any subsidiary committees to work on specific issues within its mandate.

The Secretariat

The Forum's Secretariat was established on 27 February 2003 in the Division for Social Policy and Development, Department of Economic and Social Affairs, and was provided with interim staff consisting of four professionals and two administrative staff members.⁹⁰ Many indigenous representatives have argued time and time again that the Secretariat should be staffed by a high percentage of indigenous professionals, and preferably headed by an indigenous person. This has not happened; there is only one report-writer within the Secretariat who has an indigenous background. The UN received applications from some highly qualified indigenous people for the position of director, including Mr. John Bernard Henriksen, but due to internal employment procedures within the UN, they did not get the job.⁹¹ Comparatively speaking, it would have been unthinkable for the Secretariat of the United Nations Development Fund for Women (UNIFEM) to be staffed by mostly men and in addition headed by a man. The Secretariat has a very broad mandate. Its central function is to provide substantive assistance and support to the Forum in carrying out its mandate. This includes:

- Coordinating inputs of the United Nations system to the programme of work

⁸⁵ ECOSOC Resolution 2000/22, Article 6; supra note 68

⁸⁶ See my interview with Mr. John Bernard Henriksen, Oslo, 6 July 2004, in supra note 75, p. 42, and see also García-Alix, supra note 41, p.66

⁸⁷ Ole Henrik Magga was quite upset about the financial situation when I first interviewed him in Kautokeino on 20 August 2002 as a journalist for the newspaper Finnmark Dagblad

⁸⁸ See General Assembly resolution 2003/553: Voluntary Fund for the Participation of Indigenous Peoples, 23 January 2003, at its 57th session, UN Doc. A/57/553, Agenda item 106, available 9 September at: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/No2/550/88/PDF/No255088.pdf?OpenElement>

⁸⁹ See García-Alix, p. 95; supra note 41

⁹⁰ See Permanent Forum on Indigenous Issues: Note by the Secretariat: Outcomes achieved in response to the first session of the Forum, 17 March 2003, UN Doc. E/C.19/2003/3, paragraph 10, available 9 September 2004 at: <http://ods-dds-ny.un.org/doc/UNDOC/GEN/No3/283/69/PDF/No328369.pdf?OpenElement>

⁹¹ See my interview with Mr. John Bernard Henriksen, Oslo, 6 July 2004, p. 43, supra note 75

of the Forum. Chairing an intradepartmental task force within the Department of Economic and Social Affairs for the Forum

- Representing and advocating the policies of the Forum before United Nations policy-making bodies, agencies, programmes and funds
- Providing support to the Chair of the Inter-Agency Support Group for the Forum; pursuing the integration of indigenous issues within the intergovernmental and inter-agency system
- Consulting with representatives of United Nations Member States, indigenous organisations, academia and others concerned with a view to implementing the programme of work of the Forum
- Implementing activities for raising the awareness of indigenous issues among non-governmental organisations, the media, academia and civil society at large; and administering the voluntary fund for the Forum.

When the Secretary-General was asked to conduct a review of the existing mechanisms for participation of indigenous peoples, the man who actually drafted it was of course not Kofi Annan himself, but an indigenous man by the name of John Bernard Henriksen. Mr. Henriksen was also the man who launched the idea and drafted the first proposal for a Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous people. This demonstrates how important it is to have indigenous persons within the secretariat.⁹²

The Sessions

The first session of the Permanent Forum was held in New York from 13 to 24 May 2002. In addition to the members of the Forum, some 900 observers representing Governments, the United Nations system, indigenous peoples' organisations and other non-governmental organisations

attended the session. Ole Henrik Magga was chosen by the members to be the first President of the Permanent Forum. Wilton Littlechild was chosen to be the Forum's first rapporteur. The main focus of the first session was the need to establish a secretariat and for the UN to improve the financial situation of the Permanent Forum. Priority was also given to gathering information within the UN system in order to promote coordination on the work on indigenous issues. The Permanent Forum recommended that a UN publication be produced every three years on the status of the world's indigenous peoples.⁹³

Talks with the Security Council

The second session of UNPFII was held from 12 to 23 May 2003 at the UN Headquarters in New York. The theme of the second session was "Indigenous Children and Youth". High suicide rates, alcohol abuse and lack of basic education are common problems for all indigenous children and youth all over the world. In addition, the Permanent Forum also received many reports of very serious human rights violations from all around the world; involving mass murders, systematic rape by military forces, forced labour, slavery, disappearances and torture. The Permanent Forum cannot do anything about these reports apart from reporting them to other UN agencies. The most shocking reports came from Congo in Africa. Mr. Makelo from the Pygmies in Congo said that never before had his people known atrocities on the scale being committed at present. The Mambasa pygmies, in the Ituri District, were being hunted and eaten as though they were game animals. This cannibalism was committed by members of armed groups who thought they could acquire magical powers by eating the flesh of Bambuti people. According to Mr. Makelo, the selective character of this cannibalism, which was carried out only on the Bambutis, was tantamount to genocide. The representatives

⁹² See my interview with Mr. John Bernard Henriksen, Oslo, 6 July 2004, in *supra* note 75, p. 44

⁹³ For information about the first session see: Permanent Forum on Indigenous Issues: Report of the first session (New York 13-24 May 2002), UN Doc. E/2002/43/Rev.1, E/CN.19/2002/3/Rev.1

«This cannibalism was committed by members of armed groups who thought they could acquire magical powers by eating the flesh of Bambuti people»

of the indigenous people of the Democratic Republic of Congo had come to the United Nations to ask for help before all hope was lost, the Forum was told.⁹⁴ This was a situation that called for swift and immediate action. Despite the fact that there is nothing in the mandate that specifically allows it, the chairman, Ole Henrik Magga, made direct contact with the President of the UN Security Council. He requested a meeting on the situation in Congo for indigenous peoples and called for immediate action, asking the Security Council to do everything in its power to stop the violence in Congo. The Security Council responded directly to the call from Ole Henrik Magga, providing a powerful signal that the United Nations, at the highest level, was willing to work with the Permanent Forum. Although there is nothing within the mandate that mentions the possibility of such contacts with the Security Council, there is nothing within the mandate that prohibits it. This was an incredible victory for the Permanent Forum, making both the members of the Forum and others aware of the huge potentials of this UN body.⁹⁵

Indigenous women

The third session of the Permanent Forum took place from 10 to 21 May 2004 at the UN Headquarters in New York, and the special theme of this session was «Indigenous Women». The session was attended by some 1,000 NGO, academic and other civil society representatives, with a strong participation of indigenous women. Representatives from 68 member states were present, including representatives from the Holy See. In addition, some 33 or-

ganisations from the UN system and other intergovernmental entities attended. The Forum's lively meetings were concluded by 42 side events, including an international funders' meeting. Also two pre-session training courses for indigenous participants were held. This session, not least through the voices of indigenous women, brought into focus the grave impact of conflict on indigenous communities and the need for them to have a meaningful voice in conflict resolution and peace building. Violence against indigenous women is a serious problem all over the world, including systematic rape by military forces, domestic violence and sexual abuse. In addition, trafficking, forced labour and slavery were among the most serious issues. The Forum adopted twelve pages of recommendations on the special theme, with specific recommendations to some 20 different UN bodies.⁹⁶

The Millennium Development Goals

The fourth session was attended by 1,200 participants from 68 member states and the Holy See, as well as 30 UN systems and other intergovernmental entities. On the agenda were Millennium Development Goal (MDG) Number One, to eradicate extreme poverty and MDG Number Two, to provide primary education for all. The Permanent Forum recommended a human rights-based approach to development, and the full and effective participation of indigenous peoples in designing, implementing and monitoring MDG-related programmes and projects that concern them or may affect them. The Forum recommended that the Poverty Reduction Strategy Papers of national governments should recognise indigenous peoples' rights to land, forest, marine and other natural resources. The Permanent Forum also recommended that indigenous communities must participate in all decisions regarding education of their children. Education should be given

94 For more information on the cannibalism in Congo see: UN Press Briefing: Press Conference by Indigenous Peoples of Democratic Republic of Congo, 21 May 2003, available 19 August 2004: <http://www.un.org/news/briefings/docs/2003/indigenouDRCpc.doc.htm>

95 For more information on how UNPFII cooperated with the Security Council on the Congo situation see: UN Press Briefing: Press briefing by Chairman, Permanent Forum on Indigenous Issues, 23 May 2003, available 19 August: <http://www.un.org/news/briefings/docs/2003/maggabrf.doc.htm>

96 For more information about the third session and its recommendations see: Permanent Forum on Indigenous Issues, Report of the third session (New York 10-21 May 2004), UN Doc. E/2004/43, E/C.19/2004/23

in their own language. The mother tongue must be the first learning language and the national language the second language. States must recognise that isolation is a major obstacle that prevents indigenous peoples from fully enjoying their right to education. States should also review current national curricula and textbooks to erase culturally discriminatory materials and enhance knowledge of indigenous cultures. The fifth session will take place from 15-26 May 2006. And the theme of this session will be “The Millennium Development Goals and indigenous peoples: Re-defining the Millennium Development Goals”.⁹⁷

⁹⁷ For information about the fourth session see: Permanent Forum on Indigenous Issues: Report of the fourth session (New York 16- 27 May 2005), UN Doc. E/C.19/2005/9. Available on 25 December 2005 at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/377/61/PDF/N0537761.pdf?OpenElement>
For information about the fifth session see: Home page of UNPFII, available 25 December 2005 at: <http://www.un.org/esa/socdev/unpfi/index.html>

Human Rights

We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development. – Article 24, The Millennium Declaration.

The previous chapters have mostly set out a number of facts. In this chapter I will analyse and discuss some of the most difficult questions facing the Permanent Forum. It has not yet been decided *how* the Permanent Forum will approach human rights. I will look at how the “principle of consensus” might affect the *ability* of the Permanent Forum to address the most difficult human rights issues. Then I will address how the Permanent Forum might affect other human rights institutions and UN bodies. I will look firstly at the power and influence of the Forum, and then lastly I will look at how the establishment of the Forum might affect the future of the Working Group on Indigenous Populations.

The role of human rights as an issue

Article 2 of Economic and Social Council Resolution 2000/22 spells out the issues that the Permanent Forum shall address. These issues are economic and social development, culture, the environment, education, health and human rights. All of these issues are interdependent and human rights are linked to them all. Indeed, one might ask; what are human rights if not the right to development, the right to speak one’s own language, the right to have access to clean water, the right to education, and the right to health? However, one might

also argue that a rights-based approach to all the issues could be counter-productive, making the work of the Permanent Forum too narrowly focused on human rights. Mr. Wayne Lord, the Canadian government member of the Permanent Forum, asserts that:

To say “this is my right, which you need to respect” can be counter-productive sometimes. It all depends on what your goals and objectives are. The goal must be to make life better for everybody. The Forum is meant to help the UN to do a better job. It has an extremely broad mandate. But still it is mostly based on a rights-based approach. And for many indigenous that is the only approach that matters. A rights-based approach tends to polarise, politicise and make things black and white - as opposed to goodwill and cooperation.⁹⁸

Wayne Lord’s approach to human rights can be seen as a so-called realist position on politics, emphasising that the end result is more important than ideologies and values. According to Hans J. Morgenthau (1985), there can be no political morality without prudence; that is, without consideration of the political consequences of seemingly moral action. Ethics in the abstract judges action by its conformity with moral law; political ethics judges action by its political consequences. According to Morgenthau, Abraham Lincoln said:

I do the very best I know how, the very best I can, and I mean to keep doing so until the end. If the end brings me out all right, what

98 See my interview with Wayne Lord in New York, 18 May 2004, *supra* note 75, p. 48

is said against me won't amount to anything. If the end brings me out wrong, then angels swearing I was right would make no difference.⁹⁹

However, the weakness of Wayne Lord's approach in terms of the Permanent Forum is that it does not really clarify what role human rights should play. It only explains what problems human rights can cause, but does not really present any alternative. Any stand on society and politics, including all the issues related to the mandate of the Permanent Forum, is based on some understanding of what is good for people (at least if we regard ourselves as moral agents). What is good for people is based on an understanding of human nature and the meaning of life, which is basically a matter of philosophy, religion and human values. What does Wayne Lord mean by "goodwill and cooperation"? According to Aristotle, political justice is based on the one hand on man-made rules that people agree on and follow because they have agreed on it, not because they are based on human nature and values. Traffic rules are an example of such rules. Secondly, Aristotle suggests that there are laws based on what is natural, also asserting that what is natural might be different and change with time.¹⁰⁰ It is easy to talk about "goodwill and cooperation" as long as the Permanent Forum is dealing with uncontroversial "traffic rules", but when it enters the foggy woods of ethics and moral values, what is "good" becomes a separate question in itself. If we profess the relativist idea of cultural contingency in moral standards, and conversely reject any form of "ethical universality", we are likely to support the notion that discrete societies are themselves the best source of values and guidance for human well-being. Many people confuse relativism with toleration of diversity and find it attractive on the grounds that it shows respect for the ways

of others. But by making each tradition the last word, we deprive ourselves of any more general norm of toleration or respect that could help us limit the intolerance of cultures.¹⁰¹ If we believe in human rights as a universal code of ethics, one that transcends all cultures and places, we become more interested in protecting individuals, making cultural affiliation itself a matter of choice – a product of individuals' expression of their humanness and identity.¹⁰²

If we look at one of the other mandate areas of the Permanent Forum, which in itself also cut across all the other mandate areas, namely development, we will see how the definition of development has moved from being a matter of charity and goodwill to becoming a matter of legal entitlement to all human rights. In 1991 the UNDP published the first *Human Development Report* and tried to establish new parameters for development. The report defined human development as a process of increasing people's choices, including access to income and employment opportunities, education, health, and a clean and safe physical environment. Each member should also have the opportunity to participate in community decisions and enjoy human, economic and political freedoms. Increasing people's choices is intimately related to securing and strengthening people's capabilities for choice making, which in turn presupposes human rights and freedoms that make such capabilities possible.¹⁰³ In this approach, "expanding freedoms" represents the ends as well as the means of development.¹⁰⁴ On 4 December 1986 the General Assembly adopted a Declaration on the Right to Development. According to Article 1 of the Declaration:

1. The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political

99 See Morgenthau, Hans J. *Politics among Nations: the Struggle for Power and Peace* (6th ed.), New York: published by McGraw-Hill, 1985, pp. 12-13

100 See McKeon, Richard. *The Basic Works of Aristotle*, New York: published by Random House Publisher, 1941, pp. 1014-1015.

101 See Nussbaum, Martha. *Woman and Human Development*, Cambridge: published by Cambridge University Press, 2000, p. 49

102 For a debate about relativism and rights related to indigenous issues see: Niezen, supra note 33, pp. 94-144

103 See Andreassen, Bård Anders. *Shifting Notions of Development – Implications for the Right to Development*, in ed. Chris Duckett: *The Right to Development: Reflections on the first four Reports of the Independent Expert on the Right to Development*, Dr. Arjun Sengupta, Geneva: Published by Franciscans International, 2003, pp. 27-29

104 See Sen, Amartya. *Development as Freedom*, New York: published by Anchor Books, 2000, p. xii

development, in which all human rights and fundamental freedoms can be fully realized.

2. The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.¹⁰⁵

According to the UN Special Rapporteur on The Right to Development, Dr. Arjun Sengupta, every human person and all peoples are entitled to a process in which all human rights and fundamental freedoms can be fully realised. To have a right means to have a claim to something of value to other people, institutions, the State or the International community, which in turn has the obligation to provide or help to provide that something of value. This emphasis towards a legal foundation of development goals implies that development outputs (culture, the environment, education and health) are not matters of charity or “welfare-ism”. They are matters of legal entitlements and claims.¹⁰⁶

The Right to Development has been repeatedly reiterated and further elaborated – by consensus – at the UN World Conference on Human Rights (Vienna), the International Conference on Population and Development (Cairo), The World Summit on Social Development (Copenhagen) and the Fourth World Conference on Women (Beijing). Worth noting is that while the Declaration on the Right to Development was not obtained by consensus (the USA being the sole dissenter), each of the above UN World Conferences has unanimously reaffirmed the Right to Development as a “universal and inalienable right and an integral part of fundamental human rights.”¹⁰⁷

According to the President of the International Centre for Law in Development, Clarence J. Dias, there is no doubt that:

The Right to Development is not a mere pipe dream or ideological slogan. It is a human right guaranteed by international law.¹⁰⁸

Thus from a human rights (legal) perspective the Permanent Forum is obliged to treat all the issues within its mandate, at least in part, as a human right. This obligation is further strengthened by the Secretary General’s call for mainstreaming of human rights into all the principal United Nations activities and programmes. Mr. Kofi Annan emphasises in his report that:

The issue of human rights has been designated as cutting across each of the four substantive fields of the Secretariat’s work programme (peace and security; economic and social affairs; development cooperation; and humanitarian affairs). A major task for the United Nations, therefore, is to enhance its human rights programme and fully integrate it into the broad range of the Organization’s activities.¹⁰⁹

In addition, the Permanent Forum must also take into account the Millennium Declaration. It was signed by no less than 147 heads of state and passed unanimously by the members of the UN General Assembly. 189 countries in total pledged their commitment to the declaration.¹¹⁰ Article 24 states that:

We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms, including the right to development.¹¹¹

¹⁰⁵ See General Assembly resolution 41/128: Declaration on the Right to Development, 4 December 1986, available 11 September 2004 at: <http://www.unhchr.ch/html/menus/b/74.htm>

¹⁰⁶ See Andreassen, p. 29, supra note 103

¹⁰⁷ See Working Group on Indigenous Populations: Consideration of a Permanent Forum for Indigenous Peoples, note by secretariat, compilation of extracts of declarations and programs of actions pertaining to indigenous people from high level United Nations Conferences, 12 June 1996, UN Doc. E/CN.4/Sub.2/AC.4/1996/5/Add.1: Vienna Declaration: article 1(10), Cairo Program of Action: principle 3, Copenhagen Declaration: Commitment 1(n), Beijing Platform of Action: article 213

¹⁰⁸ See Dias, Clarence J. The Right to Development: Back on Centre Stage Where it Belongs, in ed. Chris Duckett, *The Right to Development: Reflections on the First Four Reports of the Independent Expert on the Right to Development*, Dr. Arjun Sengupta, Geneva: published by Franciscans International, 2003, p. 121

¹⁰⁹ See Report of the Secretary-General to the General Assembly: Renewing the United Nations: A Programme for Reform, 14 July 1997, UN Doc. A/51/950, article 78 and 79, available 25 August 2004 at: <http://www.unhchr.ch/html/hchr/unrefor.htm>

¹¹⁰ See Report of the Secretary-General: Road Map towards the Implementation of the United Nations Millennium Declaration, 6 September 2001, UN doc. A/56/326

¹¹¹ United Nations Millennium Declaration adopted on 8 September 2000, UN Doc. A/55/L.2, available 25 August 2004 at: <http://www.un.org/millennium/declaration/ares552e.htm>

189 countries including 147 heads of state have unanimously pledged that they will spare no effort to promote the Right to Development, which obliges the Permanent Forum to ensure that “every human person and all peoples are entitled to a process in which all human rights and fundamental freedoms can be fully realized”. It seems clear that it is not only the indigenous peoples who think that a rights-based approach is the only approach that matters. However, according to Ms. Mililani Trask, some government members of the Permanent Forum persist in undermining the role of human rights while others have little or no knowledge on human rights:

The whole reason why we insist on human rights is that states suffer from institutional racism. The human rights covenants and conventions apply to all people. But until now most indigenous peoples have not been granted basic rights. Human rights are one of the mandate areas of the Forum. But if you look at the entire mandate all of it is basically about human rights. But the problem is that many of the state members are here to prevent further damage. In addition there is no requirement that members should have knowledge of law or human rights. Many states have deliberately chosen members who have absolutely no knowledge on human rights.¹¹²

What makes human rights a difficult issue for the Permanent Forum is, no doubt, the ever-existing split between governments and indigenous peoples on the right to self-determination. In addition, the Permanent Forum does not have a clear, uncontroversial set of human rights laws to follow, as for instance does UNICEF, which was the first UN body that adopted a human rights-based approach for all their activities. According to UNICEF:

Human rights and child rights principles

guide our work in all sectors – and at each stage of the process. These principles include: universality, non-discrimination, the best interests of the child, the right to survival and development, the indivisibility and interdependence of human rights, accountability and respect for the voice of the child.¹¹³

The most important convention for UNICEF is the Convention on the Rights of the Child (CRC). It has been ratified by 192 countries and is the most widely accepted human rights treaty that exists.¹¹⁴ Only 17 countries have ratified ILO Convention No. 169, which is the most important convention on indigenous issues. This, however, cannot be an excuse to ignore human rights for indigenous peoples. All the other human rights conventions, including the CRC, are just as relevant to indigenous peoples as any others and, in addition, according to Ronald Niezen (2003):

...the indigenous UN forum will have to include within its purview not only the urgent problems of racism, loss of land, industrial degradation, and state assaults upon identity and cultural integrity, but also the human rights abuses perpetuated by indigenous peoples themselves.¹¹⁵

Indigenous peoples are not by their nature more ethical or morally good human beings compared to any other peoples. Their cultures are not more valuable and sacred compared to other peoples' cultures.¹¹⁶ But they are entitled to the same protection under the law as other peoples, they are entitled to participate on equal terms in making and changing the laws, and of course they have to follow the laws themselves.

The principle of consensus

According to the mandate, “the principle of consensus” shall govern the work of the Permanent Forum. This means that there is

¹¹² See my interview with Ms. Mililani Trask in New York, 19 May 2004, *Supra* note 75, p. 53

¹¹³ United Nations Children Fund: Rights and results: what we do, available 9 September 2004 at: <http://www.unicef.org/rightsresults/index.html>

¹¹⁴ United Nations Children Fund: Convention on the Rights of the Child, available 9 September 2005 at: <http://www.unicef.org/crc/crc.htm>

¹¹⁵ See Niezen, *supra* note 33, p. 117

¹¹⁶ When a great culture is on the brink of extinction it might be regarded as more valuable compared to other great cultures because it is a limited resource; just like gold is a valuable metal because it is hard to find. But if one argues that indigenous cultures are superior to other cultures in themselves, that would be an expression of blatant racism.

no voting system and that all the members of the Permanent Forum have to agree on all the decisions and recommendations that they adopt. Single members may write individual statements and attach them, but such statements will not be regarded as a decision by the Permanent Forum. Decisions made by consensus have a higher status and are taken more seriously than decisions made by voting. It can also be positive because it may make it easier for the Permanent Forum to maintain unity among its members. However, decisions are more difficult to make when everybody has to agree. The members of the Permanent Forum come from very different backgrounds, traditions and religions. In addition they are split between government members and indigenous members. The Open-ended Inter-sessional Working Group on the UN Draft Declaration on the Rights of Indigenous Peoples has been working for more than ten years without even getting close to an agreement. It says a lot about how difficult it can be to reach consensus on the issues at stake. One may thus ask how the Permanent Forum is supposed to reach agreement on the most difficult issues. According to Mr. Wilton Littlechild:

During the last three years we have worked together, there has been more ground for agreement than not. But on the difficult issues there is a split. Some individuals take it upon themselves that they have “veto” power. The mandate says ‘consensus’ is the main rule for decision-making, but when some of the state members looked at the word ‘consensus’ they interpreted it as if they could block consensus. On the difficult issues we have seen some members not willing to agree. Now; is the reason because they as individuals cannot agree or because their government prohibits them?¹¹⁷

Reaching consensus among parties with different worldviews is not a new task

for the UN. Indeed, human rights can be described as the product of an “overlapping consensus”. John Rawls defines overlapping consensus as:

A consensus that includes all opposing philosophical and religious doctrines likely to persist and to gain adherents in a more or less just constitutional democratic society... shared ideas which when worked up into a political conception of justice turn out to be sufficient to underwrite a just constitutional regime.¹¹⁸

An overlapping consensus is different from a compromise. It is a freestanding rationale that everybody can agree on. It is like a “*cogito ergo sum*”; the common core elements of reason and justice, which are left when all perspectives have been exhausted in the search for common ground.¹¹⁹ The desired ideal would of course be to engage in a dialogue in which the members present their perspectives, then listen to the other perspectives, learn from them, and present a new perspective based on what they have learned from the others. In this way one should expect everybody to be willing to change their perspectives and even criticise one’s own previous perspective. But if this is not possible, on certain issues, the search for an overlapping consensus must be the minimum requirement. However, it requires that the members are willing to share their perspectives. If a member refuses to engage in a dialogue by refusing to share his/her perspectives on an issue, that member will be able to stop certain issues from being discussed. On some occasions, according to Wilton Littlechild, that is exactly what has happened in the Permanent Forum:

The principle of consensus has not been a big issue for the discussions in the Forum, but it has been raised on some occasions when some individual says they will not agree to a consensus. In my culture it is

¹¹⁷ See my interview with Wilton Littlechild in New York, 20 May 2004, *supra* note 75, p. 55

¹¹⁸ See Rawls, John. *Justice as Fairness: Political not Metaphysical*, in ed. Samuel Freeman, John Rawls: Collected Papers, published by Harvard University Press, Massachusetts 1999, p. 390 and p. 410.

¹¹⁹ For a discussion on overlapping consensus see: Rawls, John: *The Idea of an Overlapping Consensus*, in ed. Samuel Freeman. John Rawls: Collected Papers, Massachusetts: published by Harvard University Press, 1999, pp. 421-448.

«Self-determination seems to be the most difficult indigenous issue. It has been one of the most important issues for indigenous peoples all around the world for centuries»

normal to just keep on talking, but when some people simply refuse to agree the problem will continue to be unresolved. And it cannot be resolved until those who have refused to accept a consensus are willing to talk about it again.¹²⁰

Self-determination seems to be the most difficult indigenous issue. It has been one of the most important issues for indigenous peoples all around the world for centuries. And in order to show a minimum of decency and respect for indigenous peoples one must, as an international expert on indigenous issues, at least be willing to share one's own perspectives on this issue. However, up until now the Permanent Forum has not discussed self-determination, and it might be unfair to say that some of the expert members of the Permanent Forum have been deliberately trying to hamper the work of the Permanent Forum. According to Ole Henrik Magga:

The work has been functioning very well, expect for some very few exceptions. As long as nobody opposes anything directly and says that they are fundamentally against something, we would include it in the report. The members may have critical comments and may, if they so wish, attach these comments to the report explaining why they agreed to the consensus anyway. We have had an understanding among ourselves not to handle some of the most difficult questions in the beginning. In addition it has not been natural for us to engage in a discussion about self-determination while it is being discussed by the Open-ended Inter-sessional Working Group on the Draft Declaration.¹²¹

All in all, it seems too early to say how the Permanent Forum in reality is going to be able to handle the most difficult issues like self-determination. One of the most important elements of self-determination is the "principle of free, prior, informed consent". There is no disagreement about this principle among the members and they have vigorously promoted it.

The principle of 'Free, Prior, Informed Consent'

The 'principle of free, prior, informed consent' is worth looking at more closely because it is an expression of what the Permanent Forum is essentially about. The Forum springs out of a long struggle by indigenous peoples to be heard, consulted and to participate in decisions that affect them. Now that the Permanent Forum has been established, one of its most important tasks has been to promote this principle in the rest of the UN system. In its first report it proposes the organisation of a working group on prior informed consent and participatory research guidelines to meet three times annually for three to four days each year, for three years. In the report from the second session, under the agenda on Economic and Social Development, the Permanent Forum recommended that ECOSOC should establish a three-year working group on free, prior, informed consent.¹²² In the report of the third session the request for a three-day workshop on Free, Prior, Informed Consent was one of the main draft decisions by the Permanent Forum to ECOSOC.¹²³ A UN press release stated that an:

...issue of vital importance to indigenous peoples, and one that will come under consideration at this session of the Forum, is their wish that governments and international agencies should obtain the «free, prior and informed consent» of indigenous communities to development projects and plans that may affect them. This has

¹²⁰ See my interview with Wilton Littlechild in New York, 20 May 2004, supra note 75, p. 56

¹²¹ See my MA dissertation, p. 56, supra note 75

¹²² See Report of the Second Session, paragraphs 27, 36 and 45; supra note 51

¹²³ Permanent Forum on Indigenous Issues: Report of the third session (New York 10-21 May 2004), UN Doc. E/2004/43, E/C.19/2004/23, Draft decision II.

emerged as the desired standard to be applied in protecting and promoting indigenous peoples' rights in the development process.¹²⁴

The principle comes from ethical principles developed by medical practitioners and researchers.¹²⁵ And what is interesting is that the principle within medicine was, like that of the indigenous struggle, a result of a long struggle for self-determination and autonomy. Dr. Kelly A. Edwards explains that:

*Medicine has undergone a revolution from the paternalistic approach, where the doctor was considered to know best and expected to make decisions on behalf of the patient, to the contemporary approach, where the patient's viewpoint or autonomy is respected. Doctors have to acknowledge and carry out the value-based preferences of their patients. The principle of respect for autonomy obliges us not only to respect but also to facilitate the self-determination and choices of autonomous persons.*¹²⁶

Indigenous peoples have always been and are still treated as ignorant patients who do not know what is best for them. The UN, multinational companies and governments have implemented thousands of development projects, in good faith, without consulting the indigenous peoples themselves. Mr. Max Ooft from the Organisation of Indigenous Peoples in Surinam puts it like this:

In the past, indigenous peoples were living peacefully in their homelands, in harmony with nature. Then came 'civilization'.. They conquered the land, we lost our homes, our sacred sites, our agricultural areas, our hunting fields, our fishing waters. They

called it development, we called it destruction. They said it would raise living standards, we said it brings humiliation. They earned money, we got poor. They founded big companies, we became cheap labour. They ruined the biodiversity; we lost our sources of traditional medicines. They spoke of equality, we saw discrimination. They said infrastructure, we saw invasion. They thought civilization; we lost our cultures, our language, and our religion. They subjected us to their laws; we saw them claiming our land. They brought illness, weapons, drugs and alcohol, but not equal education and health care. It has been going on for more than 500 years. And it still goes on.¹²⁷

The principle is an expression of many well-founded human rights articles. Article 21.3 of the Universal Declaration on Human Rights says; "the will of the people shall be the basis of the authority of governments".¹²⁸ Article 27 of the Covenant on Civil and Political Rights professes that "persons belonging to minorities shall not be denied the right in community with other member of their group to enjoy their own culture." The Human Rights Committee explains in General Comment 23 (7) "With regards to the exercise of cultural rights protected under article 27... especially in the case of indigenous peoples... may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."¹²⁹ Article 6 (a) of ILO Convention No. 169 obliges the government to "consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may

124 UN Press release: World's Indigenous Peoples to meet at United Nations 10-21 May, UN Doc. DPI/2335A, available 3 September 2004 at: <http://www.un.org/hr/indigenousforum/presst.html>

125 See World Medical Association Declaration of Helsinki: Ethical Principles for Medical Research Involving Human Subjects, Adopted by the 18th WMA General Assembly, Helsinki, June 1964, available 4 September 2004 at: <file:///C:/MA%20Human%20Rights/The%20dissertation/FPICDeclaration.htm>

126 See Howarth, G. Basic Informed Consent, in *Geneeskunde the medicine journal*, March 2002, volume 44 no 2, available 3 September 2004 at: <http://www.medpharm.co.za/safp/2002/march/basic.html>

127 See statement by Ooft, Max. Organization of Indigenous Peoples in Surinam, Report of the Working Group on Indigenous Populations on its thirteenth session, Geneva, 24-28 July 1995. UN Doc. E/CN.4/sub.2/1995/24, paragraph 54

128 For the text of the UNDHR see Brownlie, p. 21; supra note 31

129 See Malmgren, Otto. *International Human Rights Documents – a Compilation of United Nations Conventions, Optional Protocols, General Comments and General Recommendations*, 2nd edition, Oslo: published by the Norwegian Institute of Human Rights, 2002, p. 116

affect them directly.” Article 15.1 states that “the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.” And Article 16.2 states that “where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.”¹³⁰ These are only some of the legal instruments under international law.¹³¹ This principle entails that all the UN bodies which are working on issues relevant to indigenous peoples must seek to increase the participation of indigenous peoples in their decisions. If the relevant UN bodies were to follow this recommendation it would truly have an immense impact on the whole UN organisation and it would in turn significantly increase the power and influence of UNPFII.

The power of the Permanent Forum

To what extent does UNPFII have power to influence other UN bodies to give priority to indigenous human rights? This question might be answered by looking at how different governments are persuaded to conform to human rights standards. One of the most comprehensive studies on this subject has been conducted by Thomas Risse, Stephen C. Ropp and Kathryn Sikkink (1999). They have developed a theory, “The Boomerang Theory”, about the power of human rights based on the study of eleven countries representing five continents. They argue that governments that violate human rights norms may be subject to domestic and international pressure to conform with human rights standards, and as pressure increases, they may respond to these pressures based on instrumental or principled motives. It is often said that many states only pay “lip-service” to hu-

man rights. Risse and his colleagues show how “lip-service” empowers the domestic and international pressure groups and increases the pressure. Governments might find it hard not to back their words with action for fear of being accused of hypocrisy. Risse argues that many governments have a desire to be looked upon as one of the “good guys” – not just selfish and cynical. In reality they might not care, but if they openly show negligence for human rights it might be bad for business. As they are sucked into a dialogue and argumentative process they may try to make some tactical changes to “buy off” external pressure. However, such “tactical concessions” will only serve to increase the power of domestic NGOs and pressure groups leading the governments into a “self-entrapment” in which they find themselves engaged in moral dialogue with external and internal critics. This in turn may lead to real changes and conformity with human rights norms. Risse proposes a model with five stages: repression, denial, tactical concession, prescriptive status and rule consistent behaviour.¹³²

The Boomerang Theory is based on a wide variety of different regimes ranging from democracies to dictatorships. Assuming that this model contains some truths¹³³, it might be possible to say something about how to make different United Nations regimes conform too. Although there is a difference between individual countries and international regimes, it is possible to identify similar pressure groups and processes. The important assumption we need to make is that UN agencies, programmes and organisations care about being perceived as “good guys” just as much as individual states. In relation to the indigenous issues, we have these pressure groups:

- UNPFII, ECOSOC and the General Assembly
- Different more or less supportive UN

¹³⁰ For the text of the convention see Brownlie, p. 366-369; supra note 31

¹³¹ For a more comprehensive legal analysis and a detailed explanation of the principle see: Motoc, Antoanella-Iulia and the Tebtebba Foundation, Preliminary working paper on the principle of free, prior and informed consent, UN Doc. E/CN.4/Sub.2/AC.4/2004/4, 8 July 2004

¹³² See Risse, Thomas et al. *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: published by Cambridge University Press, 1999, pp. 1-38.

¹³³ For a critical perspective on the Boomerang Theory see Freeman, Michael. *Human Rights*, Cambridge: published by Polity Press, 2002, pp. 134-138

bodies with a policy on indigenous issues¹³⁴

- Different more or less supportive governments¹³⁵
- The Inter-Agency Support Group
- Indigenous organisations and various NGOs

The Permanent Forum is placed high up in the UN hierarchy and in its reports it makes specific requests to a large number of UN bodies. The reports include what they should focus on and how they should report back to the Permanent Forum. The report from the third session states for example that:

The Forum encourages United Nations bodies whose activities have an impact on indigenous women (including, but not limited to, the OHCHR, ILO, WHO, UNICEF, UNIFEM, UNDP, UNFPA, UN-Habitat, UNEP, UNESCO, FAO, UNITAR, the regional commissions, the Department of Economic and Social Affairs of the United Nations Secretariat, especially the Division for the Advancement of Women, and the Department of Information of the United Nations Secretariat), to integrate the human rights, including the reproductive health rights, and special concerns and needs of indigenous women into their programmes and policies, and to report regularly to the Forum. The reports should contain detailed information on the strategies and policy assessments at the regional and national levels and on the progress made within existing programmes directed at and relating to indigenous women, as well as policy assessments and recommendations concerning the issue of indigenous women.¹³⁶

According to the Special Rapporteur on the situation of the human rights and funda-

mental freedoms of indigenous people, Mr. Rodolfo Stavenhagen:

What is important is the message that the Permanent Forum gives to the UN system. The Forum is able to gather a great number of UN bodies like UNESCO, UNICEF, WIPO, WHO, etc. These UN agencies and organisations present their activities to the Forum and take back to their organisation specific recommendations.¹³⁷

If a UN body fails, for some reason, to report to the Permanent Forum, it will be criticised by the Forum, indigenous representatives, some governments and some other UN bodies. In addition the Permanent Forum will mobilise other UN bodies in order to put pressure on those who are absent. The World Health Organisation's representative failed to show up and report to the third session of the Permanent Forum¹³⁸; in its report the Permanent Forum wrote that:

90. The Forum urges WHO to attend its sessions, and encourages WHO to submit a report to it at its fourth session, responding to recommendations made by the Forum at its first to third sessions. The Forum regrets that WHO was unable to respond to its recommendations made at its second session, in particular those contained in chapter I, section B, paragraphs 16, 63-64, 68, 74, 79 and 82. The Forum recommends that the Special Rapporteur on the right to health examine the disparity of health standards for indigenous peoples in developed countries in the light of the fact that United Nations agencies and specialized entities, including WHO, do not undertake health programmes in developed countries.¹³⁹

In addition to the Permanent Forum's ses-

¹³⁴ The term "more or less supportive", means that a UN body is in dialogue with UNPFII and likes to think that they have a good and friendly policy toward indigenous peoples. Some of these UN bodies are: ILO, WIPO, UNDP, UNICEF, UNESCO, the Convention on Biological Diversity (CBD), the World Bank, WGIP and the Special Rapporteur.

¹³⁵ Supportive countries are those who like to think they have a good policy on indigenous peoples, and who participate at the sessions and are in dialogue with UNPFII. Denmark has perhaps been the most supportive country so far and the other Scandinavian countries are following right behind. Other big countries like the USA have also participated vigorously and have come with many suggestions and recommendations. I am not suggesting that these countries necessarily have a good record on indigenous rights. But what is clear is that UNPFII was created by the governments. This means that there are many countries that support UNPFII.

¹³⁶ See Report of the third session, paragraph 5; supra note 123 (I have abbreviated the reference to most of the UN bodies in order to make the quotation shorter)

¹³⁷ See my interview with Mr. Stavenhagen in my MA dissertation, p. 62, supra note 75

¹³⁸ In fact what happened was that the representative from the World Health Organisation, Ms. Helena Nygren-Krugh, ironically fell ill and could not attend because of bad health. I met her shortly after the third session at a conference in Gothenburg on "Globalisation and Marginalisation: Implementing Human Rights", 14-16 June 2004, organised by the Centre for the Study of Human Rights in Gothenburg.

¹³⁹ See Report of the third session, paragraph 90-91; supra note 123

sions, NGOs and indigenous organisations participate in some of the meetings of the UN organisations “at home”, reminding the governments and the UN bodies about the recommendations made by the Permanent Forum. If they are successful some governments would support their call, and in order to resolve the matter the UN body might make contact with members of the Permanent Forum or its secretariat to request more information; not perhaps because they are sincerely interested, but because they want to silence “the winding mob”. When they do so they are “hooked” and must start a dialogue. Next, they may provide a representative from their secretariat to sit in the Inter-Agency Support Group. The Inter-Agency Support Group provides pressure from inside the UN bodies; the Secretariat of the UN has a great deal of power when it comes to putting things on the agenda. The “boomerang effect” depends on which human rights norms we are talking about. But if we are talking about the “principle of free, prior, informed consent”, it implies increased participation of indigenous peoples, which means that tactical concessions will serve to increase the pressure. It seems clear that more and more UN bodies will start to engage in a dialogue with the Permanent Forum. And as they do the pressure on these UN bodies to conform and the pressure on other UN bodies will increase. And, as the situation of indigenous peoples becomes better, their NGOs will become stronger, their people will become more educated, and they will be able to participate more in decision-making bodies. All these things will eventually increase the power of the Permanent Forum. It might take some time, but the UN Permanent Forum for Indigenous Issues was called “permanent” in order to indicate that it is not a temporary UN body; it is there to stay.

Worth noting also is that many indig-

enous members of the Permanent Forum have been invited to speak at several high profile conferences and meetings. In this way they will eventually achieve a high profile within the UN and will be treated as the world’s experts on indigenous issues. Important to note also is that the mandate of the Permanent Forum is very broad and puts very few limitations on it. The Forum has a lot of “creative freedom”, which was fully demonstrated when Ole Henrik Magga succeeded in getting help directly from the Security Council. The thing that really limits the power of the Permanent Forum is funding. It is at present overloaded with work and cannot fulfil its mandate to coordinate activities on indigenous issues within the UN system. And although the states cannot easily disband the Permanent Forum they can limit its powers by cutting the budget.

Future of the Working Group on Indigenous Populations

What implications does the establishment of the Permanent Forum have for the future of WGIP? There is a split between many governments and indigenous peoples on this issue. Many governments argue that the creation of the Permanent Forum should eventually bring to an end the existence of WGIP in order to avoid duplication of work within the UN.¹⁴⁰ Indigenous organisations have been arguing that WGIP and UNPFII are two different bodies of vital importance and that they should therefore complement one another; one should not substitute for the other.¹⁴¹ The issue was not resolved before the Permanent Forum was established and it was basically left to the Forum to decide. The preamble of ECOSOC Resolution 2000/22 on the establishment of the Permanent Forum stresses that:

...the establishment of the permanent fo-

¹⁴⁰ See Open-ended Inter-sessional Ad hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations system: First Report, 25 March 1999, UN Doc. E/CN.4/1999/83; statements by Australia (para. 78), India (para. 79), Switzerland (para. 80), Brazil (para. 82) New Zealand (para. 83), and Governments of the Asian Group (para. 96). See also Open-ended inter-sessional ad hoc working group on a permanent forum for indigenous people, Second Report, UN Doc. E/CN.4/2000/86, 28 March 2000, paragraph 53 and 54

¹⁴¹ See the Report of the Second workshop on a permanent forum for indigenous people within the United Nations system held in accordance with Commission on Human Rights resolution 1997/30, 19 September 1997, UN Doc. E/CN.4/1998/11, Grand Council of the Crees: Written statement to the second workshop on a permanent forum for indigenous peoples, UN Doc. HR/STGO/SEM/1997/CRP.2, see Saami Council: Written statement to the second workshop on a permanent forum for indigenous peoples, UN Doc. HR/STGO/SEM/1997/CRP.3 And see Declaration of the Second International Indigenous Conference on a Permanent Forum for Indigenous People Ukupseni, Kuna Yala, Panama, 4-6 March 1998, UN Doc. E/CN.4/1998/11/Add.3 18

rum should lead to careful consideration of the future of the Working Group on Indigenous Populations of the Sub-commission on the Promotion and Protection of Human Rights,

And Article 8 of the resolution decided that:

...once the Permanent Forum has been established and has held its first annual session, to review, without prejudging any outcome, all existing mechanisms, procedures and programmes within the United Nations concerning indigenous issues, including the Working Group on Indigenous Populations, with a view to rationalizing activities, avoiding duplication and overlap and promoting effectiveness.¹⁴²

The chairman of the Permanent Forum, Ole Henrik Magga, has tried to initiate a dialogue with WGIP. He says it is his wish that WGIP should continue to exist. However, he has received a response in a rather arrogant tone from WGIP. Magga explains that:

I have received a rather lukewarm response from the Working Group. They act as if they are equal to UNPFII¹⁴³

The chairman of WGIP, Mr. Miguel Alfonso Martinez, addressed the third session of the Permanent Forum by emphasising that WGIP was the first UN organisation solely dedicated to indigenous issues. He reported in grand terms about the accomplishments of WGIP before he got to his primary arguments in defence of the continued existence of WGIP:

ECOSOC have always supported the Working Group, while the Commission on Human Rights has been negative on several occasions... The Council (ECOSOC) should take into account the respect for the exist-

ence of all the indigenous UN organisations. There is a need for cooperation and there should not exist overlap between mandates. The Working Group has taken into account that they have to adapt to the new situation; that there are three bodies on indigenous issues today (the WGIP, the UNPFII and the Special Rapporteur). We should respect our mandates and facilitate cooperation.¹⁴⁴

It is clear that the argument about how the Commission on Human Rights has been more negative towards WGIP compared to ECOSOC is irrelevant; the Commission on Human Rights is a subsidiary organ to the ECOSOC. And it seems a bit strange that WGIP, after three years, is merely "taking into account that it has to adapt". That speech was made two years ago. Should they not have realized by now that the Permanent Forum, in reality, has the power to disband WGIP, and that it is the Permanent Forum that is responsible for coordinating all activities on indigenous issues within the UN? WGIP has not drafted a single report or declaration on how their work could be an important supplement to the Permanent Forum or how their work is fundamentally different from that of the Permanent Forum. The ones that are defending WGIP are the indigenous organisations. Indigenous peoples' arguments in favour of WGIP are as follows:

- WGIP has a specific mandate to set new standards in human rights; UNPFII does not have such a specific mandate. It is essential not to "lose mandate areas" of vital importance to indigenous peoples.
- WGIP is an important institutional space through which indigenous peoples can have access to human rights-related bodies, and where indigenous peoples can inform the international community of violations of their rights. The possibility of indigenous participation regardless of ECOSOC status is very important, espe-

¹⁴² See ECOSOC Resolution 2000/22, Article 8; supra note 68

¹⁴³ See my interview with Professor Ole Henrik Magga. Personal Interview, in Oslo, 29 April 2004, supra note 79, p. 65

¹⁴⁴ From personal notes taken at the Plenary Meeting on the sixth day of the UNPFII third session in New York on Monday 18 May 2004; explanatory notes are provided by me in parentheses. For a short summary of the first part of his speech (the second part was not included) see: UN Press Release: Establishment of Response Mechanism for Violations of Indigenous Rights, among Concerns, as Permanent Forum Concludes Human Rights Discussion, UN Doc. HR/4757, 17 May 2004, available 3 September 2004 at: <http://www.un.org/News/Press/docs/2004/hr4757.doc.htm>

cially since at present only 15 indigenous organisations have the necessary consultative status.

- Within the United Nations system there are many examples of bodies which deal with the same issues, such as the Commission on the Status of Women, The Committee on the Convention for Elimination of all Forms of Discrimination against Women, and the United Nations Development Fund for Women (UNIFEM).¹⁴⁵

However, the mandate of the Permanent Forum in no way prohibits it from setting new standards in human rights. If WGIP were disbanded it would be natural to allocate the budget of WGIP to the Permanent Forum, so that it can set up a committee on human rights with a mandate to establish new international standards. There is today no majority among states to disband WGIP, but if WGIP does nothing drastically to justify its existence it will most likely disappear.

¹⁴⁵ For more information on arguments for and against WGIP see: supra note 140

Conclusions

In the introduction I asked whether indigenous peoples have really become members of the UN? The answer is no. The members of the Permanent Forum do not represent anyone. They are members in their own capacity as independent experts. The first article of the Universal Declaration of Human Rights asserts that “all human beings are endowed with reason and conscience”. One might therefore ask: what is so unique about the UN seeking advice from the indigenous peoples themselves? Would it not be natural for any organisation to ask those whom they want to help how to do it? This is only natural and not at all unique. But ever since the first attempts by governments to create an international organisation for peace, indigenous peoples have been treated as non-existent. It is clear that indigenous peoples did exist before the League of Nations and the United Nations were created, but somehow they became domesticated and disappeared from the world map. Instead of being treated as a subject of international law, they were treated as a domestic problem – a disease on the sovereignty of national states.

It might seem as if the participation of non-governmental representatives was a precondition for placing indigenous issues on the international agenda. It is interesting that the first international organisation that cared about indigenous peoples was the International Labour Organisation, which was the only international organisation with non-governmental members. ILO is also the only international organisation that has developed human rights conventions devoted to indigenous peoples.

One might also note that the participation of indigenous peoples themselves was

necessary in order to create instruments of international law that were founded on respect and dignity. The patronising language of ILO Convention No. 107, which presumed that indigenous peoples would eventually “evolve” and disappear, was only changed after the establishment of the Working Group on Indigenous Populations. WGIP provided an opportunity for indigenous organisations without ECOSOC status to participate as observers. The sessions of WGIP soon became one of the largest annual events at the UN in Geneva. However, WGIP is at the lowest possible level within the UN and very little is left of the indigenous peoples’ voices when they have passed through all the government filters and administrative levels.

The establishment of the Permanent Forum was a tremendous victory for indigenous peoples. Not only was it placed very high up in the UN system, but it also gave indigenous peoples an opportunity to nominate experts from among their own peoples. Never before had indigenous experts participated as members of a UN body on an equal footing with government appointed experts. In addition, the Permanent Forum has a very important mandate; not just including advising ECOSOC, but the enormous task of coordinating all activities on indigenous issues within the UN. It should promote awareness of indigenous issues throughout the whole UN system. It should also advise those UN bodies who have no programme on indigenous peoples as to how they should realise their responsibilities for indigenous peoples. Before the United Nations Conference on Environment and Development in Rio de Janeiro in 1992, an indigenous person had never been

invited to speak at the highest level in the UN. Today, many of the indigenous members have been invited to several high level meetings. Ole Henrik Magga has addressed the General Assembly on several occasions, and the fact that he was able to mobilise the UN Security Council to take immediate action on the situation in Congo, shows that the United Nations Permanent Forum for Indigenous Issues is indeed a “new chapter in the history of indigenous peoples at the United Nations”.

The most serious limitation on the Permanent Forum’s ability to function is funding. The Forum has a very small budget and is thus not able to fulfil its mandate to coordinate activities on indigenous issues within the UN. Ironically, the reason for giving the Forum responsibility for coordination was to avoid duplication of work and to save money.

There seems to be some disagreement about whether the Forum should adopt a rights-based approach in all its mandate areas: economic and social development, culture, the environment, education and health. However, it is clear that human rights law provides the only framework for moral guidance. Development, which is an issue specifically mentioned in the Forum’s mandate, has moved from being a matter of charity and goodwill to becoming a matter of legal entitlement to all human rights. And, as a UN body, the Forum must take into account the Millennium Declaration and the wishes of 189 countries, including 147 heads of state, that have unanimously pledged that they will spare no effort to promote the Right to Development. Also, it is obliged by the Secretary General’s call for mainstreaming of human rights to enhance human rights in all of its activities. It is the indigenous representatives of the Permanent Forum who want a human rights-based approach to all issues and it is the government-appointed members of the Forum who want something else. But what is their alternative?

The Permanent Forum calls upon and brings together representatives from all the UN agencies, funds, programmes and organisations which have a mandate that

may affect indigenous peoples. Those UN institutions that have a programme on indigenous peoples present their work to the Permanent Forum members and to the one thousand indigenous leaders and representatives from indigenous organisations. The perspectives of the indigenous leaders and representatives from every corner of the world give the UN bodies a good indication of how their work is benefiting the indigenous peoples in real life. It brings the local people into the UN – not merely reports and statistics. The Forum has a number of pressure groups to bring about conformity with its recommendations and principles. These are other UN bodies with a policy on indigenous peoples, different supportive governments, the Inter-Agency Support Group, and indigenous organisations and NGOs. Based on the assumption that UN institutions care about their reputation and image, it might be possible to use Thomas Risse’s “Boomerang Model” to predict how different UN institutions may be sucked into an argumentative process that will eventually bring about changes based on human rights norms for indigenous peoples. The Permanent Forum vigorously promotes the principle of “free, prior, informed consent”. Once this principle is implemented in some of the other parts of the UN, the power of the Permanent Forum will increase, and the process of implementing this principle will escalate, which in turn will enhance the power of the Permanent Forum even more. The Permanent Forum is called “Permanent” because it is there to stay. It might take some time, but it seems clear that the Permanent Forum will become a very significant UN organisation. The only question is what will happen to the UN as a whole.

As for WGIP, unless it is willing to respond to the obligations placed on the Permanent Forum to review the existence of WGIP, it is likely to disappear. The best thing might be to allocate the mandate and the budget of WGIP to the Permanent Forum. In this way, the Forum could set up a committee on human rights directly under its authority.

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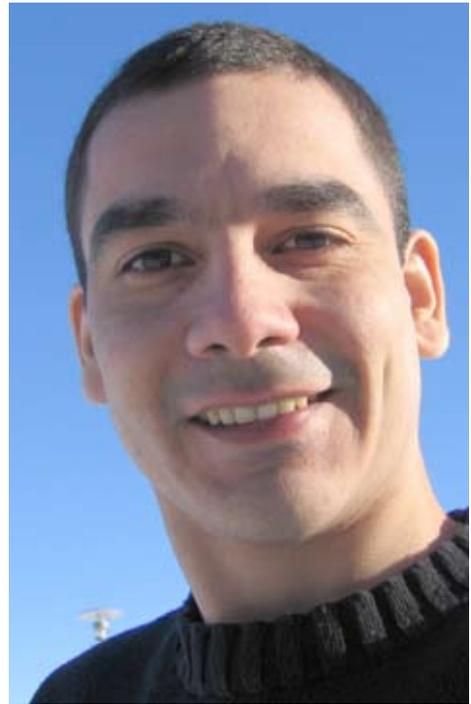
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Resource Centre for the Rights of Indigenous Peoples
(Álgoálbmotvuoigatvuođaid gelbbolašvuođaguovddáš) is located in Guovdageaidnu/Kautokeino, Norway, and aims to increase general knowledge about and understanding of Saami and indigenous rights. Our principal activity consists of collecting, adapting and distributing relevant information and documentation regarding indigenous rights in Norway and abroad. Targeted are seekers of knowledge about indigenous rights, including schools, voluntary organisations, public institutions and authorities.



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