

**Forum for Development Cooperation with Indigenous Peoples
Forum Conference 2006**

**“Words of action?
Transition from indigenous Activisms to Political Power – Challenges from
South Africa”**

**“An adoption of the UN Declaration on the Rights of Indigenous Peoples – a
major breakthrough?”**

- Presentation by Mattias Åhrén -

Thank you,

In 1984, the WGIP commenced crafting a Draft UN Declaration on the Rights of Indigenous Peoples. Ten years later, it presented a draft to the Sub-Commission on Human Rights, which approved the draft and the UN subsequently established the ad hoc Working Group on the Draft Declaration on the Rights of Indigenous Peoples in 1995. The Working Group worked for 11 years, until in June 2006, the just established UN Human Rights Council removed the standing epithet “draft” from the Declaration, and approved a UN Declaration on the Rights of Indigenous Peoples, with a vote of 30 for, 2 against, 13 abstaining and 2 states being absent. This fall, in a few weeks, the Declaration will be up in the UN General Assembly for final adoption, and will, if nothing unforeseen happens, be finally approved by the UN member states in the General Assembly, and a 22 year old process has come to an end.

The question I have been asked to answer is whether this is a happy ending? Before getting into that question, I would like, however, to say something about the process.

It has often been stated that the 22 years it took to reach an agreement on the Indigenous Declaration, was an extremely long one. And certainly, it felt so for

us that have been a part of that process. I participated in the Working Group only from 2001, and still it feels like a life-time ago. And Jens Dahl who is here today, has participated in the Declaration process since the beginning, and when the Declaration will be adopted, he is so tired he has to retire himself...

But if having a little bit of perspective, the UN has really only seriously discussed indigenous rights since the 1980s. Moreover, the issue of indigenous' rights is perhaps the most complicated and perplex human rights area that the World Community has ever had to address. That is so, because the contemporary human rights system in general has developed without any real consideration of indigenous societal structures, during an epoch when it was still quite socially acceptable to discriminate against indigenous peoples and claim that indigenous peoples are not peoples in the true meaning of the word and should rather be assimilated into the engulfing colonial society. But what happened was that indigenous peoples survived this period of colonization, discrimination and assimilation, not only as individuals but as distinct ethnic groups, with their own cultures, languages, livelihoods and, most importantly, territories. In other words, they survived as distinct peoples.

And in the 1980s, the human rights system had established itself sufficiently and social-Darwinist and cultural hierarchist theories had been extinguished in most corners of the world. In addition, the idea that human rights must not consider only individuals but also collectives had also established itself within the human rights discourse, even though the debate is still ongoing when it comes to whether collective rights can constitute human rights proper. Hence, the United Nations and its member states could no longer with any credibility deny that the human rights system they had themselves crafted, should not also apply to indigenous peoples - without discrimination.

But with this awakening followed a practical problem. Because if indigenous peoples' have the same right as other people, without discrimination,

their societies have the same right to exist and develop as other societies. The states therefore had to ask themselves the following questions? How do you achieve such non-discrimination as to the right to preserve one's distinct society when the land areas on which indigenous societies today exist with few exceptions overlaps with the non-indigenous societies? The indigenous nations are established on lands that today also, under the international law developed by states, constitute the territory of a state, and is also inhabited by members of the colonizing people. And how do you address the issue that two societies sharing the same land-base, want to run their societies in different directions, according to two separate legal systems? And perhaps the most problematic issue at all, how do you reconcile the fact that those damn indigenous peoples' lands and waters are host to most of the world's collective natural resources in the world, with an international legal system that was developed without considering that one day it would also apply to indigenous peoples, and that now clearly establishes that all peoples have the right to control their natural resources?

I will not try to answer these questions for the states, but merely conclude that states have realized that implementing the human rights system they have themselves created in a non-discriminatory manner to apply also to indigenous peoples will in many cases result in considerable societal structural changes in the state. The states hence came to WGDD wanting indigenous peoples to accept a lesser standard than apply to other peoples. They were essentially saying; "We do want to recognize your rights, but to accept them fully would cost too much for us and would also cause problems with regard to the interests of the rest of the population in our country. Hence, could you please accept that we recognize some of your rights, acknowledge others to some extent, and perhaps we do not have to talk so much about some of the rights?"

Indigenous peoples, on the other hand, rather naturally, saw little reason to voluntarily give up any rights that international law endows on all peoples. To do

so would be the same things as accepting an institutionalized form of discrimination in the very Declaration that was supposed to protect their rights.

Moreover, one must recognize that the Indigenous Declaration was elaborated in a truly unique setting. It is the only example in the UN history where the member states have shared jurisdiction in a standard setting activity. State and indigenous representatives negotiated the Declaration in partnership. It was always an unofficial agreement – not official, because that would violate the United Nations rules of procedures – that the adoption of the Declaration required the approval not only by the states, but also by indigenous peoples. I believe that it truly worked that way, that each participant's word carried equal weight. Of course, with this new negotiation setting followed new challenges. First, in purely practical terms, the state representatives were not used to share the floor and speaking time with another group, and in addition, the indigenous peoples' working methods might not always have been what senior state representatives would label diplomatic. But more importantly, there were of course twice as many people to have onboard before reaching an agreement, people with a very different cultural background than state diplomats.

Given this starting point, it is quite remarkable that the Working Group was able to reach an agreement on the Declaration. That fact that indigenous peoples and non-indigenous peoples could come together in this manner is indeed a major breakthrough in itself.

So how did it happen? Well, this Forum has in its name cooperation with indigenous peoples and this year's conference has a particular focus on Latin America, and I think that in cooperation with Latin America, lay the answer.

As I said before, I was not there for the first part of the Indigenous Declaration process. But at the time when I got involved some five years ago, the Working Group was very much in a dead-lock. The gap between the indigenous and

state positions was wide, to say the least. Many states declared that they needed to see substantial changes in the draft for it to be acceptable to them. Indigenous peoples responded by refusing to move a single comma in the original text.

Such was the situation still in 2002. At this point, however, some delegations, particularly from the Nordic countries and Greenland, commenced working more actively for a more dynamic negotiations setting. The Inuit and the Saami started to argue for that indigenous peoples - if we wanted to have a Declaration - had to let go of the "no-change" position, and start to discuss draft changes to the text. The Tebtebba Foundation of the Philippines also deserves to be mentioned in this regard. At the same time, the Nordic countries tried to convince the state delegations to adopt a more compromising position, evidenced e.g. by the so called Norwegian proposal in 2003 that grew into the so called CRP 1 document of 2004, in which the Nordics, together with Switzerland and New Zealand, proposed an entire new Declaration text which build on the original text, but accommodated for some, but far from all, state concerns. One could argue with some of the contents of the CRP 1 document, but one cannot disagree with that the tabling of the CRP 1 document fuelled the discussions in the Working Group.

These efforts were not enough, however. The Working Group still saw little movement towards an agreement on a Declaration text. The Nordics were simply too isolated in their efforts. So in 2003, I admit that I still had very little hope that an Indigenous Declaration would ever be adopted. But then two things happened, which both had to do with Latin America.

First, through a smart diplomatic move by Norway - Brazil, Guatemala and Mexico found themselves in a position where these countries had to take a more active responsibility for the fate of the Declaration. These countries were appointed as Chairs to various informal negotiation groups. In such a position, they had to constructively seek compromises.

Second, a group of indigenous representatives from Latin America started to attend the Working Group that had not participated before. This small but skilled group of lawyers and realpolitiker greatly complemented the indigenous peoples that had previously represented the Latin American region, changed the rhetoric of the indigenous peoples of Latin America, and greatly contributed to making the region's work more effective.

These two seemingly small things changed the entire dynamic in the Working Group. When starting to look for possible compromises, Brazil, Guatemala and in particular Mexico did an excellent job. After a while all, or almost all, of the Latin American countries had gathered around a constructive and more compromising position. This in turn influenced the Chairperson of the Working Group, who was from Peru. The Chairperson had, more or less from the day he took up his position, been criticized by the indigenous representatives for being incompetent, biased towards state positions and wanting of a back-bone. And these were the nice things we said about him... What no one thought of at the time was that being from the Latin American region, the Chairperson was essentially back-tied by the general indecisiveness of Latin America. Once the Latin American countries commenced actively and skilfully working for a Declaration, we suddenly also saw a Chair who constructively and with great competence guided the discussions in the Working Group and pushed for agreements.

Among the indigenous peoples, the change among the indigenous representatives from Latin America was instrumental in the indigenous peoples finally breaking away from the "no-change" position.

It was only when Latin America and Europe could form a partnership that there was suddenly a future for an Indigenous Declaration. It was Guatemala who managed to reach an agreement with the United Kingdom on the issue of collective human rights that had been a pain in the ass for the Working Group since its inception. It was Latin America and Europe that together actively fought Canada,

Russia, the United States, New Zealand and Australia to win enough support for the Declaration among the African and Asian states so that the Declaration was voted through with a broad margin in the UN Human Rights Council. It is now Peru who is drafting the resolution calling on the UN General Assembly to adopt the Declaration, and the European Union is first in line to co-sponsor. Certainly, delegations from other parts of the world have also been instrumental to an adoption of the Declaration. But no one can contest that it is the Latin America-Europe cooperation that have been the engine in pushing the Declaration process forward.

So I would answer the question of whether there will be a breakthrough in the affirmative, because I am convinced that the Declaration will be adopted by the General Assembly - provided that the Europe-Latin America cooperation remains.

So the adoption of the Indigenous Declaration is a major breakthrough, but is it also a good breakthrough? Yes, I believe so. I do not think that indigenous peoples gave up any of the rights we set out to defend when we started this process. We have not consented to be discriminated.

When the prospects for the Indigenous Declaration looked the worst, the Danish Ambassador Tyghe Lehman once said, admittedly provocatively but nonetheless not without truth, that he believed that one should delete all the articles in the Declaration save Article 3, proclaiming that indigenous peoples have the right to self-determination. And indeed, I do not think that one can overestimate the importance of a universal international legal instrument recognizing that the right to self-determination applies also to indigenous peoples. True, indigenous lawyers have always asserted that the right to self-determination applies equally to indigenous peoples, and rightly so I believe. But many states and some renowned international legal experts, have not accepted this claim. Anytime the right of self-determination comes up, there are protests. Even if we are correct in our arguments, it goes without saying that it is extremely difficult to have the right implemented in

such an environment. With the adoption of the Declaration, this environment will reasonably change. States with indigenous populations will now have to work actively to see how the right to self-determination shall be operationalized, when applied to non-state forming indigenous peoples.

It can be noted that recognizing that the right to self-determination applies also to indigenous peoples not only is extremely important for indigenous peoples, but also marks a fundamental shift in international law. I don't know how many legal scholars I have read that have predicted that the Declaration will never be adopted, at least not including an Article 3 in its present wording. In the same breath, they have stated that if such were to be the case, this would change their perception on international law fundamentally. We are now very close to such a fundamental shift.

There are of course many other rights contained in the Declaration that will improve the situation of indigenous people, but I will not go into these. So have indigenous peoples compromised on some of the rights, as they set out not to do? I think not, but if we did, you will find the answer in Article 46, the very last article of the Declaration. Article 46 proclaims that in the exercise of the other rights contained in the Declaration, due consideration shall be given to the rights of third parties and the general interest of the public. I agree that Article 46 is harmful, and it would have been much better had it not been included in the Declaration. But it is formulated in a very general way, and can as such not take precedent over the more specific provisions contained in the Declaration. Therefore, I do not think that Article 46 is such a threat to the rights contained in the Declaration as it is sometimes portrayed to be.

The theme of this Conference is words or action. Again referring to Jens Dahl, and I agree, the Declaration is worthless if not implemented on a grass root level. So will it be? Well, it is up to us. I think that if we really focus on this issue, the rights contained in the Declaration will become a reality. But I will depend on

the partnership between Latin America and Europe remaining. And I think that this Forum shall do its part. I therefore recommend that the theme of next years Forum shall be "Implementing the Indigenous Declaration - Partnership in Action!"

Thank you!