

E/C.19/2009/CRP. 12

5 May 2009

English Only

Permanent Forum on Indigenous Issues

Eighth session

New York, 18 - 29 May 2009

Draft General Comment No 1 (2009)

Article 42 of the Declaration on the Rights of Indigenous Peoples

by

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Article 42 as basis for a new function

1. The purpose of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration or DRIP) is to constitute the legal basis for all activities in the areas of indigenous issues. The task of the Permanent Forum on Indigenous Issues (Forum or PFII) in the years to come, following the historical adoption of the Declaration by the United Nations General Assembly 13 September 2007, will be to act within its capacity towards transforming the Declaration in its entirety to living law. This implementation to living law is fulfilled when the indigenous peoples meet the practical results on the ground.

2. The Declaration built a new foundation for the rights of Indigenous Peoples. At the same time the Forum was assigned an extended mandate with a new function based on Article 42, which stipulates that:

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

3. The goal of this General Comment is to determine and to some extent detail what are the obligations of the Forum laid down in Article 42 of the Declaration and how can the Forum fulfil these obligations. In order to determine and detail such obligations and actions one must clarify the legal understanding of the Article. This must be discussed on the basis of the status of the Declaration as an international law instrument of a human rights character.

4. The Forum is, as the only UN body, expressly mentioned in the Article. This wording emphasizes that the Forum as a UN body particularly created for indigenous issues has a responsibility for realizing the purpose of the Article.

5. The Forum has been created by the Economic and Social Council (resolution 2000/22). As an advisory body to the Economic and Social Council the Forum has so far had six mandated areas, namely indigenous issues related to economic and social development, culture, environment, education, health and human rights. Even though the Forum is a subsidiary of the ECOSOC, the General Assembly can as the global body within the UN system extend and strengthen the mandate of the Forum. Article 42 introduces a new function and responsibility, which should be read in the light of this Article as a source of international law.

The legal character of the Declaration

6. The Declaration is the most universal, comprehensive and fundamental instrument on indigenous peoples' rights. It is the legal framework of the Forum, together with resolution 2000/22 of the Economic and Social Council. The Declaration is not a treaty, and it has accordingly not the binding force of a treaty. However, this does not at all mean that the Declaration is without any legally binding effect. The adoption of any human rights instrument by the UN aspires to some binding force. The binding value of the Declaration must be seen in the wider normative context of the innovations that have taken place in international human rights law in recent years.

7. The Declaration forms a part of universal human rights law. The basic principles of the Declaration are identical with those of the main human rights covenants. In this way the Declaration affirms in its Article 3 the right of indigenous peoples to self-determination, in terms that restate the common provisions of Article 1 of the two 1966 International Covenants. The human rights treaty bodies will need to refer to the Declaration, as their practice already indicates, whenever dealing with indigenous rights. The Declaration is not the instrument of a specialized agency that binds only the State parties, but is a general instrument of human rights.

8. The Declaration is a human right standard elaborated upon fundamental rights of universal application and set in the cultural, economic, political and social context of the indigenous peoples. It should be applied on this basis regardless of how each State voted in the General Assembly or their subsequent position. One may debate how many of the specific rights in the Declaration are human rights according to the core human rights instruments. The human rights nature of the Declaration seen as a whole is certainly so marked, that this should be a main element when interpreting the document, and when deciding the working methods of the Forum in the new Article 42 era.

9. The Declaration is an instrument having been drafted through a procedure that has conferred upon it a special status as a declaration. It has been developed during a decade of negotiations between representatives of States and representatives of Indigenous Peoples, "negotiations" being a word used several times by State representatives. This long-lasting procedure has resulted in a document expressing a broad common ground, now also endorsed by the UN General Assembly. Even though it is not formally an agreement, the document is by way of its creation in reality an instrument almost universally agreed upon. In this way the Declaration is part of a practice that has advanced a growing "rapprochement" between declarations and treaties.

10. The various Articles may be binding international law, based on other instruments or customs, independent of their inclusion in the Declaration. The human rights envisaged in the Declaration are the same human rights that have been recognized to the rest of humankind, but there has been no need to produce a special declaration on the rights of non-indigenous peoples. A number of the Articles are human rights based on the Human Rights Covenants and other conventions, or they may already today have the quality of customary law by virtue of the policy in many national jurisdictions. As expressions of international customary law they must be applied regardless of the nature of the document in which they are stated or agreed.

11. The voting of the General Assembly, which proves that a great majority of the international community stands behind the Declaration, is a significant factor when determining its legal strength. The Statute of the International Court of Justice Article 38, stating the sources of international law which the Court shall apply, includes among them “the general principles of law recognized by civilized nations”. The Declaration is formulated as “principles of law”, having “rights” as the main concept, and the world-wide adherence to the Declaration, with the small and shrinking group of negative States, may soon be considered as a fulfilment of the criterion of the “civilized nations”.

12. The combined effect of these elements gives the Declaration a growing legal status. It might be argued that the Declaration in its entirety already has acquired the status of being part of binding international law. In any way, this is the case already for a number of the Articles.

13. The understanding of the Declaration here described shall form the basis on which the Forum is going to undertake its activities. The Forum has already included an item on its agenda on the Declaration.

The effect of Article 42

14. This new function assigned to the Forum by Article 42 is far-reaching. The formulas of the provision are of a twofold nature.

15. In the first place, the Forum shall promote not only respect for but also “full application” of the Declaration. This implies that the Forum shall work to promote the incorporation of the Declaration into the national legislation as well as its application in national court and administrative decisions of the various countries.

16. Secondly, the Forum shall follow up “the effectiveness” of the Declaration, that is to see whether the realities (“law in action”) are in conformity with the written law and decisions (“law in books”), and if not, take necessary actions to close the implementation gap.

17. This new and extensive responsibility does not in the wording of the Article correspond with any authority to accomplish what is required in this regard. The authority of the Forum will accordingly have to be decided by way of a reading of Article 42 on the basis of the Declaration as a whole. In this process of interpretation one has to rely on some principles or guidelines that are within the spirit of the Declaration.

18. Some accepted guidelines for interpretation will in this case be: the working of the Forum so far, the purpose of Article 42, and the normal way of protecting human rights within the UN system.

19. The present working arrangement of the Forum has to be a starting point for the reading of the new Article. The purpose of Article 42 is to contribute to the effectiveness of the Declaration, and the reading of the Article should therefore give preference to working methods for the Forum that are oriented towards substantial results for the indigenous peoples as right-holders. Looking to the normal way of protecting human rights within the UN system will also find support in the wording of the Article, where the Forum is placed on a par with other bodies of the UN.

20. When the Permanent Forum shall develop working methods for fulfilling its new Article 42 responsibility, one should accordingly look to the system established for other rights of human rights character. The Human Rights Convention treaty bodies should be regarded as models for the Forum.

21. This interpretation implies an authority to arrange dialogues with States regarding application of the Declaration and thereafter follow up on its effectiveness by making conclusions relating to each State’s Declaration behaviour, containing criticism on implementation gaps and demands for reforms. This interpretation furthermore implies that the States have a duty to respond to a Forum demand for a dialogue on the Declaration. Article 42 does not expressly empower the Forum to summon the States to appear in the meetings of the Forum and answer the questions put by the members. The Forum may accordingly decide for practical and political reasons not to put this conclusion to the test in the beginning and rather advance along a voluntary road in the relation to the States.

22. These dialogues should have information provided by Governments on their national policies and practices as a principal basis. Creative ways should be developed for the substantive preparation of dialogues, such as dispatch to States of a questionnaire regarding implementation. Such reports on indigenous peoples will need to be produced according to Article 38 of the Declaration in consultation and cooperation with indigenous peoples. Information from indigenous peoples' organizations, from various NGOs, and from Forum members must also be included as important supplementary material. The aim would be to organize a formally structured and substantially constructive dialogue followed by concluding remarks from the Forum.

23. The Forum shall integrate the Declaration into its recommendations on the six substantive mandated areas of its work as well as in its work under the special theme for the relevant sessions and its ongoing themes and priorities. In doing so, the Forum should consider not only the Articles of the Declaration but also the preambular paragraphs.

24. The Forum shall as one of the three United Nations mechanisms with specific mandates to address indigenous peoples, collaborate and coordinate its work with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, and with the Expert Mechanism on the Rights of Indigenous Peoples, in order to ensure maximum complementarity of efforts. These three mechanisms have the challenge of promoting the application and the effectiveness of the Declaration throughout the bodies and agencies of the UN.

25. The Forum shall according to Article 42 look to the Declaration as a set of superior norms that ought to be effectively applied in all national jurisdictions. Thereby the Declaration will gain in the working of the Forum a superior status in relation to national law. Moreover, it is the duty of the Forum to spread this view all over the world.