

Leaflet No 2: Indigenous Peoples, the UN and Human Rights

Key Words and Ideas

Human Rights	Derogation
Universal	Human Rights Law
Indivisible, interrelated and interdependent	
Treaty	Inalienable
Reservation	Party
International human rights law	
Customary international law	
Declarations, proclamations, standard rules, guidelines, recommendations and principles	
State responsibility for human rights	

Summary: *Human rights* are commonly understood to be those rights that are inherent to the human being. The concept of human rights acknowledges that every single human being is entitled to enjoy his or her human rights without distinction as to race, colour, gender, language, religion, political or other opinion, national or social origin, property, birth or other status. Human rights are legally guaranteed by **human rights law**, which protect individuals and groups against actions that interfere with fundamental freedoms and human dignity. They are expressed in treaties, customary international law, bodies of principles and other sources of law. Human rights law places an obligation on States to act in a particular way and prohibits States from engaging in specified activities. However, the law does not establish human rights. Human rights are entitlements that are accorded to every person as a consequence of being human. Treaties and other sources of law generally serve to protect formally the rights of individuals and groups against actions or abandonment of actions by governments that interfere with the enjoyment of their human rights.

The following are some of the most important characteristics of human rights:

- they are founded on respect for the dignity and worth of each person
- they are **universal**, meaning that they are applied equally and without discrimination to all people
- they are **inalienable**, in that no one can have his or her human rights taken away, except in specific situations: for example, the right to liberty can be restricted if a person is found guilty of a crime by a court of law
- they are **indivisible, interrelated and interdependent** because it is insufficient to respect some human rights and not others. In practice, the violation of one right will often affect several other rights. All human rights should therefore be seen as having equal importance and of being equally essential to the dignity and worth of every person.

International Human Rights Law

The formal expression of inherent human rights is through **international human rights law**. A series of international human rights treaties and other instruments conferring legal form on human rights have emerged since 1945. The creation of the United Nations provided an ideal forum for the development and adoption of international human rights instruments. Other instruments have been adopted at regional levels reflecting the particular human rights concerns of the region involved. Most States have also adopted constitutions and other laws that formally protect basic human rights. Often the language used

by States is drawn directly from the international human rights instruments. International human rights law consists mainly of treaties and customs as well as declarations, guidelines and principles.

Treaties

A **treaty** is an agreement by States to be bound by particular rules. International treaties have different designations, such as covenants, charters, protocols, conventions, accords and agreements. A treaty is legally binding on those States that have consented to be bound by the provisions of the treaty—in other words, those States that are **party** to the treaty.

A State can become a party to a treaty by ratification or accession. Ratification is a State's formal expression of consent to be bound by a treaty. Only a State that has previously signed the treaty (during the period when the treaty was open for signature) can ratify it. Ratification consists of two procedural acts: on the domestic level, it requires approval by the appropriate constitutional organ (usually the head of State or parliament). On the international level, the instrument of ratification is formally transmitted to the place where the instrument is held. That may be a State or an international organization, such as the United Nations.

Accession is the agreement to be bound by a treaty by a State that has not previously signed the instrument. States ratify treaties both before and after the treaty has entered into force (come into effect). The same applies to accession.

In order for most international treaties to be applied, other national laws must be adopted. In some States, treaties are superior to domestic law; in other States treaties are given Constitutional status; in yet other countries, only certain provisions of a treaty are incorporated into domestic law.

In ratifying a treaty, a State may enter **reservations** to that treaty, indicating that, while it consents to be bound by most of the provisions, the State does not agree to be bound by certain specific provisions. However, a reservation may not defeat the object and purpose of the treaty. Moreover, States are bound by those treaty provisions that have become part of customary international law (*see below*) or are peremptory rules of international law, such as the prohibition against torture.

Consult the leaflet on Human Rights Treaty Bodies and Indigenous Peoples (Leaflet no. 4) to see how the treaty bodies can be used to protect indigenous rights.

Customary international law

Customary international law (or simply “custom”) is the term used to describe a general and consistent practice followed by States that derives from a sense of legal obligation. For example, while the Universal Declaration of Human Rights is not a binding treaty, some of its provisions have the character of customary international law in that they are consistently applied by States.

Declarations, resolutions, etc. adopted by UN organs

General norms of international law principles and practices to which most States would agree are often stated in **declarations, proclamations, standard rules, guidelines, recommendations and principles**. While they are not legally binding on States, they nevertheless represent a broad consensus of the international community and, therefore, have a strong moral force on the practice of States in their international relations. The value of such instruments rests in their recognition and acceptance by a large number of States. Even without binding legal effect, they may be seen as declaring principles widely accepted within the international community.

State responsibility for human rights

The obligation to protect, promote and ensure the enjoyment of human rights is the prime responsibility of States. Many human rights are owed by States to all people within their territories, while certain human rights are owed by a State to particular groups of people: for example, the right to vote in elections is only owed to citizens of a State. States are obligated to make sure that human rights are protected by both providing effective remedies for persons whose rights are violated and preventing human rights violations against persons within their territories.

Under international law, the enjoyment of certain rights can be restricted in specific circumstances. For example, if an individual is found guilty of a crime after a fair trial, a State may lawfully restrict a person's freedom of movement by imprisonment. Restrictions on civil and political rights may only be imposed if the limitation is determined by law, but only for the purposes of respecting the rights of others and meeting the just requirements of morality, public order and the general welfare in a democratic society. Economic, social and cultural rights may be limited by law, but only if the limitation is compatible with the nature of the rights and only to promote the general welfare in a democratic society.

In a legitimate and declared state of emergency, States can take measures that limit or suspend (or "derogate from") the enjoyment of certain rights. Such **derogations** are permitted only to the extent necessary for the situation and may never involve discrimination based on race, colour, gender, language, religion or social origin. Any derogation must be reported to the Secretary-General of the United Nations. However, in accordance with article 4, paragraph 3 of the International Covenant on Civil and Political Rights (ICCPR), certain human rights—those called non-derogable rights--may never be suspended or restricted, even in situations of war and armed conflict. These include the right to life, freedom from torture, freedom from enslavement or servitude, and freedom of thought, conscience and religion. During times of armed conflict when humanitarian law applies, human rights law is also still in force.

(text taken from "Human Rights: A Basic Handbook for UN Staff" , OHCHR, United Nations Staff College Project)

The United Nations and Human Rights

Key Words and Ideas

Charter of the United Nations
Charter-based system
Treaty-based system
Third Committee
Resolution
Decision

Treaty bodies
Covenants
Declarations
Adoption
Consensus
Drafting

Universal Declaration of Human Rights
Office of the High Commissioner for Human Rights
Sub-Commission on the Promotion and Protection of Human Rights
International Covenant on Civil and Political Rights
International Covenant on Economic, Social and Cultural Rights
Working Group on Indigenous Populations

Summary: According to the Charter of the United Nations, one of the primary functions of the organization is to promote human rights. There are a number of bodies within the UN system that are concerned with promoting and protecting human rights. These include Charter-based and Treaty-based systems in the field of human rights. Through these bodies, governments establish international human rights standards that are contained in human rights instruments. Some of these instruments are legally binding, such as the Convention on the Elimination of All Forms of Racial Discrimination. Others, such as the Universal Declaration of Human Rights, are not legally binding but set standards that governments should try to attain.

The prominence of human rights at the UN

With the horrors of the Second World War in mind, the founders of the UN built into the organization's purposes and structures a strong emphasis on human rights. They believed that protecting human rights would provide freedom, justice and peace for all peoples.

The beginning of the UN's basic document, the **Charter of the United Nations** (UN Charter), declares that:

"We the peoples of the United Nations determined ... to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small ... and to promote social progress and better standards of life in larger freedom ..."

In its early years, the UN established basic human rights standards intended to serve all people and all nations. The organization has expanded the range of those standards throughout its existence.

UN human rights structures

It is useful to distinguish between those bodies and mechanisms of the UN human rights system that have been set up as a result of resolutions and decisions of the UN system and those that have been set up by legally binding human rights treaties. Those bodies of the former type are said to make up the **charter-based** system. The latter type make up the **treaty-based** system.

The UN Charter allowed the UN to set up a number of bodies to discuss and take action on human rights questions and to draft new standards. The most important of these Charter-based bodies is the **Commission on Human Rights** (CHR), which meets for six weeks each year in Geneva, the **Sub-Commission on the Promotion and Protection of Human Rights** and the **Third Committee** of the General Assembly. The most important body for indigenous peoples is the **Working Group on Indigenous Populations** (WGIP).

The major international human rights treaties have special bodies to supervise governments' implementation of those treaties. The main function of these **treaty bodies** is to consider and comment on reports from governments on how they observe the treaties to which they are party. Some of these bodies consider complaints from individuals who allege that their governments have violated their rights (see Leaflet no. 4 on Human Rights Treaty Bodies and Indigenous Peoples).

Office of the High Commissioner for Human Rights

The Office of the High Commissioner for Human Rights, a permanent office staffed by UN officials and headquartered in Geneva, provides support for all the UN's activities in the field of human rights. The Office is part of the UN's Secretariat and administers and coordinates the UN's human rights programme, organizes meetings, prepares studies and reports, and disseminates information and publications. The Office is headed by the High Commissioner, who is the UN's most senior official responsible for human rights issues. The High Commissioner has an important role in promoting human rights through the UN system. The present High Commissioner is Mrs. Mary Robinson, who assumed her post in 1997.

The Universal Declaration of Human Rights

The UN's first major achievement in the field of human rights was the General Assembly's adoption of the **Universal Declaration of Human Rights** in 1948. Members of the UN disputed the wording of the Universal Declaration at the time, but the declaration was finally adopted by consensus. The Universal Declaration is an eloquent and far-reaching description of the rights of all human beings. In addition, it gives *individuals* a place in international law that they had never had before. Many other human rights instruments are based on the Universal Declaration.

Some of the fundamental rights cited in the Declaration are:

- the right to equality and freedom from discrimination
- the right to life, liberty and personal security
- freedom from torture and degrading treatment
- the right to equality before the law
- the right to a fair trial
- the right to privacy
- freedom of belief and religion
- freedom of opinion
- freedom of peaceful assembly and association
- the right to participate in government
- the right to social security
- the right to work
- the right to adequate standards of living
- the right to education

The Covenants

Following the adoption of the Universal Declaration of Human Rights, the UN drafted two treaties, called **covenants**, which contain provisions of the Universal Declaration and made them legally binding on countries that agreed to become parties to the covenants. The two covenants are the **International Covenant on Civil and Political Rights** (ICCPR) and the **International Covenant on Economic, Social and Cultural Rights** (ICESCR). They were adopted by the General Assembly in 1966, but did not enter into force until 1976, after a sufficient number of countries had agreed to become party to them.

Other human rights instruments

Other instruments have specified how these rights apply to specific groups of people, such as women or children. New instruments, such as the Declaration on the Right to Development, have introduced concepts that had not been part of the thinking of the drafters of the 1948 Universal Declaration. Other important human rights treaties and declarations include:

- the Convention on the Prevention and Punishment of the Crime of Genocide
- the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)
- the Convention on the Rights of the Child

- Convention 169 of the International Labour Organization concerning Indigenous and Tribal Peoples in Independent Countries (ILO 169)
- the Declaration on the Right to Development
- the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
- the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

There are many other human rights instruments. Work continues, though more slowly, on developing new standards. One of the most important new sets of standards for indigenous peoples is found in the draft Declaration on the Rights of Indigenous Peoples (see Leaflet no. 5 on the draft Declaration on the Rights of Indigenous Peoples).

In the section of this leaflet on International Human Rights Law, we explained the difference between legally binding instruments--treaties, covenants, conventions and protocols--and instruments that are not legally binding, but have morally persuasive force, such as declarations and principles. If you think that your rights are being violated in some way, it makes a difference whether the instrument that cites the right is, or is not, legally binding. If it is legally binding, such as the Convention on the Elimination of Racial Discrimination, it may be possible to express your concern to a UN treaty body. You will then be able to argue that your government is in breach of the law. If, however, the instrument that sets out the right is not legally binding, there is no treaty body that you can go to for assistance.

Whether or not an instrument is legally binding will make a difference to your ability to take action. You need to know which legally binding instruments your country is a party to. If your country is a party to the complaints mechanisms that are provided for under the International Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination, or the Convention Against Torture, you may be able to lodge complaints. Even when there is no mechanism for submitting a complaint, as is true of the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child, you can still provide information to the relevant treaty body alleging that your country is in breach of its legal obligations.

However, if you believe your government is violating rights found in non-binding instruments, there is no official body to which you can appeal. Even when the draft Declaration on the Rights of Indigenous Peoples is finalized, it will not include a legally effective complaints mechanism. You will be able to draw national and international attention to violations of the Declaration, but the impact will be *political* rather than legal.

Figure 2 sets out some of the instruments that are particularly relevant to indigenous peoples. The table indicates which instruments are legally binding and which are not, and the range of actions available under each type of instrument, depending on whether or not your country is a party to the instrument in question.

TYPES OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

<u>TYPE OF INSTRUMENT</u>	<u>NAME OF INSTRUMENT</u>	<u>POSSIBILITIES FOR ACTION ON VIOLATIONS</u>
Legally-binding, <i>with</i> a complaints mechanism	<ul style="list-style-type: none"> • International Covenant on Civil and Political Rights • Convention on the Elimination of all Forms of Racial Discrimination • Convention Against Torture 	<ul style="list-style-type: none"> • Complaints to a treaty body • Comment on or criticism of content of a report • Public criticism in UN or media over violations
Legally binding, but <i>no</i> complaints mechanism	<ul style="list-style-type: none"> • International Covenant on Economic, Social and Cultural Rights • Convention on the Rights of the Child • Convention on the Elimination of all forms of Discrimination Against Women 	<ul style="list-style-type: none"> • Comment on or criticism of content of a report • Public criticism in UN or media over violations • NGO reports to the Committees
Not legally binding	<ul style="list-style-type: none"> • Universal Declaration of Human Rights • Other declarations • draft Declaration on the Rights of Indigenous Peoples (still under discussion) 	<ul style="list-style-type: none"> • Public criticism in UN or media over violations

How human rights standards are drafted and finalized

UN legislative bodies, such as the General Assembly, ECOSOC or the Commission on Human Rights, are similar to parliaments. Member States participate in discussions and may vote. These bodies consider issues of concern and formulate outcomes, which are then set out in what is called a **resolution** or **decision**. When a resolution is approved by a majority of voting members of a specific body, it is said to have been **adopted**. If all of the participating members approve the proposed outcome, a vote is not necessary and the resolution it is said to have been adopted by **consensus**.

The writing, or **drafting**, of human rights standards can be a long and difficult process. The governments involved represent peoples from all parts of the world, with differing political, economic and cultural systems. It is generally believed that for a human rights instrument to be effective, it should have the support of many governments. Indeed, governments generally prefer to have consensus on the text. Thus, if one or a few governments are not happy with some aspect of an instrument that is being drafted, they can delay progress. After the governments working on the text agree on the wording, the text must then be considered and adopted by the UN General Assembly.