

Seminar "The World Conference on Indigenous Peoples: Outcomes in Contexts"

25-26 April 2015, Columbia University, New York

Co-sponsored by

The Sami and Indigenous Rights Group at the **Arctic University of Norway**, UiT

The Center for the Study of Ethnicity and Race

The Institute for the Study of Human Rights

And

The University Seminar on Indigenous Studies

at **Columbia University**

The conference will be held at Columbia University's Teachers' College, Room 130 MY (Macy Hall)
525 W 120th street, New York City.

Concept note and draft program

Background

The preparatory process

On 15 September 2014 the UN General Assembly (the UNGA) unanimously adopted the Outcome Document of the high-level plenary meeting of the General Assembly, also known as the World Conference on Indigenous Peoples (WCIP).¹ The Outcome Document was a result of a long preparatory process, which can be said to have had two stages.

In 2012, indigenous peoples commenced their internal preparations as to what should be the outcome of the WCIP. This work started at a national level with subsequent regional meetings and culminated in a global indigenous conference in Alta, Norway, 8-13 June 2013. The Alta Conference was organized by the Sami parliament in Norway, and gathered around 600 indigenous peoples' delegates from all seven indigenous geopolitical regions, as well as another couple of hundred observers. At the Alta Conference, the indigenous delegates adopted, by consensus, the Alta Outcome Document, which laid down the indigenous peoples' position on what should be the outcome of the WCIP.²

The second part of the preparatory process commenced when states started to engage in the preparations of the WCIP Outcome Document. This part of the process commenced in June 2014 and continued almost up until the actual WCIP. This part of the process, which

¹ A/RES/69/2.

² The Alta Outcome Document was subsequently submitted to the UNGA and thus got an official UN Document number; A/67/, annex.

was led by two indigenous and two state advisors appointed by the President of the UNGA (PGA), can in turn be said to have had two stages.

During the period June-August, indigenous and state representatives negotiated on the content of the Outcome Document on an equal footing if not formally so at least informally. During this part of the preparatory process, indigenous representatives exercised considerable influence over the content of the Outcome Document. As they based their positions on the Alta Outcome Document, a substantial number of the recommendations contained in the Alta Outcome Document found their way into the WCIP Outcome Document, although not necessarily with the exact same wording as in the Alta Outcome Document. The relevance of the Alta Outcome Document is also underlined by the fact that the WCIP Outcome Document refers to the former document in its paragraph 2.

In September, the negotiations on the WCIP Outcome Document entered into a process where only state representatives were formally allowed to participate. From then on, indigenous peoples' representatives had to negotiate through friendly states and their two advisors to the PGA. As touched upon, a few days prior to the WCIP an agreement was reached on an Outcome Document, which was subsequently formally adopted at the opening session of the WCIP, by consensus.

The WCIP Outcome Document

(a) Structure of the Outcome Document

The WCIP Outcome Document consists in all of 40 paragraphs, which set out a large number of recommendations. The recommendations do not aim to create new rights, neither do they aspire to elaborate on existing ones. Rather, the principal focus of the WCIP Outcome Document is on reiterating states' obligations to implement the human rights of indigenous peoples, with a particular focus on the rights enshrined in the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). To further that end, the Outcome Document calls for the creation of a number of processes and mechanisms with the potential of contributing to the implementation of indigenous peoples' rights.

The recommendations in the WCIP Outcome Document that call for the establishment of various mechanisms and processes that aim at accelerating the implementation of indigenous peoples' rights aspire to further the realization of indigenous peoples' rights in general and do thus not pertain to specific rights. In addition, however, a large number of recommendations found in the WCIP Outcome Document addresses specific rights.

The recommendations contained in the WCIP Outcome Document – both those recommendations that call for the establishment of various mechanisms and processes that aim to further the implementation of indigenous peoples' rights in general and those that addresses specific rights. - can be divided into two basic categories. In the first category are recommendations that are directed at the UN system. These recommendations contain suggestions as to how the UN system can be improved in order to better contribute to the realization of indigenous peoples' rights. The second category of recommendations are directed at states. These recommendations thus point to what action states can and should take at the national level in order to enhance and speed up the implementation of the human

rights of indigenous peoples with, as mentioned, a particular focus on the rights enshrined in the UNDRIP.

Unsurprisingly, as this is customary for these kinds of documents, the majority of the recommendations, both those directed at the UN and state levels, are voluntary in nature and lack concrete content. But perhaps unexpectedly to some, a not insignificant number of the recommendations are in fact of an obligatory character and thus place clear obligations on the UN system as well as on states.

(b) The recommendations in the WCIP Outcome Document that address specific rights

The category of recommendations in the WCIP Outcome Document that address specific rights cover a wide spectrum of areas. They pertain to areas such as the rights to equality, culture, access to justice, traditional knowledge, religious and cultural sites and repatriation of ceremonial objects and human remains, education, health (both physical and mental, and including sexual reproductive health), housing, and sanitation, as well as to rights of indigenous persons with disabilities, women, children and youth, and elders, rights with regard to major development projects and transnational corporations, and rights pertaining to traditional subsistence activities, sustainable development, and the right to development including within the framework of the post-2015 development agenda.

With regard to the two sets of rights generally held to be at the core of the indigenous rights regime, i.e. (i) land and natural resource rights, and (ii) the right to self-determination, the WCIP Outcome Document can be said to be relatively strong on the former while it is notably essentially silent on the latter.

As far as land rights are concerned, states declare their intention to address the impacts of major development projects on indigenous peoples (paragraph 23), and commit to take further steps to ensure that transnational corporations do not violate the human rights of indigenous peoples (paragraph 24).

In addition, in paragraph 21 states reaffirm their commitment to establish processes to acknowledge, advance, and, perhaps most importantly, adjudicate indigenous peoples' rights over territories and natural resources. Such a concrete commitment to realize the core land and resource rights is of course of critical importance and value to indigenous peoples, if acted upon.

Moreover, in paragraph 20 states reaffirm their commitment in the UNDRIP to "consult and cooperate ... with indigenous peoples concerned ... in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources." The recommendation draws heavily for UNDRIP Article 32.2, and thus essentially repeats already agreed language. Notwithstanding, the provision proved to be highly contentious in the negotiations on the WCIP Outcome Document, signaling the sensitivity of the issue whether indigenous peoples do have the right to withhold their consent to industrial and other activities that seek access to territories traditionally used by them. Against this backdrop, it can be said to be significant that in the end, the Outcome Document did take a stand on the issue, although by merely repeating already agreed language. Again, all in all, the WCIP Outcome Document can be said to be relative strong on land and resource rights, perhaps surprisingly so to some.

But, as indicated, if the WCIP Outcome Document is strong on land rights, it does not contain one single reference to the right to self-determination. Presumably, this right is more contentious to, or even contested by states than land rights. One reason for this might be that a relatively rapidly growing amount of international legal sources are starting to paint a quite clear picture as to the contours of the scope and content of indigenous peoples' rights over lands and natural resources. At the same time, legal sources offering guidance as to how the right to self-determination materializes itself when applied to indigenous peoples are still scarce. Another rationale might be that some states still have problems disconnecting a right to self-determination applied to indigenous peoples from the principle of national unity and territorial integrity of states.

But even if the WCIP Outcome Document does not explicitly refer to the term "self-determination", the Outcome Document does contain a couple of recommendations that can be said to connect to that right. In this context, reference can in particular be made to paragraph 3. In this provision, which borrows language from UNDRIP Article 19, states reaffirm their commitment to consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them. Clearly, a right of indigenous peoples to impact upon administrative, and, in particular, legislative measures, could be viewed as one aspect of their right to self-determination.

With regard to paragraph 3, it can be added that since the PGA's advisors perceived the issue of prior informed consent to be highly contentious in the negotiations on the WCIP Outcome Document, they decided to introduce paragraph 3 at the top of the Outcome Document, referring to it as an "omnibus" provision. The advisors' idea was that all other recommendations in the Outcome Document should therefore be understood in the light of the omnibus reference to prior informed consent in paragraph 3. In that way, one could, in the view of the advisors, avoid repeated references to prior informed consent throughout the rest of the document. It is, however, not entirely clear whether this approach actually works. Paragraph 3 is not formulated in a manner that makes it evident that it should influence the interpretation of all other provisions in the WCIP Outcome Document. On the contrary, it contains no language to that effect, neither explicit nor implicit. And, as articulated above, an additional reference to prior informed consent was in the end added to the WCIP Outcome Document in the lands and natural resources section.

© The recommendations calling for the establishment of mechanisms and processes aiming at advancing the implementation of indigenous peoples' rights

(i) Recommendations directed at the UN system

As mentioned, in addition to the recommendations that address specific rights or issues, the WCIP Outcome Document contains a number of recommendations that call on (i) Member States, and (ii) the UN system, to introduce mechanisms and processes that can assist in furthering the human rights of indigenous peoples.

As to the recommendations directed at the UN system, two recommendations found in paragraphs 28 and 33, respectively, may be said to be of particular interest. These initiatives

may potentially be of significant relevance to the indigenous rights regime as they may at the same time greatly enhance the implementation of indigenous peoples' human rights and highlight the legal status of indigenous peoples in the international legal system.

In paragraph 28, states invite the Human Rights Council (HRC) to review the mandate of existing mechanisms, including the mandate of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), with a view of modifying and improving these mechanisms, to give them the capacity to better assist states in their efforts to monitor and improve the achievements aiming at meeting the ends of the UNDRIP. (Mechanisms other than the EMRIP must reasonably refer to the UN Special Rapporteur on the Rights of Indigenous Peoples, since the other existing UN mechanism specifically targeting the situation of indigenous peoples, the UN Permanent Forum on Indigenous Issues, does not report to the HRC. But one can also imagine the creation of new mechanisms. During the negotiations of the WCIP Outcome Document, a so called pledging system, where states voluntarily pledge to implement specific human rights of indigenous peoples identified by the state itself, was mentioned in this regard.) The recommendation is obviously very open ended. Both very ambitious but also relatively small revisions of the present mandate of the EMRIP and other existing mechanisms, as well as the creation of new mechanisms, could be said to fall within the ambit of the recommendation.

But even if paragraph 28 is open-ended, it should be noted that at least from the indigenous side, the idea with this proposed review was to remodel the EMRIP into a mechanism that more resemblances the UN treaty bodies that oversee the major international human rights treaties. This would enable EMRIP to make country specific observations as to how a particular state is succeeding in implementing the rights enshrined in the UNDRIP. As indicated, there might be state opposition against giving the EMRIP such a mandate, for, among other reasons, there are few examples of oversight mechanisms that monitor the implementation of formally non-legally binding human rights instruments, although some precedents do exist. Should the EMRIP be remodeled into a treaty body kind of mechanism, a number of issues would have to be resolved, such as whether reporting should be mandatory or voluntary, what composition EMRIP should have, what should be the form of the reports its produces (one general report or several country specific reports), what should be its meeting schedule, and so on,.

Turning to paragraph 33, here states commit that the UNGA should consider ways to enable indigenous peoples' representative institutions to participate in their own capacity in UN meetings relevant to and on issues affecting them. As seen, similarly to paragraph 28, paragraph 33 is rather generically formulated and thus opens up for a number of outcomes. In addition, as the provision speaks only about "participation", a potentially larger issue is not explicitly mentioned in the recommendation.

The recommendation contained in paragraph 33 is presumably motivated by recent developments within the indigenous rights regime, which suggest that indigenous peoples have emerged as peoples for international legal purposes, thus enjoying rights as such, including the right to self-determination. This has in turn resulted in that a number of states where indigenous peoples live have recognized, or even established, indigenous representative institutions such as parliaments, congresses, governments, tribal councils etc. that have the capacity and authority to represent the indigenous people as a people. This

potentially elevated status of indigenous peoples within the international legal system has, however, so far not been matched by a participatory capacity within the UN system and other international fora. Indigenous peoples can continuously only participate in UN activities in the capacity as NGOs. Their own representative institutions – the genuine representatives of the people – can at present only participate in UN activities if forming NGOs or through their respective national delegations. Neither of these avenues are, however, an option to many indigenous peoples, as they maintain that to form an NGO or sit in the government delegation would be contrary to their status as peoples. It is this situation that the process initiated by paragraph 33 aims to address.

The above suggests that the issue of indigenous peoples' right to participate in UN meetings through their own representative institutions is intrinsically linked to the question of indigenous peoples' legal status within the international legal system. Thus, should the UN General Assembly decide that indigenous peoples' representative institutions should be allowed to participate in UN meetings in their own capacity, this could at the same time be viewed as a recognition of indigenous peoples' elevated legal status within international law.

Should the UN General Assembly opt to grant indigenous peoples' participatory status within the UN, some issues of a somewhat less principal nature need also to be resolved. For instance, what exact participatory status should indigenous peoples have? At present, the only status available is permanent observer status. But some states may be hesitant to award indigenous peoples such a status, which would place them on par with, among others, Palestine. Also, should the participatory status be awarded to all indigenous peoples, or is national recognition of such a status a prerequisite? Finally, should indigenous peoples be allowed to define themselves what are "relevant United Nations bodies" and "issues affecting them" or should that be defined by states, potentially through a list that names the bodies where indigenous peoples may attend?

Of the other recommendations directed at the UN system, it may in particular be worth noting that in paragraph 31, states request the Secretary-General to begin the development of a system-wide action plan to ensure the ends of the UNDRIP. In the same paragraph, states further invite the Secretary-General to accord an existing senior UN official responsibility for coordinating the action plan. Also worth noting is that in paragraph 29, states invite the UN treaty bodies to consider the UNDRIP in their activities. This is yet another example of a provision in the WCIP outcome document that underlines the legal relevance of the Declaration, as states would hardly encourage the treaty bodies to consider rights that are not binding upon them. In a similar vein, in paragraph 29 states also encourage themselves to include information as to what measures they have undertaken to pursue the objectives of the UNDRIP when reporting to the treaty bodies as well as to the Universal Periodic Review process.

(ii) Recommendations directed at the national level

Among the recommendations directed at the national level, paragraph 21 on the establishment of mechanisms for implementing indigenous peoples' rights over lands and natural resources, including through adjudication, paragraph 20 on prior informed consent in the context of resource extraction projects in indigenous territories, and paragraph 3 on free and informed

consent with regard to legislative and administrative measures have already been identified as particularly interesting.

In addition to the paragraphs referred to above, paragraphs 7 and 8 are of significant interest. In these two paragraphs, states commit to take measures at the national level to achieve the ends of the UNDRIP, including legislative measures and national action plans. These recommendations are obviously first and foremost significant because of the fact that states concretely commit to implement the rights enshrined in the UNDRIP on the national level, a commitment of great importance both for the daily lives of indigenous peoples and the indigenous rights regime. But in addition, the recommendations contain further reaffirmation of the legal relevance of the Declaration, as the commitment to implement the rights enshrined in the UNDRIP signals that at least a number of these rights are indeed legally binding upon states, although articulated in a formally non-legally binding instrument. Because if non-legally binding, why would states commit to implement these rights?

About the seminar

The purpose of the seminar, which will be held at Columbia University, New York, on 25 and 26 April 2015, in-between the two working weeks of the 14th session of the UN Permanent Forum on Indigenous Issues (20 April-1 May), is to analyze and discuss first and foremost the actual WCIP Outcome Document from various angles, but also the relevance of WCIP process as such. Questions that will be addressed include: What is the legal relevance of the WCIP Outcome Document? What might its impacts be on the indigenous rights regime? What is, if any, the relationship between the Outcome Document and human rights treaties and general principles of international law? Is the WCIP as such and its Outcome Document relevant for other reasons, including for the role indigenous peoples managed to play in the preparation of the Outcome Document as well as at the actual conference? What could and/or should be the result of the review of the mandate of the EMRIP as well as of the consideration to elevate indigenous peoples' participatory (and potentially legal) status in the UN system (and beyond)? Does the WCIP Outcome Document contain other recommendations that carry the potential of enhancing the UN system's work towards indigenous peoples? What significance may the recommendations directed at states have for the implementation of indigenous peoples' human rights, and in particular for those rights enshrined in the UNDRIP, at the national level, as well as for the legal status of the Declaration?

The seminar will be oriented around nine particular aspects of the WCIP process, of the actual conference, and, in particular, of its Outcome Document. For each of the nine topics there will be an introductory presentation (see further attached draft program), that will serve as a point of departure for the following discussions. Although the seminar will have an academic base, it will be open for all those that are interested in attending. The size of the meeting room may, however, place limitations as to the number of participants that can participate. All those participants that have registered for the seminar will be encouraged to participate in the discussions that ensue following each opening presentation.

Following the conclusion of the seminar, the introductory speakers will each write an academic article on her or his topic. The academic nature of the articles shall not preclude the possibility, however, that some articles may also include concrete practical recommendations,

particularly with regard to the two mentioned processes that the WCIP Outcome Document initiated, i.e the review of the mandate of the EMRIP and the consideration of elevating indigenous peoples' participatory, and potentially legal, status in the UN system. The articles will be published in a book.

Draft program

The Seminar will be held at Columbia University's Teachers' College, Room MY (Macy Hall) 130. Teachers' College is located at 525 W 120 street in New York City.

Saturday 25 April

09.30-10.00 am	Registration and coffee and refreshments
10.00-10.15 am	Welcoming remarks by representatives of the Center for the Study of Ethnicity and Race and the Institute for the Study of Human Rights at Columbia University and the leader of the Sami and Indigenous Rights Group at the Arctic University of Norway, UiT
10.15-10.45 am	The relevance of the WCIP, the Alta Outcome Document, and indigenous peoples' participation in the process in general. Introductory presentation by Les Malezer
10.45-11.30 am	Discussion, Dr. Myrna Cunningham facilitator
11.30 am-12.00 pm	The relationship between the WCIP Outcome Document and international human rights treaties and general principles of international law. Introductory presentation by Professor Martin Scheinin
12.00-13.30 pm	Lunch
13.30-13.45 pm	Discussion, Associate Professor Mattias Åhrén facilitator
13.45-14.00 pm	Coffee and refreshments
14.00-14.30 pm	The legal relevance of the WCIP Outcome Document and its potential impacts on the indigenous rights regime, including on the legal status of the UNDRIP. Introductory presentation by Professor Hurst Hannum
14.30-15.15 pm	Discussion, Les Malezer facilitator

15.15-15.30 pm	Coffee and refreshments
15.30-16.00 pm	The proposed enhanced participatory status of indigenous peoples in the UN system; the potential impact on the legal status of indigenous peoples under international law. Introductory presentation by Manuel May Castillo
16.00-16.45 pm	Discussion, Professor Hurst Hannum facilitator
16.45-17.00 pm	Closing of first meeting day
20.00 pm	Seminar dinner (dinner for invited speakers is covered by the organizers; others are welcome and they have to cover their own expenses).

Sunday 26 April

09.00-09.30 am	States commitment to implement the UNDRIP at the national level in the WCIP Outcome Document paragraphs 7 and 8; relevance for the legal status of the UNDRIP. Introductory presentation by [TBC]
09.30-10.15 am	Discussion, Professor Elsa Stamatopoulou facilitator
10.15-10.30 am	Coffee and refreshments
10.30-11.00 am	A relevant mandate for the EMRIP: an insider's perspective. Introductory presentation by Dr Claire Charters, Senior Lecturer
11.00-11.30 am	A relevant mandate for the EMRIP; theoretical thoughts and considerations. Introductory presentation by Associate Professor Mattias Åhrén
11.30 am-12.15 pm	Discussion, Professor Martin Scheinin facilitator
12.15-13.30 pm	Lunch
13.30-14.00 pm	The relevance of recommendations directed at states for the implementation of indigenous peoples' human rights at the national level, in particular for those rights enshrined in the UNDRIP. Introductory presentation by Dr. Myrna Cunningham
14.00-14.45 pm	Discussion, Dr. Manuel May Castillo facilitator
14.45-15.00 pm	Coffee and refreshments

15.00-15.30 pm	The relevance of other recommendations contained in the WCIP Outcome Document. Introductory presentation by Professor Elsa Stamatopoulou
15.30-16.15 pm	Discussion, Dr. Claire Charters facilitator
16.15-16.30 pm	Closing of the seminar