

SPECIAL MEETING OF THE WORKING GROUP TO  
PREPARE THE PROPOSED AMERICAN DECLARATION  
ON THE RIGHTS OF INDIGENOUS PEOPLES

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Summaries of the Presentations made by the Panel of Experts

(Presented at the inaugural session of the Special  
Meeting of the Working Group, March 11, 2002)

### List of Experts

1. Ana V. Araújo, Brazil, Director of the Rainforest Foundation in New York, but not long ago, representative and defendant of the indigenous rights in Brazil
2. Benedict Kingsbury, New Zealand, Professor of the International Department of the University of New York.
3. Wayne Lord, Canada, Government of Canada, Department of Foreign Affairs.
4. Fergus Mackay, New Zealand, lawyer specializing in human rights and the rights of indigenous peoples.
5. Augusto Willemsen Díaz, Guatemala, Guatemalan Legal expert. Human Rights Center of the United Nations in Geneva, in charge of issues concerning the future Universal Declaration on the Rights of Indigenous Peoples.

**MRS. ANA VALÉRIA ARAÚJO**

The situations of indigenous peoples in the Hemisphere are quite diverse, and that makes the drafting of a Declaration on the Rights of Indigenous Peoples very complex. But it is necessary to put together an international instrument that will provide Indians with basic standards for the recognition of their rights in relation not only to the nation states in which they live but also to the globalized world society.

Regarding section 5 of the Declaration, making the effectiveness of the American Declaration subject to domestic law nullifies any progress and renders the text of the Declaration itself innocuous.

Also of concern is that the Declaration gives member states the discretion to define, according to their own understanding, what sort of public interest would justify the removal of indigenous peoples from their territories. The text of the draft should emphasize that removal would be used only as a last resort.

Discussion of collective intellectual property rights necessarily involves the establishment of a specific system that recognizes the distinct characteristics of the indigenous system of creating knowledge.

The text must be innovative and comprehensive, capable of fostering evolution in the thinking of governments and officials, which is the role of international law.

**MR. BENEDICT KINGSBURY**

Addressed the topic of self-determination with reference to Article XV of the Draft Declaration. He argued that a new understanding of self-determination has emerged in local and international practice. Until recently, the question of self-determination was understood as an opposition between the rights of states and the right of indigenous peoples. But a new approach sees self-determination as structuring a relationship between indigenous peoples and states. Professor Kingsbury argued that a relational approach to self-determination should be placed at the center of the Draft Declaration, not confined to Article XV, and should inform all of the specific articles about education, health, lands, environment etc. These articles should set principles structuring the relations between indigenous peoples and states. The Draft should include a requirement that states and indigenous peoples negotiate their own specific arrangements on all of these issues to realize self-determination within the framework of the general principles of the Draft Declaration.

Professor Kingsbury argued that a strong and effective OAS Declaration is becoming possible because of dramatic changes in the law and policy of state-indigenous peoples relations in the Americas over recent years. A strong, well-thought out Declaration elaborated jointly by states and indigenous peoples is preferable its ad hoc and inconsistent formulation of principles on indigenous issues that otherwise will occur in relation to the Free Trade Agreement of the Americas, the Inter-American Development Bank, human rights bodies, regional programs for democracy promotion and poverty reduction, etc. Professor Kingsbury believed that a historic possibility now

exists to build a good relational process to adopt a strong policy, and begin to strengthen national dialogue and implementation.

**MR. WAYNE LORD**

Indigenous issues are a high priority at the national, regional and international level. Progress has been made in building dialogue between states and indigenous people that leads to reconciliation, new relationships and partnerships as well as political and practice agreements. However, many serious problems remain; many indigenous peoples are struggling for their very existence. There are conflicts and disputes. In this context, we have a historic opportunity to achieve a strong and effective declaration, which can provide a framework; a set of principles to inspire and guide us. Just as important is the process—a process that builds confidence and trust between states and indigenous peoples will create the conditions of respect, and transparency leading to understanding and agreement.

Experts have an important role and responsibility in influencing both the process and the outcome.

**MR. FERGUS MACKAY**

The presentation focused on the rights set forth in Section V of the Proposed Declaration, which includes property rights, labour rights, intellectual property rights and the rights to development. It began by relating the right to self-determination to property rights and not that that right includes rights to own lands, territories and resources and the right to jurisdiction over those lands and resources. It was not that the United Nations Human Rights Committee has previously stated that Indigenous peoples hold this rights and that it applies to ownership of territory and resources. It also noted that many of the rights presently set forth in the Declaration are presently recognized by and binding on member states by virtue of ratified human rights instruments and customary international law. The Decision of the Inter-American Court on Human Rights in a recent case was used to illustrate this point. The Court's decision in that case was related to Article XVIII(1)(2) and (8) and it was stated that these paragraphs are consistent with the Court's decision.

Article XIII(7) was also discussed and it was noted that this paragraph conflicts with the rights set fourth in Article XVIII because it appears to allow states to unilaterally declare Indigenous territories to be protected areas. It was suggested that in order to be consistent with Article XVIII international instruments and practice that the paragraph be amended to provide for Indigenous consent to protected area status, for a prior resolution of territorial rights and for the right of Indigenous peoples to declare their territories to be protected areas. Article XVIII(5) was described as inadequate because it failed to provide meaningful protections to Indigenous peoples affected by resource exploitation. It was also suggested that Article XVIII(6) be amended to remove the "public interest" limitation from the protection from involuntary relocation found in that article. Intellectual property rights, found in Article XX, were described as largely consistent with international standards, except for paragraph 3, which adopted a position contrary to the Convention on Biological Diversity. Finally, Article XXI was described as adequate and consistent with international standards.

**MR. AUGUSTO WILLEMSSEN DÍAZ**

He referred in considerable detail to newly coined constitutional provisions in Bolivia, Colombia, Ecuador, and Peru, which address the exercise of jurisdictional authority by the natural authorities of indigenous communities. He indicated that a new era had begun, relegating to the past the days when legal systems of indigenous peoples were excluded or were included on an unacceptably subordinate basis.

Mr. Willemsen said that in the area of law, genuine legal pluralism was the only valid and legitimate solution in multiethnic, multicultural, and multilingual countries where indigenous peoples have maintained and maintain, through a profound daily consensus, their own age-old legal systems that have always been applied in regulating social organization and conduct and in resolving conflict.

To afford true depth to the participatory democracy we all longed for, one essential and urgent measure was to maintain and enhance respect for the legal systems of indigenous peoples. This was a significant means of bringing peace and harmony to communities and, therefore, to society generally.