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Realizing UNDRIP Implementation

A Study of Considered Mechanisms Between UN Member States and Fourth World Nations

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Introductory Summary

Why was this study conducted?

After more than forty years of discussion, dialogue and negotiations between indigenous peoples' delegations, UN agencies and bodies, and the enactment of the UN Declaration on the Rights of Indigenous Peoples proposals have begun to emerge discussing in more concrete terms how the Declaration may become not only principles by actions taken by UN Member States and Fourth World nations. The Center decided to weigh these proposals in terms of the probability that states and nations would mutually agree to their content and purpose.

A set of political decisions will need to be made to move from principles to practical application. Therefore, political analysis was considered essential.

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ABSTRACT

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) did not include in its narrative a method or methods for implementing principles and mandates adopted by the UN General Assembly save an indirect mention in paragraph 42. States' governments, Fourth World governments, the World Conference on Indigenous Peoples, the Global Indigenous Preparatory Conference at Alta, Norway in 2013, and UN agencies have offered four main proposals to implement the Declaration. This study examines the potential advantages and disadvantages as well as benefits and harms to states' and nations' interests should one of these proposals be considered as viable, and discusses the probability of UN Member States and Fourth World nations adopting one of the proposals. The study systematically identifies and weighs the interests of states and nations and compares the achievement of those interests against eleven remedies derived from an assessment of state and nation interests that may come from each of the four proposals. The study reveals a significant probability that states and nations will more likely embrace the status quo (essentially doing nothing) as a first option and adoption of the Fourth World nations' state-nation specific proposed Protocol as a second likely option. The study demonstrates that it is least likely that states' and nations' governments will seriously adopt the UN proposed use of the *Expert Mechanism on the Rights of Indigenous Peoples* as a monitoring mechanism or the *UN Permanent Forum on Indigenous Issues' considered optional protocol* to establish a monitoring and claims mechanism. If the latter two are indeed established, the study suggests these will be least effective in terms of achieving a balance between the interests of states and nations due to "rights ritualism."[1]

1 The concept of "rights ritualism" is a concept originated by Robert Merton and discussed at length by Dr. Hillary Charlesworth director of the Centre for International Governance and Justice at the Australian National University as, "… subscribing to institutionalised methods of achieving certain goals, while having little commitment to the goals themselves. Merton, Charlesworth and others raise the important question, "Why is there such a large gap between the promises of human rights law and its implementation?"

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Realizing UNDRIP Implementation

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The Challenge: How will implementation be realized?

How will the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), developed over the course of forty years, become a living instrument for the social, economic, and political elevation of indigenous peoples to a position of political equality with all other peoples? That is the question that troubles leaders of Fourth World nations and indigenous non-governmental organizations throughout the world. This singular piece of international sentiment proffers the possibility that as "peoples" Fourth World nations may now join all peoples in the world as equal beneficiaries of human development. Can Fourth World nations and individual UN Member States agree to carry out the Declaration's principles?

The study reveals a significant probability that states and nations will more likely embrace the status quo (essentially doing nothing) as a first option and adoption of a Fourth World nation's state-nation specific proposed Protocol as a second likely option. The study demonstrates that it is least likely that states' and nations' governments will seriously adopt the UN proposed use of the Expert Mechanism on the Rights of Indigenous Peoples as a monitoring mechanism or the UN Permanent Forum on Indigenous Issues' considered Optional Protocol to establish a monitoring and claims mechanism. If the latter two are indeed established, the study suggests these will be least effective in terms of achieving a balance between the interests of states and nations due to "rights ritualism"[2]

In an effort to advance the local, regional, and international debate on this issue, the Center for World Indigenous Studies (CWIS) conducted this study to politically assess the likelihood of the main characters concerned with implementing the UN Declaration adopting any one of four proposed methods to achieve that goal. While researchers and decision-makers in the United Nations and non-governmental organizations assume that implementing the Declaration is a legal problem demanding legal analysis and interpretation, this study poses the more obvious question of how to address the political problem of implementation. By adding a political analysis, based in systematic inquiry, to the local, regional, and international debate CWIS hopes to encourage an expanded debate

2 The concept of "rights ritualism" is a concept originated by Robert Merton and discussed at length by Dr. Hillary Charlesworth director of the Centre for International Governance and Justice at the Australian National University as, "… subscribing to institutionalised methods of achieving certain goals, while having little commitment to the goals themselves. Merton, Charlesworth and others raise the important question, "Why is there such a large gap between the promises of human rights law and its implementation?"

relevant to solving the problem structuring a Declaration implementation process. There is no doubt that taking an international instrument—generally panned by states' governments as "non-binding" or unrelated to their domestic system of government—and elevating its main principles into binding international political and legal practice is a complicated and daunting process. It is made even more difficult since the principles of self-determination and free, prior and informed consent—widely accepted norms applied in international relations—are now required by the Declaration to become norms applied to the more than five thousand nations that many states believed they had replaced in the 20th century.

Built-in Political Tensions

The Declaration contains a built-in political tension where indigenous nations and most states compete internally to exercise sovereign powers over lands, natural resources, territories, and peoples. It is this political tension that most researchers, indigenous rights advocates, and attorneys seek to avoid. This study argues that the probability of achieving an agreed approach to carrying out the Declaration depends on reducing this tension—though not eliminating it. This can be achieved by identifying an approach to carrying out provisions of the Declaration mutually acceptable to UN member states and Fourth World nations—both parties must embrace and adopt the developed approach. In this study we have inquired into which of the four proposals now on the table will most likely maximize mutual benefit to each state and indigenous nation while minimizing harm to the interests of each party.[3] Given the greater possibility of minimized social, economic, political, strategic, and cultural harm, individual states and individual nations are more likely, so we hypothesize, to mutually agree to a proposed method for implementing the Declaration. This is a political judgment that we have made to systematize a process for drawing a conclusion.

It is one thing to craft a consensus document that carefully spells out the minimal rights for peoples in more than five thousand nations, but it is quite another matter to negotiate relations between Fourth World nations and UN Member States to create a political environment wherein indigenous peoples may become respected political equals in the human family. It is the case, after all, that each Fourth World nation and each UN Member State must negotiate internationally enforceable agreements that ensure the rights of thousands of peoples are guaranteed. And, if the interests of nations and those rights are violated there can be international sanctions to restore those rights and protect those interests.

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3 The four approaches to Declaration implementation are variously proposed or suggested by the World Conference on Indigenous Peoples (WCIP), the UN Permanent Forum on Indigenous Peoples (UNPFII), indigenous peoples' regional preparatory meetings in advance of the September 2014 WCIP, Indian Law Resource Center (ILRC) and 135 US-based Fourth World governments and organizations, Global Indigenous Preparatory Conference at Alta, Norway in 2013, the Center for World Indigenous Studies (CWIS) and eleven Fourth World governments representing more than 34 million people on four continents, the Expert Mechanism on the rights of indigenous peoples (EMRIP), states' government delegations participating in developing language for the World Conference on Indigenous Peoples Outcome Statement, the UN Special Rapporteur on the rights of indigenous peoples and five Experts commissioned by the UN Permanent Forum on Indigenous Issues to consider the optional protocol analysis produced by Dalee Sambo-Dourough and Megan Davis in 2014.

Since its 2007 adoption by the UN General Assembly, implementing UNDRIP principles has become the focus of intense inquiry and debate. How, when, and by what means will the collection of principles become living instruments of social, economic, political, and cultural security for the world's 1.3 billion indigenous peoples?

Four Approaches to UNDRIP Realization

As of this Study, four proposals aimed at implementing the UNDRIP principles have begun to emerge:

1. **Do nothing** (status quo) and things will work out over time as political leaders in the UN and in the Member States come to better understand the UNDRIP and the World Conference on Indigenous Peoples Outcome Document;
2. Review and modify the mandates of existing United Nations mechanisms—the **Expert Mechanism on the Rights of Indigenous Peoples** in particular so that it can promote respect for the Declaration;
3. Craft and offer for adoption by UN Member States an **Optional Protocol** through the UN Permanent Forum on Indigenous Issues, the Council on Human Rights, and the UN Third Committee establishing additional explicit measures to establish a mechanism to monitor both the content and the weight of the Declaration since as the Special Rapporteur on the rights of indigenous peoples indicates that the Declaration is weakened by ambiguities and positions about its status and content—in particular suggesting that it is "non-binding and merely aspirational;" and
4. Craft and offer for adoption a **Protocol on Intergovernmental Mechanisms to Implement the UN Declaration on the Rights of Indigenous Peoples** that establishes guidelines for state-and-nation-specific mechanisms—mutually developed, mediated by a third-party guarantor, and with mutually negotiated terms and conditions for the application of UNDRIP principles taking into consideration the specific and unique conditions and circumstances of each nation and each state.

The first three of these proposals assume the United Nations will carry the burden of implementing the Declaration. The fourth proposal assumes the UN will provide the venue for negotiating the framework for a protocol, but implementation is left in the hands of each Fourth World nation and each UN Member State that have formally adopted that protocol.

All four proposals require formal or implied agreement by states through their constitutional or customary agencies. The fourth proposal requires that both Fourth World nations and UN Member States adopt the international instrument and under international guarantees negotiate bi-lateral treaties or other constructive arrangements with the primary responsibility for implementation falling to each state and each nation.

Scope of Study

This study focuses on the interests of UN Member States and Fourth World nations' governments as publicly expressed in reservations or side comments given at the adoption of the UN Declaration on the Rights of Indigenous Peoples (2007) and at the adoption of the World Conference on Indigenous Peoples Outcome Document in 2014; and published

comments of political leaders since the adoption of both instruments. The interests of UN Member States and Fourth World nations were subcategorized into social, economic, political, strategic, and cultural interests. The study focuses only on four prominent proposals for implementing the Declaration that originated with state representatives, UN agencies, the World Conference on Indigenous Peoples, and Fourth World nation governments and organizations.

The main focus of the study was to determine which of the four proposals is most likely to be adopted by both nations and states as mutually beneficial and minimally harmful to the exercise of their interests. Adoption of a proposal by both states and nations was considered a necessary precondition to that proposal effectively implementing the Declaration. The study measured the greatest degree of mutual acceptance states and nations may express when offered one or the other of the proposals to adopt—given that the study assumes that a proposal will be accepted by states and nations if and only if the political leaders consider the proposal offers the greatest advantages and least disadvantages.

Background

The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples on September 13, 2007—following a forty-year-long path through the UN system of councils, sub-commissions, working groups, additional councils and committees, and final General Assembly approval. Adopting the Declaration, 144 states delegations gave their approval while four states opposed, eleven abstained, and thirty-five states did not vote. While many government delegations praised the Declaration as a great step forward for human rights, five states in particular (Australia, Canada, New Zealand, United States of America, and the United Kingdom) expressed opposition outright or issued reservations. The United Kingdom opposed the usage of "collective rights" language as well as asserted its view that "self-determination" of indigenous peoples could only be exercised within the context of an existing state—thus reducing the well-established international principle to a "domestic concern." The United States, with Australia, Canada, and New Zealand stressed their opposition to the mandate in the Declaration requiring a state to obtain the "free, prior and informed consent" of an indigenous people before instituting policies, legislation, administrative, and judicial acts that affect the interests of particular peoples. Opponents and some states that voted or abstained stressed their view that the Declaration is merely aspirational and does not have the force of law—"non-legally binding and did not propose to have any retroactive application on historical episodes"(UN-DPI, 2007). Canada and its province of Quebec stress major opposition to the Declaration on grounds that it "cannot be pled in court and is accordingly legally inoperable" and the then minister of Indian Affairs Chuck Strahl, speaking for Canada, declared the Declaration "unworkable in a Western democracy under a constitutional government" on grounds that the Canadian Constitution does not provide for collective rights that would be demanded by indigenous peoples.

The UNDRIP was described as being irrelevant to state domestic policies and laws or offensive to internal affairs by many of the states that simply abstained.[4] Azerbaijan objected

[4] Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine.

to language that would open that state to consider the rights and interests of Nagorno-Karabakh, an Armenian region that seeks to absorb into Armenia, but due to oil pipelines passing through the territory the Azerbaijani government claims the exclusive right to the area. Bangladesh is in constant conflict with the "hill tribes" of the Chittagong Hill Tracts, and countries like Nigeria, Kenya, and Russia enclose so many different indigenous nations that to recognize the UNDRIP would, in their government's view, open complex political, economic, and strategic challenges to the stability of the country.

Forty-nine of the UN Member States either opposed the UNDRIP outright, rejected key provisions and abstained, or opposed the Declaration on other grounds and did not vote.

Topic Overview

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) has been described as a major step forward to elevate the original nations of the world to a position of equality with all other peoples. It has also been described as "unworkable," "aspirational," and "not-legally binding." Clearly there are many different opinions about the benefits and harms of this Declaration, but in September 2014 the United Nations General Assembly, meeting in Plenary Session, took another step in the direction of establishing an "action oriented" plan to advance the principles expressively presented in 2007. The World Conference on Indigenous Peoples issued its Outcome Document calling for measures to implement the UNDRIP.

The "action oriented" pronouncement of the UN General Assembly became a clarion call for specific mechanisms to monitor the state implementation of the UNDRIP principles. In other words, how can the UN, state governments, and indigenous governments carry out the UNDRIP principles?

Post UNDRIP Consultations—Emergent Proposals

In advance of the World Conference on Indigenous Peoples in 2014 this question was taken up by regional indigenous organizations, the United Nations Permanent Forum on Indigenous Issues (UNPFII), a Global Indigenous Preparatory Conference at Alta, Norway in 2013 and finally at the World Conference on Indigenous Peoples itself. Indigenous regional meetings urged the need for "effective accountability and monitoring processes [that] must be established and maintained with the involvement and the participation of Indigenous Peoples and their representative organisations" (IP-Pacific, 2013).

Several **UN Member States international law experts[5] argue that the *status quo* or doing nothing** to specifically implement the Declaration is the best approach. Beginning in 2010 indigenous peoples' representatives and states' government representatives began engaging in dialogues internally and between the separate parties to identify language that would best secure a compromise statement of an "action oriented" effort to carry out the principles and

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5 The governments of Namibia, Russian Federation, United Kingdom, Azerbaijan for example and UNPFII expert group member Elifuraha I. Laltaika, a Maasai at Tumaini University Makumira.

statements of the UNDRIP. While the process sponsored by the UN General Assembly President drew on more than three years of conversations, conferences and regional meetings, the statements of indigenous representatives and many states government delegations were quite divergent. States' representatives, during consultations in the summer of 2014, questioned the need for any specific or binding process that would require implementation of the Declaration. Indeed, delegations from the Russian Federation, Namibia, South Africa, and others explicitly and implicitly argued that it is not necessary to actively implement the Declaration since some countries (i.e., Bolivia) have adopted the Declaration in whole into their domestic law. Others stated that they have in place mechanisms defined by their Constitution (Canada, Russia) that renders the Declaration irrelevant. Repeatedly, states including New Zealand stated during consultations that the Declaration is "non-binding" and therefore does not require any further action.

The **Global Indigenous Preparatory Conference Outcome Document** (GIPC-Alta, 2013), joining indigenous peoples' organizational and governmental representatives, affirmed a UNDRIP implementation proposal to the World Conference on Indigenous Peoples by stating the importance of,

> "the creation of a new UN body with a mandate to promote, protect, monitor, review and report on the implementation of the rights of Indigenous Peoples, including but not limited to those affirmed in the Declaration, and that such a body be established with the full, equal and effective participation of Indigenous Peoples" (Theme 1, 1).

Statements from consortiums of indigenous nations delivered to the UNPFII in 2013 echoed this recommendation (ILRC, 2013). The Alta Conference went on to call for the establishment of an international "mechanism to provide oversight, redress, restitution, and the implementation of Treaties, agreements, and other constructive arrangements between Indigenous peoples or nations and States, predecessor and successor States" as well.

A **Joint Statement of Constitutional and Customary Indigenous Governments,** submitted to the UNPFII in May 2014 by eleven indigenous governments representing more than 35 million people from four continents, urged establishment of internationally binding state and indigenous nation-specific intergovernmental mechanisms to negotiate implementation of the Declaration with international enforcement guarantees consistent with the Alta recommendation (CWIS-11Igov, 2014). This proposal emphasizes direct bi-lateral negotiations between each state and each nation based on mutually agreed upon interests. It also includes the feature that the state-nation-specific mechanism for negotiations become internationally binding through a protocol to the UNDRIP. The proposal explicitly requires that dialogue and negotiations include a mutually agreed upon third-party mediator-guarantor to ensure appropriate enforcement of state/nation agreements. The acts of carrying out provisions of the Declaration are left first and foremost to each state and each indigenous nation and a guarantor. The United Nations merely acts as the facilitator and not the judge.

The UNPFII commissioned a study in 2012 (**Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism**) to assess "the need for a mechanism by which to monitor implementation of

the Declaration and its interpretation in international law" (Sambo-Dorough & Davis, 2014). The study states that the Declaration itself (Para 42) called for the promotion and "full application" of the Declaration by Member States (UNGA, 2007). The UNPFII study recommends the development of a "voluntary or optional mechanism providing for a complaint mechanism aimed at negotiation and dialogue underpinned by the principles of partnership as enshrined in the Declaration" (Sambo-Dorough & Davis, 2014). The Sambo-Dorough and Davies study recommends that a mechanism should be voluntary at the request of states, third parties and indigenous peoples, confined to the provisions of the Declaration and contentious issues associated with lands, territories and resources; and the mechanism should be negotiated between indigenous peoples and states "on mutually agreed terms," and finally the mechanism or committee establish should be composed of "key international lawyers experienced in international law and indigenous human rights" (Sambo-Dorough & Davis, 2014).

The **World Conference on Indigenous Peoples Outcome Document**—issued in September 2014, after three months of consultations (UNGA, 2014)—concluded that the Human Rights Council should conduct a "review of the mandates of its existing mechanisms, in particular the **Expert Mechanism on the Rights of Indigenous Peoples**, during the sixty-ninth session of the General Assembly, with a view to modifying and improving the Expert Mechanism so that it can more effectively promote respect for the Declaration, including by better assisting Member States to monitor, evaluate, and improve the achievement of the ends of the Declaration" (Para 28). The Expert Mechanism was created by the Human Rights Council resolution 6/35 at its 34th meeting on 14 December 2007. The five member appointed body (primarily indigenous nationals holding three-year terms) has a single mandate: "The thematic expertise will focus mainly on studies and research-based advice" (HRC, 2007). This proposal essentially calls on the Human Rights Council to enhance what is actually a study and research group of five indigenous representatives so that it may assume monitoring, evaluation, and Declaration-promotion duties to support states' governments. To change the Expert Mechanism in this way would effectively convert this research and study group into a "mini-Indigenous Human Rights Committee."

Finding Common Ground Between States and Nations

Four solutions have been proposed as possible remedies for mechanisms to implement the United Nations Declaration on the Rights of Indigenous Peoples: The Status Quo (emphasizing Human Rights in the UN Third Committee and the Human Rights Council); Expanding the authority of the five member Expert Mechanism on the Right of Indigenous Peoples; Optional Protocol to monitor UNDRIP implementation and complaints; Protocol for state/nation specific negotiations of UNDRIP implementation.

Status Quo – Do Nothing

Some may argue that since the UN Declaration of 2007 and the World Conference on Indigenous Peoples Outcome Document (2014) have come into being the UN has already incorporated many policy positions of indigenous peoples into new international law. For example, since indigenous rights are considered in the Convention on Biodiversity, Intellectual Property Rights Convention, ILO Convention 169 and formation of the UN

Permanent Forum on Indigenous Issues, Expert Mechanism on the Rights of Indigenous Peoples, and the Special Rapporteur on indigenous rights nothing further need be done. Evolved changes will eventually bring about the minimal standards indicated in the UNDRIP.

UN Expert Mechanism

The WCIP Outcome Document Proposal argues as do two members of the UNPFII Expert Group (see below) that the Expert Mechanism can be tasked to monitor states' compliance with the UNDRIP minimal standards and then report its findings to the Council on Human Rights and ultimately by way of the UNPFII to the Third Committee.

UNPFII Optional Protocol Proposal

The UN Permanent Forum has decided to explore the potential benefits and costs of promoting the development of an Optional Protocol to establish a monitoring and claims mechanism to promote compliance by UN Member States with the UNDRIP minimal standards.

State/nation Specific Protocol Proposal

Finally, eleven indigenous governments in their Joint Statement of Constitutional and Customary Indigenous Governments (2014) have proposed the development of a protocol to implement the UNDRIP that prescribes the formation of state and nation-specific negotiating mechanisms created by mutual agreement by each state and indigenous nations within its existing boundaries and mediated by a third party guarantor.

Proposal Remedies

Each of the proposed methods offers possible outcomes to achieve the goals and intent of the Declaration. Proponents contend their particular proposal or the proposal they advocate will benefit Fourth World nations and or benefit UN Member States. As a political matter, states' parties and nations' parties must perceive that their interests will be adversely affected minimally while the method by which Declaration principles are advanced maximizes benefits. A relatively equal weighing of interests and benefits between states and nations enhances the probability that they will mutually enter into agreements that have lasting utility to both sides. We have extracted from the proposals eleven "remedies" that may or may not actually advance the interests of the states or nations where it is possible that where a state benefits from a remedy a nation may perceive or actually sustain harm. Considering the social, economic, political, strategic and cultural interests of states and nations benefits or harm may affect advantaging or disadvantaging interests. When taken together (interests vs. benefit/harm) we can determine which of the proposals offers the least harm or the greatest benefit while minimally having an adverse effect on state or nation interests.

Proposal Characteristics

1. ***Equally Enforced***

Each of the proposals suggest that enforcement or compliance with provision of the UNDRIP can be achieved through human rights "shaming," political pressure or through

international guarantees either issued by the UN, voluntary action or by a third party guarantor. Since UN Member States are perceived to be the "grantors of rights" they are also seen as the party responsible for complying with the Declaration. We have taken the view that for Fourth World nations to be political equals in the exercise of sovereignty they too must be responsible for complying with provisions of the Declaration. In either case, the interests of each party may experience or perceive benefit or harm depending on the mechanism for implementation.

2. Exposed to International Condemnation

All four proposed mechanisms have the potential for creating international condemnation either from non-governmental organizations, multi-lateral bodies (global and regional), states and nations as well as academics and political leaders.

3. Human Rights Protected

The four mechanisms suggest a vigorous protection of human rights by either calling on various international human rights organs (UNHRC, OSCE, Inter-American Commission on Human Rights, African and Asian bodies) or by invoking various international conventions and agreements. There is, however, the potential for states or nations to engage in "rights ritual" that creates the impression that favorable action is taken.

4. Flexible Policies on Land and Resources

Mechanisms are by their nature a framework within which contending parties seek relief or to advance interests or a cause. Control over land and natural resources are central themes where both the state and the nation seek measures of influence over land, resource and territorial policies as well as practice. The four mechanisms offer varying degrees of flexibility either determined as a result of uncertainties by the parties, unsettled political or legal arrangements, or by mutually defined arrangements.

5. Enhance Political Stability

The social, economic, political, strategic and cultural interests of each state and nation define the relative political stability of each party. The mechanisms proposed provide tools that benefit or harm the interests of either state or nation parties. The degree to which each party has an advantage or disadvantage influences the degree to which remedies offered in mechanisms can be considered acceptable.

6. Minimize Political Conflict

Mechanisms in the list of proposals can either contribute to state and nation conflict or reduce or minimize such conflict. The degree to which tools exist in association with the mechanism that can increase or decrease conflict influences the degree to which interests are benefited or harmed.

7. Minimize Violent Conflict

States and nations have taken up arms against each other over land, natural resources, religious differences, cultural differences, the degree of shared or separated powers over land, resources and people. Mechanisms proposed offered greater or lesser means for

increasing or reducing violent conflict. All of the proposed mechanisms imply a reduction, but not all actually provide the means for achieving reductions in conflict.

8. International Engagement

All of the mechanisms offer opportunities to states and to nations to communicate their concerns and claims either in UN and other international venues or domestic state/nation venues. All suggest the importance of engagement between the parties, and the degree to which a proposed mechanism can facilitate effective communications and direct engagement between the parties either benefits or harms the interests of the parties. States may see an advantage to engaging Fourth World nations, but not within an international framework, whereas a nation may see an advantage to engaging states in an international environment and not in a domestic environment. In any circumstance there are benefits and harms to such engagements.

9. Preserving Internal Integrity

Mechanisms that preserve the internal honor is a principle that both states and nations covet to ensure reliable relations with external partners. When parties perceive that a mechanism reflects in a positive way on the integrity of government or society it is considered beneficial, but if it is perceived as counter to honor it is seen as harmful. Integrity can be determined by the extent that an outside body exercises over the internal sovereignty of a party, for example.

10. Political and Economic Sanctions

Mechanisms hold the implication of international political and economic sanctions as a method of enforcement. However, the degree to which such methods of political and economic pressure exacted may vary depending on the extent of state or nation sensitivity to political or economic pressures.

11. Internationally Enforced Recognized Agreements: Land & Natural Resources

Mechanisms that include specific agreements may be perceived as beneficial or harmful depending on how such agreements are enforced. If they are perceived as interfering in the internal state or nation affairs such agreements will be considered adverse to the interest of one or both parties. Conversely enforcement through an agreed method may be considered beneficial.

The Rule of Law

The Rule of Law inside existing states and international law between states are both under tremendous threat, given the rise of American exceptionalism as a policy where the US governing authorities pick and choose which laws they will recognize and which laws they will ignore. Other governments now find more flexibility in their interpretation of international law as a result. Since the government of Ronald Reagan—when international laws were repeatedly characterized as suspect and not in the interest of the United States of America—and more dramatically since the George W. Bush government's repudiation of the United Nations Convention against Torture (1987) by virtue of its policies to torture "non-combatants" in the US "war against terrorism", the Rule of Law domestically and internationally has received lip service, but is generally disregarded. If a state considers an

international law in its interest it demands compliance, but if state interests are not served, international law is ignored. States, corporations, transnational religions, non-governmental organizations, and organized crime syndicates now act with impunity ignoring any commitments made or accepted norms of human conduct.

As UN Special Rapporteur Miguel Alfonso Martinez observed in his final report to the UN Commission on Human Rights in 1994: "The concept of the "rule of law" began to traverse a long path, today in a new phase, towards transformation into the "law of the rulers" (Martinez, 1999-1).

Such an environment is not particularly helpful to the Fourth World or to UN Member States if they rely mainly on legal precedents, legal analysis, and the construction of legal frameworks within international instruments. In other words, approaching the concerns of Fourth World nations from a legal perspective is by definition limiting since, as Alfonso observes, the rule of law becomes the "law of the rulers." Despite this reality the United Nations Permanent Forum on Indigenous Issues has turned to a legal analysis and arguments for and against the development of an Optional Protocol concentrating on the development of a voluntary mechanism "to serve as a complaints body…" with a central emphasis on "claims and breaches of indigenous peoples' rights to lands, territories, and resources at the domestic level" (Sambo-Dorough, Davis, 2014).

The 21st century offers a threshold for Fourth World nations[6] from which to launch a new era where they have an accepted presence as legitimate participants in domestic and international dialogue and negotiations. The modest principle of "free, prior and informed consent" written three times in the UN Declaration on the Rights of Indigenous Peoples and affirmed in two significant paragraphs issued by the UN World Conference on Indigenous Peoples hints at the possibility of changes in the global political environment.

UNPFII Sambo-Dorough/Davies Proposal

The United Nations Permanent Forum noted the prominent recommendation by indigenous peoples and indigenous governments attending the Alta Norway Conference in June 2013 calling for the establishment of an UNDRIP monitoring mechanism within the United Nations. In response to that recommendation members of the UNPFII, Dalee Sambo-Dorough and Megan Davies, were appointed to conduct a study concerning the viability and character of an Optional Protocol to the UN Declaration on the Rights of Indigenous Peoples emphasizing the establishment of a voluntary mechanism to function as a "complaints body" dealing with indigenous peoples' claims and breaches of their land rights, territories, and resources within the state. The Dorough/Davies document (*Study on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples focusing on a voluntary mechanism designated as a UN Economic and Social Council* document

[6] It must be borne in mind that, according to all available information, the terms "indigenous", "native", "mitayo", "Indian", "autochthonous populations" and others of a similar cast do not come from the lexicon of those whom we today label "indigenous peoples", but from the vocabulary utilized by the "discoverers"/conquistadores/colonizers and their descendants, to differentiate themselves - in a relationship of superiority/inferiority - from the original inhabitants of the new territories being added to the European crowns.

E/c.19/2014/7) opened an international debate regarding the advisability of such a protocol and the mechanism it would create.

The Study focused on the rational and legal precedents for a protocol to implement an international agreement, bearing in mind the different UN sources urging consideration of such an idea. It points to "… the basic principles that underscore the universality of human rights and stress that they are interrelated, interconnected, indivisible, and interdependent, including those embraced by the Declaration, and must be fully recognized in the context of the advancement of a possible optional protocol" (Sambo-Dorough & Davis, 2014). The Study argues that any mechanism must be legally affirmed—noting, "… the jurisprudence that is evolving through the United Nations treaty bodies and mechanisms, as well as in regional human rights bodies in Africa, the Inter-American system and elsewhere, remains highly important. * * * Such jurisprudence must be safeguarded and in no way diminished or undercut by any potential mechanism. In this regard, a voluntary protocol to the Declaration would mean that states could not insist upon contradictory understandings or substandard positions being binding on indigenous peoples" (para 8, p. 4/16).

The Study's authors discuss at length what a protocol is in international law and argue that a protocol or similar mechanism will be necessary to ensure enforcement and effective monitoring and management of individual complaints against a state by indigenous peoples. An additional argument is made that a protocol provides an "early warning" or call for "urgent action" thus allowing treaty bodies to assert their authority to force state compliance.

Optional protocol limitations are detailed by the Study pointing to how only individuals or groups in the signatory states can file complaints or actions. To make an international agreement such as a protocol operable, the Study points to the need for each adopting state's domestic legal system acting to enable the law. Finally the Study points out that states adopting an optional protocol may enter reservations that limit the effect of the formal adoption domestically.

The Study emphasizes international legal agreements favoring the "distinct body of developing customary international law [concerning] land, territories and resources." Given this emphasis, the Study focuses primarily on the application of an optional protocol in the areas of land, territories, and resources.

The Study also emphasizes that the Optional Protocol must develop incrementally and that the mechanism created for the Declaration "be optional, or voluntary and should not compel the states to engage" (para 40, p. 12/16). The assumption is that cooperation and partnership will define the work of the mechanism.

The Study calls attention to the importance that an Optional Protocol result from negotiations between states and indigenous peoples that could be conducted and coordinated by a human rights working group, conduct of expert meetings, or coordinated by the Special Rapporteur on the rights of indigenous peoples or the Expert Mechanism. The proposal amplifies this point by suggesting that "agreement in principle" should be the standard for determining when and if an agreement is achieved.

The Study finally proposes a committee of expert international human rights lawyers (see below) but does not explain the function or the purpose of such a body.

The Expert Group

The Optional Protocol repeatedly stresses human rights law, voluntary action by states, conditional agreements in principle, and an emphasis on legal precedent and legal compliance with international jurisprudence. To explore the optional protocol proposal and consider other avenues an Expert Group was assembled in January 2015 to enter into a "Dialogue on an optional protocol to the United Nations Declaration on the Rights of Indigenous Peoples". We now consider the documentary views of five individuals selected by the UNPFII as they comment on the optional protocol proposal:

1. Professor Mattias Ahrén [Law Professor at Tromsø University, member of the Sami Council, (Norway)]
2. Professor Fleur Adcock [National Center for Indigenous Studies, Australian National University, (Australia—Maori/English)]
3. Professor James Anaya [Human Rights Law and Policy at the University of Arizona James E. Rogers College of Law, (USA)]
4. Lecturer Elifuraha I. Laltaika [Human Rights Lecturer-Tumaini University Makumira (Arusha-Tanzania), Doctoral candidate – Indigenous Peoples Law and Policy Program – University of Arizona (USA) and Co-founder of Association for Law and Advocacy for Pastoralists (ALAPA) (Tanzania)]
5. Director Suhas Chakma [Director of Asian Centre for Human Rights, New Delhi, (India)]

Professor Ahrén of Sámi argues that in his view the Expert Mechanism on the Rights of Indigenous Peoples should be enhanced to become an "oversight mechanism" empowered to receive "receive country specific information and allowed to offer objective advice as to how well the country in question is doing when it comes to upholding human rights" (Ahrén, 2015). He further argues that the newly enhanced five person Expert Mechanism must be empowered to receive complaints directly from indigenous peoples. He bases his proposal on the postulate that those states that "recognize the competence of the Expert Mechanism" should submit regular reports on their progress toward implementation. He further urges that UN Member States engage the Expert Mechanism on a voluntary basis and obscurely he suggests that the Expert Mechanism should provide a voluntary "process or pathway for parties to resolve disagreements in a cooperative environment in order to reach a mutually acceptable resolution." He suggests that only indigenous organizations or groups recognized by the state may be permitted to file a complaint or communication with the Expert Mechanism if: 1. All available domestic remedies have been exhausted; 2. A communication to the Expert Group is filed within six months of the exhausted efforts at domestic remedies; 3. The claimant must file a communication explaining a violation of one or more rights entered into UNDRIP. The Expert Mechanism should remain with five members. Professor Ahrén offers a draft resolution for consideration by the Human Rights Council.

Ms. Adcock is a Maori at the Australian National University who writes that the human rights law system is limited in respect to monitoring of rights and the current system encourages what Robert Merton calls *rights ritualism,* "where an individual abandons

culturally prescribed aspirations but 'almost compulsively' abides by the socially structured avenues for realising those aspirations" (Adcock, 2015). Adcock argues further that the tendency of states to domestically legislate international indigenous rights norms and the widely existing gap between the Declaration and actual state implementation strongly indicate a rising likelihood that states will adopt the ritualistic practice concerning indigenous human rights. To make her point finer, Adcock references researchers John Braithwaite, Toni Makkai, and Valerie Braithwaite to refine the definition of ritualism to the "acceptance of institutionalised means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves" (p.4). Adcock stresses the practice of states accepting internationally originated norms and their failure to apply these norms in domestic practice. Furthermore, she suggests, even when states enact domestic legislation to appear in accord with international norms this too may "be a form of rights ritualism where the policies, processes and resources to give effect to those commitments are lacking" (p.50). She is further concerned that another monitoring mechanism will unduly burden the international system that is already overloaded. In addition she points out that international human rights mechanisms put a significant burden—given time and resource limitations—on those who call attention to violations. Duplication of functions is yet another argument raised by Adcock suggesting that many organs already exist to consider human rights violations and she argues that the main tool of human rights organs is the carrot and the stick where "shaming" is admittedly the weakest of the sticks available. She points out that stronger "stick" enforcements such as economic and military coercion are not generally available to international human rights bodies. She argues that "cooperative measures" where human rights bodies domestically are enhanced and technical cooperation to help facilitate rights protection may be a stronger carrot. Finally, Adcock urges that if there is to be a mechanism it must promote capacity building in the state, cooperation, ensure "robust" Secretarial support and [UN] institutional support, clearly distinguish the new body from other bodies and balance criticism of states with praise and encouragement for rights promotion.

As a former Special Rapporteur on the rights of indigenous peoples, Professor Anaya, an Apache and Purépecha at the University of Arizona, stresses the "implementation gap." He notes that while there are many venues for rights protection through a range of UN mechanisms (UNPFII, Expert Mechanism on the Rights of Indigenous Peoples, Special Rapporteur, International Labor Organization, Human Rights Council, African and Inter-American Human Rights institutions and UN treaty bodies), they are insufficient. He suggests that an optional protocol should be considered in connection with an expanded role for the Expert Mechanism on the Rights of Indigenous Peoples. He expresses his skepticism that the complaints mechanism as outlined by Sambo-Dorough/Davies and in the Expert Mechanism will be sufficient. He sees the need for a "new mechanism [that] is devised to have features of engagement with States, indigenous peoples and others significantly beyond those of existing complaint procedures" (Anaya, 2015). He suggests that it is important to remember that many reporting and monitoring mechanisms already exist and stresses that the Special Rapporteur already has the mandate to examine, communicate indigenous peoples rights violation complaints. He stresses furthermore, "something different and more than what a formal international complaint procedure can offer is required to genuinely enhance international capacities to effectively advance

implementation of the Declaration" (p.9). He points out that changes in administrative policies, practices and legislation can only take place at the domestic level of state government. Anaya notes that bridging the "implementation gap" must have an influence on the domestic affairs of a state—stressing Professor Harold Koh's analysis, "obedience ordinarily comes from multidimensional processes of norm internalization, validation and application that engage local actors, rather than by command by an external authority" (p.10). Much more needs to be done, according to Anaya, to raise the awareness at the local level about indigenous rights—what is needed more than a monitoring system is a robust program of awareness about the rights of indigenous peoples aimed at state government officials.

Lecturer Elifuraha I. Laltaika, a Maasai at Tumaini University Makumira, suggests "rather than creating a new institution or advocating for an optional protocol to the UN Declaration, mandates of existing international legal frameworks and their associated institutions, particularly those exclusively dealing with indigenous peoples rights could be reviewed with the view to addressing barriers to implementation" (Laltaika, 2015). He further suggests that taking this approach avoids opening up a new set of potential problems such as the length of time it may take for states to ratify an optional protocol in a way that gives it a global representation. He further argues that taking advantage of existing mechanisms will lead to avoidance of indigenous rights ritualism', defined to mean a situation in which "States (or other actors) embrace the institutionalized means for advancing indigenous peoples rights but are not concerned with actually realizing their rights." Laltaika suggests that a single mechanism won't be enough since it is usual that many mechanisms must work together to advance claims of rights violation. He further argues that it will be necessary to clarify who can issue complaints "in light of concerns about the workload of unpaid experts, backlog of reports and communications, qualities of expertise and secretarial support raised in the on-going reform process" (p. 11). He concludes that no changes will be needed except to make the systems already present work better.

Suhas Chakma, Director of the Asian Centre for Human Rights in India, suggests that if it is the purpose to establish a complaints body "to adjudicate breaches of the UNDRIP akin to consideration of individual complaints by the UN Treaty Bodies, there is no escape from the rigors of enacting a new treaty by the UN" (Chakma, 2015). He contends that it is better to draft a new treaty—a Convention on the Rights of Indigenous Peoples. If the Convention is not considered possible he argues that using existing United Nations bodies (UNPFII, EMRIP, SRRIP, HRC) to implement the Declaration is the next best thing. He suggests that making the Optional Protocol voluntary will not likely produce constructive or active participation by states governments.

The members of this Expert Group offer discussions that outline four approaches to carrying out the Declaration's principles, ranging from essentially doing nothing, enhancing the Expert Mechanism on the Rights of Indigenous Peoples, proceeding with the human rights emphasis of a voluntary optional protocol or adopting a new protocol or convention that establishes a direct relationship between indigenous peoples and states governments supporting international changes.

Study of UNDRIP Proposals' Harm/Benefit to UN Member States and Fourth World Nations

Methodology

The true test of whether any or all of these measures is effective is to propose them and seek agreement with UN Member States and Fourth World nations. Another approach is to evaluate which remedy may actually have the possibility of state and nation acceptance by way of assessing beneficial outcomes and undertaking to weigh the perceived and reported responses of UN Member States and Fourth World Nations to each of the four currently offered proposals listed above. To estimate the probability of one or other of these measures achieving political acceptance by both UN Member States and Fourth World nations, CWIS has formulated what I am calling a "Net Benefit and Harm Analysis" (NBHA) with the intention of determining which of these measures will mutually benefit both UN Member States and Fourth World nations. By making such a determination, it will be possible to assess where greater energy should be put towards diplomatically bringing about agreement between the UN Member States and Fourth World nations on a mechanism for implementing the UNDRIP.

This study of the four proposals to essentially to determine which of four proposals would produce the greatest benefits for both UN Member States and Fourth World nations while minimizing the harms. The method depended on conducting a weighted assessment of the common interests of Fourth World nations and UN Member States. The common interests were defined as social, economic, political, strategic and cultural. The strong and weak weighted measures of interests were then compared to eleven remedies [7]offered by each of the four proposed methods of Declaration implementation. Each proposed implementation method was then assigned a numeric value on a scale of 0-3 with zero indicating "no effect," 1 equaling harm, 2 equaling balanced and 3 equaling benefit.

Before benefit and harm can be calculated the definition of advantages and disadvantages to state and nations interests must first be established. Social, economic, political, strategic and cultural interests are commonly associated with the geopolitical concerns of both UN Member States and Fourth World nations. This study has given a brief meaning to each of these categories of geopolitical interest for both the state and the nation and weighed each interest in terms of relative advantage or disadvantage (Appendix Table 1).

For each state and each nation social stability is a significant advantage that tends to ensure continuity and capacity to govern and maintain a society. While it does not absolutely advantage the state or nation (since minor instability may be acceptable and even caused by the state or nation), social stability is nevertheless given some weight—a 2, within a scale of

7 These remedies were derived from perceived or stated social, economic, political, strategic and cultural advantages noted in public and official statements, reports and analyses by states' government representatives and representatives of Fourth World nations. They are expressly inferred from provisions of Expert Mechanism on the rights of indigenous peoples resolution and stated purpose, objectives outlined in the UNPFII optional protocol analysis, statements of UNPFII Expert Group members, the United Nations Charter, the UN Declaration on the Rights of Indigenous Peoples, the World Conference on Indigenous Peoples Outcome Statement and the Global

1-3 where 1 is the least advantage to the state or nation and 3 is the greatest advantage to the state or nation. The same weighting may be applied to economic advantage for the state where it is considered essential since there is a greater dependence on manufacturing or commercial development, whereas a nation may consider economic prosperity and equality of less advantage since raw materials may be more accessible to the population. Similarly strategic interests are of paramount advantage to a state since its strategic relationships largely determine the social and economic stability of the state. Strategic interests for a nation may be of a more limited advantage since balance of power or relative strength of power does not usually determine social and economic stability though it may provide a defense against a greater power. Finally, cultural interests are generally a lesser advantage for states since a great many states are immigrant states or moderately well protected by their internal capacities, whereas cultural interests for nations may be paramount to ensure internal stability and group coherence. Inversely, a negative number is given to indicate a deficit or disadvantage using the same 1-3 scale only in the inverse (see Appendix Table 1).

Findings and Analysis

Through the application of aligning multiple variables this study concludes that the status quo and the Expert Mechanism are the least desirable remedies, given the extreme beneficial imbalance between the perceived and reported states and the nations interests. The optional protocols are themselves stretched between the least likely to produce balance and the greatest likelihood to produce balance between the interests of UN Member States and Fourth World nations.

The standard deviation from the mean value of the state and nation NBHA numbers provide a much more specific demonstration of whether the state or the nation gains an advantage in terms of interests. A balance between Advantage and Disadvantage for UN Member States and Fourth World nations would seem to recommend UNDRIP implementation strategies that demonstrate shared benefits and harms. The Advantage/Disadvantage distance between UN Member States and Fourth World nations is here measured by comparing the reported or perceived benefits and harms each may experience in 11 categories or topics (associated with provisions of the UNDRIP). Assessing the degree of benefit or harm results in the calculation of total benefit or harm for each party. We then calculate the standard deviation (**σ)** or relative distance between the parties where (0) zero represents mutual benefit and greater numbers or negative numbers represent wider distances between the parties. With wider distances, we can expect UN Member States or Fourth World nations to be less likely to agree to a particular UNDRIP implementation remedy since each will perceive political disadvantages or greater threats to political, economic, strategic and cultural interests.

Four Proposals Assessment

The UNPFII proposed Optional Protocol to establish a UN monitoring and claims mitigation mechanism is threatening to the interests of states' governments, and more favorable to the interests of Fourth World nations. The Indigenous Governments' proposal for an Optional Protocol that involves structuring constructive relations between each state and each nation within a mutually accepted intergovernmental framework appears to have

the greatest potential for facilitating agreement and ultimately implementation of the UNDRIP.

Neither the Status Quo nor the Expert Mechanism offers a significant opportunity for mutually beneficial outcomes for UN Member States and Fourth World Nations. With a standard deviation of 9.8 or 9.9 they are of equal disadvantage to promoting closer cooperation between UN Member States and Fourth World nations (see Appendix Table 6). While we can readily see (Appendix Table 4) that international condemnation of states by UN Member States, NGOs and other international players clearly advantage Fourth World nations, UN Member States are advantaged by the lack of enforcement mechanisms, retained flexibility to regulate and control land and resources, while preserving internal political integrity. Meanwhile Fourth World nations are mainly disadvantaged by the lack of enforcement and the UN Member States or disadvantaged by violent conflict, political conflict, international criticism, and political and economic sanctions. The political distance (as suggested by the **σ** 9.9) is quite wide and rather maintains or exacerbates existing gaps.

The Status Quo proposal adversely affects states minimally, but notably benefits states in terms of policies on land and resources and ensures internal political integrity. This is particularly clear since states generally maintain control over military and policing powers extended over land and resources while controlling the methods of management and development. Fourth World nations, on the other hand are likely to suffer significant losses over land and resources even though they may achieve a level of international support that results in limited enforcement curbing state actions through international condemnation. Since there is no specific regime for mediating differences between states and nations over land and resources UN Member States gain, but nations lose. States' governments through political, economic and military power in the final analysis may benefit the state marginally while nations are significantly harmed largely due to the lack of control in the ill-defined political environment. The extreme imbalance between moderate state benefit and nation harm renders this approach problematic.

The Expert Mechanism offers nations moderate benefits and generally fails to benefit the states at all. Indeed, if states fully recognized the authority of the Expert Mechanism these harms will materialize and cause the state significant problems. The state may avoid any possibility of harm, however, by practicing the "rights ritual" mentioned in this study. By seeming to respect the Expert Mechanism states need only generally ignore its findings and recommendations by suggesting that proposals are being studied or may have been addressed by internal legislation. States may decide to recognize the Expert Mechanism to minimize any actual obligations. Nations on the other hand may realize significant or greater benefit from the Expert Mechanism by simply gaining greater visibility through human rights mechanisms (HCR, OSCE), and thus realize moderate benefits in the possibility of equality enforcement, minimal political conflict, reduced violent conflict and the potential of internationally enforced recognition of agreements or recommendations to the state. The Expert Mechanism would create the partial reality of "rights progress" and UNDRIP implementation, but since the body is essentially under the control of states through the UN system its ability to actually achieve benefits for nations is marginally better. States, on the other hand, may not truly realize benefits if they chose to grant actual power to the body.

The UNPFII Optional Protocol offers considerable benefits to the interests of nations and almost opposite harm to states. While the mechanism is decidedly voluntary, it is questionable that states would chose to grant power to the UN to challenge its internal laws and claimed prerogatives in connection with land, natural resources and territories. The approach offered by the voluntary optional protocol opens states to potential international condemnation, loss of control over land and natural resources, restrictions on state military power over Fourth World nations, reduced ability to maintain internal political integrity resulting from UN invocation of UNDRIP provisions that challenge state sovereignty, external enforcement of the principle of free, prior and informed consent that many states regard as an infringement on internal sovereignty, and the potential of external enforcement of agreements over land and natural resources between the state and indigenous nation. Nations on the other hand would gain significantly if states opted for the UNPFII optional protocol since it would effectively place the UN in the position of advocating the rights of indigenous peoples supplemented by states' parties interested in using compliance with UNDRIP as a political pressure point. Of the three proposals discussed this is the least well balanced in terms of state and nation interests. It is probable that indigenous nations would happily endorse the UNDRIP protocol with some modifications and UN Member States would vehemently object and chose not to adopt.

The state/nation-specific protocol proposed by the eleven-nation Joint Statement of 2014 would marginally benefit UN Member States and significantly benefit Fourth World nations. If adopted by both states and nations it would create a self-monitoring negotiation framework where the state and the nation would define the parameters of their agreements to implement provisions of the UNDRIP under the supervision of a mutually agreed third party guarantor/mediator. Each state would be left to engage on the basis of its own constitutional or customary laws and each nation would be in the same position of relying on its constitutional or customary laws. The agreements may vary reflecting the capacity, interests and laws of each state/nation combination guided under principles agreed to by both parties. Both nation and state benefit from equitable enforcement, human right protections, minimization of political conflict, minimization of violent conflict and improved internal political stability. Moderate internal political stability and internationally introduced enforcement of agreements are probable while nations will moderately benefit from international political pressures from possible condemnations of the state and possible threats of economic and political sanctions by states. Both states and nations would probably experience moderate to no harms since the benefits themselves would outweigh the possible harms. In other words, greater political stability and reduction of violence, for example, benefits the state economically, socially and strategically. Similarly those benefits to nations strengthen the focus on social and cultural improvements as well as economic and political stability. Both the state and the nation realize benefits and minimal harms that allow for maintaining their economic, social, political strategic and cultural geopolitical interests. Of the four proposals the state/nation specific protocol has the benefit of a greater balance of interests for both the state and the nation.

Conclusions

The goals of the United Nations, its Member States, Fourth World nations, indigenous peoples' organizations and the UN Declaration on the Rights of Indigenous Peoples itself can most likely be realized when states and nations interests are least threatened, a measure of control remains in the hands of both and essentially non-punitive assessments can be taken of the progress both states and nations make to implement the Declaration. By employing a method of agreement that has international guarantees (protections) for both states and nations while maintaining geopolitical advantages and maximizing benefits, the essential parties necessary for implementing the Declaration (states' governments and nations' governments) have the advantage of enhancing the international system and confirming international norms. The **Protocol on Intergovernmental Mechanisms to Implement the UN Declaration on the Rights of Indigenous Peoples** provides a consistent and predictable method for mediating differences and achieving mutually acceptable goals by both states and nations. The following goals set by the UN have the greatest probability of being achieved by state and nations since they are mostly to benefit from mutually determined agreements that least harm their interests:

> 1) Providing support to Member States for the development of legal, policy and administrative measures to achieve the ends of the UNDRIP, and for Indigenous peoples to participate in the respective processes.
>
> 2) Collection, disaggregation and dissemination of statistical data on Indigenous peoples.
>
> 3) Raising Awareness on the situation and rights of Indigenous peoples.
>
> 4) Capacity building on Indigenous peoples' rights of UN staff, Indigenous peoples, civil servants, judiciary, parliamentarians, and civil society.
>
> 5) Participation of indigenous peoples in projects, processes and meetings that affect them.
>
> 6) Supporting the implementation of the principle of free, prior and informed consent.

While the UN Member States appear to gain advantages by either minimal or informal requirements or commitments to implement the UNDRIP many of these states risk serious violent conflicts, instability and unstable international relations. Meanwhile, though Fourth World nations appear to gain advantage from the possibility of international criticism of the states and thus the possibility of reduced political conflict, their land, natural resources and social, economic, political and cultural interests remain at risk of confiscation or limitations by virtue of states exercising political, economic and military power over them.

Net Probable Benefit/Harm from Proposed Remedies

After a systematic consideration of the advantages/disadvantages to state and nation interests and the perceived or demonstrative benefit or harm each UNDRIP implementation proposal offers—as compared against prospective remedies—the data apparently suggest that doing nothing or maintaining the status quo may be the best, though not a mutually

beneficial, option. This conclusion is drawn from the relative benefit/harm to states and nations (Appendix Table 4). The difficulty, however, with this finding is that after forty years of developing the UNDRIP there is a high probability that another sixty years will be needed to realize benefits to either states or nations, given unfolding geopolitical and bio-cultural variables that may occur during that time. In other words, while the status quo may only slightly harm nations more than states, the harm may in fact be serious enough as to destroy some nations—and states. A kind of *laizze-faire diplomacy* would essentially prevail with the strong and weak having to contest for generations to come—resulting in losses for Fourth World nations and states, given that the majority of the world's conflicts today are between states and nations (rather than between states). Many states in the world are unstable and indeed have either collapsed or are on the verge of collapse. States such as Somalia, Burma, Afghanistan, Iraq, Syria, Lebanon, Nigeria, Nicaragua, Uzbekistan, Ukraine, Thailand and others suffer from constant instability and much of that instability arises from conflicts between the state and Fourth World nations. Contests over self-determination, environmental degradation, development, climate change refugees, social disintegration, political instability, strategic imbalances and food insecurity are the likely results of *laizze-faire diplomacy*.

The **Protocol on Intergovernmental Mechanisms to Implement the UN Declaration on the Rights of Indigenous Peoples**[8] proposed by eleven Fourth World governments in their Joint Statement of Constitutional and Customary Indigenous Governments (2014) holds the next most likely chance of achieving implementation of the Declaration in the near and long term. We see in Appendix Table 4 and Appendix Table 6 that there is a greater balance between interests of both nations and states and thus a greater likelihood of mutual agreement to adopt this protocol. The standard deviation figure (1.414) in Table 6, CCIG Protocol for "S" and "N" demonstrates that states and nations will most probably align their interests much more closely while there is a considerable gap between states and nations with the other proposals ranging from 9.899 to 11.314 A protocol establishing guidelines for intergovernmental mechanisms that balance the interests of states and nations offers a non-threatening possibility for mutually agreed social, economic, political, strategic and cultural comity. Third party mediators and guarantors offer protection for state and nation governments since such third party interlocutors will have the benefit of mutual agreement between the parties. Ultimately, the appeal of this protocol is that it offers stability, predictability and political equality—even though nations and the states will probably continue to experience some degree of economic, strategic, cultural and social imbalances of power. This approach also has the benefit of reaffirming the rule of law and human equality.

Both the Expert Mechanism and the UNPFII proposals are least likely to achieve Declaration implementation since UN Member States are more likely to perceive disadvantages and harm. While nations will gain (Appendix 3 and Appendix 4) advantages and benefits through UN monitoring and processing of claims by nations against the states, the states will likely oppose, block or simply ignore the decisions of these mechanisms. Indeed, the UNPFII proposal is least likely to achieve state endorsement (Appendix Table

8 Also referred to as the state/nation specific protocol to implement the Declaration.

4) since more than human rights will be at stake. States will and do recognize that Fourth World nations compete with them over land, natural resources, legal challenges, political obstruction and consequently pose a perceived internal threat. To adopt the UNPFII Optional Protocol states would have to accept constant United Nations challenges to their economic and strategic interests and would consider such challenges as undue interference in the internal affairs of their state. The states of Russia, Namibia, South Africa, Turkey, Azerbaijan, Kenya, and Nigeria have long maintained that such interference is inherent in the UNDRIP. They would not participate in the vote on UNDRIP in 2007. Indeed, the United States, Canada, Australia, New Zealand and the United Kingdom remain in fundamental opposition to the UNDRIP requirement that states obtain the free, prior and informed consent of indigenous peoples before taking actions that directly or indirectly affect the interests of indigenous peoples. While these states have now "endorsed" the UNDRIP they have not withdrawn their reservations concerning the principle of "free, prior and informed consent." With such opposition to the central elements of the UNDRIP, it is not likely that these states and virtually all other states will step up to agree to a five-member Expert Mechanism's challenges or the formal adoption of the UNPFII optional protocol that establishes public challenges to their authority.

It is therefore most probable, as indicated by the significantly reduced gap of 1.414 that states and nations will be able to converge on a protocol or agreement that permits mutual benefit and the least harm to geopolitical interests.

It is fair to conclude, therefore that neither the status quo, the Expert Mechanism nor the UNPFII optional protocol offer much to the probability of forming mutually beneficial arrangements between UN Member States or Fourth World Nations—an essential requirement for realizing implementation of the UNDRIP.

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Appendix

Table 1: State/Nation Interest - Advantage/Disadvantage

ADVANTAGE		
Social	S-2 N-2	Stability, equality, comity
Economic	S-3 N-2	Prosperity, equality
Political	S-2 N-3	Shared, internal
Strategic	S-3 N-1	Balance of power, strengthen

		power
Cultural	S-1 N-3	Development, strengthen, cohesion, identity, continuity
TOTAL:	S-12 N-11	
DISADVANTAGE		
Social	S-[-2] N-[-1]	Instability, discord
Economic	S-[-2] N-[-1]	Poverty, breakdown of wealth
Political	S-[-1] N-[-1]	Weakness, inability to decide
Strategic	S-[-2] N-[-1]	Others gain economically, military advantage
Cultural	S-[-1] N-[-2]	Lack of cohesion
TOTAL:	S-[-8] N-[6]	

The NBHA is derived from calculating the advantage given to either the states or nations based on the relative perceived benefit and harm for each when the remedy for implementing the UNDRIP is compared against each of the eleven remedies. When the numeric values of each possible state and nation benefit and harm are compiled it may be clear which approach or approaches best serve the interests of states and nations. In other words, can we measure—with some confidence—the possibility of states and nations finding common ground on a method for implementing the UNDRIP that least interferes with their separate interests?

Value Derivations

The numeric values are derived from an assessed level of (social, economic, political strategic and/or cultural) advantage vs. disadvantage that either a state or a nation may decide will result from adopting one of the four alternative instruments for implementing the UNDRIP (see Table 2 and Table 3). The social, economic, political, strategic and cultural interests of each state and nation is distilled to a single number with the result that a total positive number of 12 would constitute the use of "S" where the state significantly benefits and the letter "N" where the nation benefits. The letters "S" and "N" can then be translated to a 0-3 scale where the capital letters equal the value of "3." A combined number (note: not all interests have an equal value for each state nor do they have an equal value in relation to each other – see table below) defines the letter value. The values between "8" and "10" produce "s" or "n" indicating the state or nation moderately benefits. The value of "s" and "n" then is equal to "2". The combined letters "S-N" indicates that both parties significantly gain benefits and so each is awarded "3." The combined letters "s-n" indicate that both parties moderately gain benefits and so each is awarded "1.5". The paired "s" and "n" therefore constitutes a significant balance of interests or a moderate balance beneficial to each set of interests. Such a balance is considered beneficial in support of comity between states and nations and therefore produces a higher value.

When the "s" and "n" figures are unbalanced (i.e. S-n or s-N), the coding indicates either an unbalanced benefit or harm considered significantly or moderately beneficial or harmful to

the interests of the state or nation. An unbalanced code is awarded the value of "1" for the moderate and "1.25" for the significant benefit or harm (see Table 3 below).

Weighted benefit vs harm of each implementation strategy (Status Quo, Expert Mech, UNPFII Op Protocol monitor and Joint Statement OpProtocol in Table) compared against probable mechanism outcome in terms of benefiting or harming state or nation interests.

The calculation for benefits is S+s=B1

or N+n=B2

The calculation for harm is S+s+0=H1 and/or N+n+0=H2.

The Net State and Nation benefit/harm figure (S&H) is derived by subtracting the Harm score from the Benefit score: Bs-Hs=Net1 and Bn-Hn=Net2, with a third Net number being derived from summing the Net scores for the state and nation.

Table 2: Weighted values of State/Nation Interests

	INTERESTS					
	Social	Economic	Political	Strategic	Cultural	Ag Value
STATE Advantage	2	3	3	3	1	12
STATE DISADVANTAGE	-2	-2	-1	-2	-1	-8
NATION ADVANTAGE	2	2	3	1	3	11
NATION DISADVANTAGE	-1	-1	-1	-1	-1	-5
Aggregate value	1	2	4	1	2	
Standard deviation	1.79	2.06	2.00	1.92	1.66	9.07
State Stdev	2	2.5	2	2.5	1	10
Nation Stdev	1.5	1.5	2	1	2	8

EXAMPLE:

A. State "S"	S2 + E3 + P3 + St3	=	11
B. State "s"	E3 + P3 + St3	=	09
C. S-n	S2 + E3 + P3 + St3	=	11 AND S2 +E2+P3+C1 = 8

When combining the scores the "interest range" indicates the combined value where for the state a range of 10-12 is an advantage or positive and for the nation a range between 10-11 is

an advantage or positive. Where the numeric value of 2 is given the interest range is 6-9 and for numbers generated from combinations S-N, s-n and S at 1.25 the interest range is 10-12 or there is no interest range. Scores produce the following results:

Table 3: Coding Values and their Derivation

Letter Code	Numeric Value	Interest Range	Explanation
S	3	10 - 12	Advantage, positive
N	3	10 -11	Advantage, positive
s	2	6-9	Reduced advantage, moderate
n	2	6-9	Reduced advantage, moderate
S-N	3	10-12	Balanced, where each significantly benefits or loses
s-n	1.5		Balanced parties split the value of each moderate benefit minus .25
S	1.25		When unbalanced minus the value of the moderate benefit plus an advantage
s	1		When unbalanced
n	1		When unbalanced

In example "A" the state is perceived or will probably benefit from social, economic, political and strategic improvements as a result of adopting a particular alternative. Conversely, the same figures if placed in a "Harm" column would indicate that the state significantly suffers losses in the areas of interest.

In example "C" we note that the state significantly benefits its social, economic, political, and strategic interests and thus is awarded an "S," which has a numeric value of "3." Meanwhile, making the same decision a nation may receive moderate social, economic, political and cultural benefits that combine to generate an "n" with a value in a paired code of 1.25. The converse would result if applied in the "Harm" column.

The benefit and harm measures what may fall to a state or a nation, given eleven specific remedies (if adopted). The measures are given as letters or letter combinations that evaluate

numbers that are in turn rendered as standard deviations—indicating the degree of benefit or harm to the state or nation (see Table 4).

The bottom of the table indicates that Fourth World nations will suffer the greatest harm if decision-makers do nothing, while states will moderately benefit. On the other hand if the Expert Mechanism approach is adopted, states will be harmed more (while nations benefit) and, therefore, be less likely to actually accept this approach. With the UNPFII optional protocol states will be most harmed and less likely to consider adopting this approach. Finally the state-nation specific protocol would benefit both states and nations and thus become more acceptable politically—and more probable of being adopted.

Table 4: State/Nation Benefit-Harm Analysis of UNDRIP Remedies

	Status Quo			Expert Mechanism			UNPFII OP			Joint Statement OP		
	Benefit	*Net B/H*	*Harm*	*Benefit*	*Net B/H*	*Harm*	*Benefit*	*Net B/H*	*Harm*	*Benefit*	*Net B/H*	*Harm*
Equally Enforced	s-N	-0.25 0.25	S-n	s	0.5 -1.5	s-n	s	-0.5 -1.5	s-n	S-N	1.5 1.5	s-n
Exposed to International Condemnation	N	-2 3	s	N	0 3	-	N	-3 3	S	n	-2 2	s
Human Rights protected	s-n	-0.5 1.5	s	s-N	1 1.25	-	S-N	1 3	s	S-N	2 2	s-n
Flexible Policies on Land and resources	S	3 -3	N	S	3 -3	N	N	-3 3	S	s-N	-0.5 -0.25	s-n
Enhance Political Stability	s	0.5 -1.5	s-n		-2 0	s	n	-2 2	s	s-n	0 0	s-n
Minimize Political Conflict	s	2 -2	n	n	-2 2	s	N	-2 3	s	S-N	3 3	
Minimize Violent Conflict	-	-1.5 -1.5	s-n	n	-2 2	s	n	-3 2	S	S-N	1.5 1.5	s-n
International Engagement	-	-2 0	s	n	-2 2	s	n	-2 2	s	n	-2 2	s
Preserving Internal Political integrity	S	3 -2	n	s	2 0		s-n	-1.5 1.5	S	S-N	1 3	s
Political and Economic Sanctions	n	-3 2	S		-3 0	S	n	-3 2	S		-1 -1	s-n
Internationally enforced recognized agreements, Land, Natural resources	s	2 -2	n	n	-2 2	s	N	-3 3	S	s-n	-0.5 1.5	s
Net State Benefit/Harm		1.25			-6.5			-21			3	
Net Nation Benefit/Harm		-5.25			7.75			23			15	
Summary State/Nation B/H		3.25			7.125			22			6.125	

Table 5: Explanation of Coding Values for Benefit & Harm to Interests

Coding Values	And their meaning	
No entry = 0	No perceived or reported effect on party interests	No affect social, economic, political, strategic or cultural interests
S Entry = 3	Strong effect on the perceived or reported state interests	May affect social, economic, political, strategic or cultural interests
N Entry = 3	Strong effect on the perceived or reported state interests	May affect social, economic, political, strategic or cultural interests
s Entry = 2	Minor effect on the perceived or reported state interests	May affect social, economic, political, strategic or cultural interests
n Entry = 2	Minor effect on the perceived or reported nation interests	May affect social, economic, political, strategic or cultural interests
BENEFIT		
Sb Entry = 3	Strongly benefits the interest of states	The state stands to gain politically, economically, strategically and/or culturally
Nb Entry = 3	Strongly benefits the interest of nations	The nation stands to gain politically, economically, strategically and/or culturally
sb Entry = 2	Minor benefit to the interests of states	The state stands to experience a marginal gain politically, economically, strategically and/or culturally
nb Entry = 2	Minor benefit to the interests of nations	The nation stands to experience a marginal gain politically, economically, strategically and/or culturally
s-Nb Entry = 1 & 1.25	Unbalanced minor benefit to the interests of states while strong benefit to the interests of nations	The nation stands to experience a significant gain politically, economically, strategically and/or culturally, but the state also stands to experience a marginal gain
S-nb Entry = 1.25 & 1	Unbalanced strong benefit to the interests of states while minor benefit to the interests of nations	The state stands to experience a significant gain politically, economically, strategically and/or culturally, but the nation also stands to experience a marginal gain
S-Nb Entry = 3	Balanced strong benefit to the interests of states and nations	The state and the nation stand to experience a significant gain politically, economically,

		strategically and/or culturally.
s-nh Entry = 1.5	Balanced moderate benefit to interests of state and nation	The state and the nation stand to experience a moderate gain politically, strategically and/or culturally.
No Entry = 0	No benefit to either the state or the nation	Neither the state nor the nation stands to gain or lose according to interests.
Harm		
Sh Entry = 1	Strongly harms the interests of states	The state stands to lose politically, economically, strategically and/or culturally
Nh Entry = 1	Strongly harms the interests of nations	The nation stands to lose politically, economically, strategically and/or culturally
sh Entry = 2	Minor harm to the interests of states	The state stands to experience a marginal loss politically, economically, strategically and/or culturally
nh Entry = 2	Minor harm to the interests of nations	The nation stands to experience a marginal loss politically, economically, strategically and/or culturally
s-Nh Entry = 1 & 1.25	Unbalanced minor harm to the interests of states while strong harm to the interests of nations	The nation stands to experience a significant loss politically, economically, strategically and/or culturally, but the state also stands to experience a marginal loss
S-nh Entry = 1.25 & 1	Unbalanced strong harm to the interests of states while minor harm to the interests of nations	The state stands to experience a significant loss politically, economically, strategically and/or culturally, but the nation also stands to experience a marginal loss
S-Nh Entry = 3	Balanced strong harm to the interests of states and nations	The state and the nation stand to experience a significant loss politically, economically, strategically and/or culturally.
s-nh Entry = 1.5	Balanced moderate harm to interests of state and nation	The state and the nation stand to experience a moderate loss politically, strategically and/or culturally.
No Entry = 0	No harm to either the state or the nation	Neither the state nor the nation stands to gain or lose according to interests.

Table 6: State and Nation Convergent/Divergent A/D to UNDRIP Remedy

Perceptions of Benefit/Harm	Status Quo No Changes		Expert Mechanism		UPFII Opt Protocol		CCIG Protocol	
	S	N	S	N	S	N	S	N
Net Probable Benefit	17	7	9	13	7	25	22	28
Net Probable Harm	13	17	15	5	28	2	20	8
Net Ben/Harm Analysis	10	-4	-6	8	7	23	22	20
Standard Deviation	9.899		9.9		11.314		1.414	

Here Table 6 illustrates how distant or close state and nation interests are from one another. The closer the numerical value of deviation is to 1 the closer the state and nation parties' interests and therefore the greater probability of mutual agreement.