

Advisory Letter

**THE DRAFT DECLARATION ON THE RIGHTS  
OF INDIGENOUS PEOPLES**

FROM DEADLOCK TO BREAKTHROUGH?

September 2004

**Members of the Advisory Council on International Affairs**

**Chair** F. Korthals Altes  
**Vice-chair** Professor F.H.J.J. Andriessen

**Members** A.L. ter Beek  
Professor G. van Benthem van den Bergh  
Ms A.C. van Es  
Professor W.J.M. van Genugten  
Dr B. Knapen  
H. Kruijssen  
Professor A. de Ruijter  
Ms E.M.A. Schmitz  
Ms H.M. Verrijn Stuart

**Secretary** P.J.A.M. Peters

P.O. Box 20061  
2500 EB The Hague  
The Netherlands

Telephone + 31 70 348 5108/6060  
Fax + 31 70 348 6256  
E-mail [aiv@minbuza.nl](mailto:aiv@minbuza.nl)  
[www.aiv-advice.nl](http://www.aiv-advice.nl)

## **Members of Human Rights Committee**

<b>Chair</b>	Professor W.J.M. van Genugten
<b>Vice-chair</b>	Ms H.M. Verrijn Stuart
<b>Members</b>	Professor P.R. Baehr Professor Th.C. van Boven Professor C.P.M. Cleiren Professor D.M. Curtin T. Etty Professor C. Flinterman Professor J.E. Goldschmidt Ms C. Hak R. Herrmann F. Kuitenbrouwer Dr. B.M. Oomen Professor N.J. Schrijver Ms. A.L.E.C. van der Stoel J.G. van der Tas
<b>Secretary</b>	T.D.J. Oostenbrink

## Foreword

In July 2004, the Advisory Council on International Affairs (AIV) decided on its own initiative to issue recommendations on the Netherlands' position in the debate on the United Nations Draft Declaration on the Rights of Indigenous Peoples.

Recommendations have been issued on this matter in the past, notably by the then Advisory Committee on Human Rights and Foreign Policy (in 1993 and 1995) and by the National Advisory Council for Development Cooperation (1993). They called for the Netherlands to support the Declaration and its rapid adoption. Now, almost ten years after the start of negotiations to finalise the text, the process seems to be in deadlock. In the early years, the Netherlands actively cooperated in the special open-ended intersessional Working Group, and indeed chaired it for a while. However, in recent years, the Netherlands has become fairly invisible in this area. In this advisory letter, the AIV sets out a number of reasons why, in its view, the Netherlands should once more become actively involved in this debate.

This advisory letter was prepared by the chair and members of the AIV's Human Rights Committee. It consists of: Professor W.J.M. van Genugten (chair), Professor P.R. Baehr, Professor Th.C. van Boven, Professor C.P.M. Cleiren, Professor D.M. Curtin, T. Etty, Professor C. Flinterman, Professor J.E. Goldschmidt, Ms C. Hak, R. Herrmann, F. Kuitenbrouwer, Dr. B.M. Oomen, Professor N.J. Schrijver, Ms A.L.E.C. van der Stoel, J.G. van der Tas and Ms H.M. Verrijn Stuart (vice-chair). The secretary was T.D.J. Oostenbrink, with the assistance of Ms S. Everts (trainee).

The AIV adopted this advisory letter at its meeting of 10 September 2004.

## From Deadlock to Breakthrough?

The Advisory Council on International Affairs (AIV) has observed that the process of agreeing a Declaration on the Rights of Indigenous Peoples is in deadlock. The AIV believes it is vital that this deadlock be broken, and would advise the Dutch government to make every effort to achieve this goal.

According to United Nations figures, there are around 300 million indigenous people in the world, distributed among some 5,000 indigenous communities/peoples. The best known are the Inuit of Canada, the Aborigines of Australia, the Sami of Scandinavia, the Pygmies in Africa and a range of Native American tribes in the US and Latin America. These peoples face many problems. They are often discriminated against and treated as second-class citizens, live in impoverished conditions, have no access to decent education, suffer the negative impacts of major infrastructural projects - some of them carried out with financial support from the World Bank and IMF - and have little or no political say in matters that affect them. In more general terms, they are simply not given the opportunity to be themselves.

In January 1993 the then Advisory Committee on Human Rights and Foreign Policy (ACM) issued an advisory report entitled 'Indigenous Peoples'. It urged the Netherlands to do everything in its power to put an end to the injustice done to many of these peoples. The report includes thirty conclusions and recommendations to this effect.<sup>1</sup> Some refer to the Draft Declaration on the Rights of Indigenous Peoples, on which the Working Group on Indigenous Populations, made up of independent experts from the UN Sub-Commission on the Promotion and Protection of Human Rights and chaired by Ms E.I.A. Daes, had been working since 1985. The Draft Declaration was eventually adopted a little over a year after publication of the ACM advisory report. The ACM advised the government to make vigorous efforts to ensure that the Working Group completed its task as quickly as possible, and that the Declaration was adopted by the member states of the UN 'provided that it meets with the approval of a significant majority of indigenous peoples'.<sup>2</sup> During a discussion of the advisory report with foreign minister Peter Kooijmans and development minister Jan Pronk on 3 March 1993, the former noted that 'he regarded the Working Group's draft as well formulated' and that 'the Netherlands would do as much as possible to promote its adoption'.

Once the Draft Declaration had finally been adopted by the UN Sub-Commission and was presented to the UN Commission on Human Rights, the ACM issued a further advisory report in which it renewed its call for support for the speedy acceptance of the Draft Declaration.<sup>3</sup> The ACM characterised it as 'generally balanced in tone' and containing numerous 'well-considered articles concerning a range of issues important to indigenous peoples, such as avoiding any further genocide and destruction of cultures, the right to their own media in their own language, and the use and possible restitution of land or granting of rights to 'fair compensation' (advisory letter, p. 2). It also noted that there were clear

1 See ACM, 'Indigenous Peoples', advisory report no. 16, January 1993, pp. 42-50.

2 Ibid. pp. 35-37 and recommendation no. 27.

3 See ACM, advisory letter on Indigenous Peoples, November 1995.

parallels between the Draft Declaration and ILO Convention no. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989),<sup>4</sup> including a series of collective rights, such as the right to self-determination. This subsequently turned out to be particularly relevant, as in the meantime the Netherlands became party to the ILO Convention in question, partly at the suggestion of the ACM, despite the fact that, as the government pointed out, our country 'has no indigenous peoples'.<sup>5</sup> The rationale behind the ratification was partly 'that proper observance of the Convention is not only important and consistent with government policy, but benefits from ratification by as many countries as possible, including countries that have no indigenous peoples as referred to in the Convention' (ibid.). In ratifying the Convention the Dutch government made clear its willingness to work for the improvement of the legal status of indigenous peoples.

This was almost ten years ago, but in the meantime the debate on the rights of indigenous peoples has continued, both in many individual countries and at international level.<sup>6</sup> The continuing debate on the Draft Declaration on the Rights of Indigenous Peoples can serve as an indication of the Dutch government's willingness to support indigenous rights in this new millennium. In 1995 the UN Commission on Human Rights set up an open-ended intersessional Working Group to prepare a Declaration to be adopted by the General Assembly before the (first) International Decade of the World's Indigenous Peoples comes to an end in December 2004. European Union member states may also take part in the open Working Group. Some have done so over the years, including France, Great Britain, Greece, Spain and Denmark, and the Netherlands was also active in the early years of the group's existence.

In the AIV's view, there are two reasons why the Netherlands should once more become actively involved in the debate, while it holds the Presidency of the EU. The first relates to the *content* of the Declaration. To date, agreement has been reached on only a few of the 45 articles, but with a little inventiveness, the AIV estimates that progress could be made on many more. For instance, the Working Group has for years been discussing the right to self-determination, interpreted by states as the right to internal self-determination (autonomy), but by many indigenous peoples as a right that leaves open the *possibility* of external self-determination, particularly at times when internal self-determination is not adequately safeguarded. When sufficient safeguards are in place, the right to external self-determination will rarely be invoked, is the general thinking in indigenous circles. By way of illustration, one might consider the Turkish aspect of the Kurdish issue. For years the issue was dominated by separatism (external self-determination), but became much less explosive when the Turkish government set about substantiating the Kurds' right to internal self-determination. The Netherlands might propose in the Working Group that the right to self-determination be interpreted as 'in conformity with principles of international law, as it develops'. In international law, the right to self-determination can be interpreted as a right to *external* self-determination only in certain specified cases. They include the decolonisation process, which was based on the right of colonies to establish their own independent sovereign

4 See also ILO Convention 169, Netherlands Treaty Series 1996, no. 99, 55 (1989), no. 2.

5 House of Representatives, 1996-1997, 25020, no. 3, p. 2.

6 See W. van Genugten and C. Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights: Global, Regional, and National Dimensions', in *International Journal on Minority and Group Rights* (forthcoming).

state, the disintegration of federative states such as the Soviet Union and Yugoslavia, and the ending of military occupation in one state by another.

The real debate on the right to self-determination is currently about what a state can inflict on its indigenous peoples (and minorities) before forfeiting the right to keep them 'on board', as it were. One recent example has been the debate on Kosovo and the question of whether the former Yugoslavia had in fact forfeited its rights in this area by treating Kosovo as it did in the 1990s (depriving it of the status of autonomous region, and actively persecuting a large proportion of the population). The answer is not a matter simply of technical distinctions under international law; there are also political and ethical dimensions. Furthermore, in issues such as this, the problem is precisely that there is no universal rule, which means a just solution has to be sought in each specific case. The inclusion of a phrase like 'in conformity with the principles of international law, as it develops' has many advantages. First, it would put an end to the debate on the wording of the right to internal and external self-determination which has been preoccupying the Working Group for years. Second, indigenous peoples would not be discriminated against in relation to other peoples (albeit that the already completed process of decolonisation should be respected, including the borders it has produced). Third, any future developments in law in the field of the right to self-determination would already be accounted for in the article. And finally, in the absence of specificity, concrete situations would have to be resolved in a just and satisfactory way on an ad hoc basis by an independent judicial (or quasi-judicial) body.

Another delicate point is the debate on collective rights in general, many examples of which are contained in the Draft Declaration (and in ILO Convention 169, which the Netherlands has ratified).<sup>7</sup> For instance, indigenous people have a right to education in their own language, to the establishment of their own media and to the use of lands that they have traditionally inhabited and farmed. It is feared that collective rights such as these would in practice serve as a straitjacket on individual members of indigenous peoples who might have different views from their leaders on how things should be done. However, in this connection it is important to read the Declaration as a whole, including the closing article, which states that the exercise of the rights in the Declaration may never give rise to activities aimed 'at the destruction of any of the rights and freedoms recognized in applicable international human rights law, or at their limitations to a greater extent than is provided for therein' (article 45).<sup>8</sup> This would appear to provide sufficient guarantees. However, if desired and if there is no alternative, a clause to similar effect could be added to various articles if that would expedite the adoption of the Declaration. This is already happening to some extent.

With regard to numerous other issues, the Netherlands could use its status as 'concerned third party' to launch proposals that are consistent with international law and politically feasible, on issues such as the use of natural resources.<sup>9</sup> More and more indigenous

7 See ACM, 'Collective Rights', advisory report no. 19, The Hague, May 1995 and AIV, 'Universality of Human Rights and Cultural Diversity', advisory report no. 4, June 1998, pp. 31-35.

8 Text from draft Declaration 1994.

9 See e.g. ILO Convention 169, articles 14-19.

peoples are prepared to accept that they do not have an exclusive right to the development of natural resources on their territory, as long as any such development is coupled with respect for their special historical and spiritual ties with the land in question and as long as the profits are shared equitably. In that respect, too, provisions could be worded in such a way as to satisfy all parties to the debate. All the more so if, in the long term, a supervisory, quasi-judicial body is established to arbitrate where parties fail to agree on a reasonable solution and the national courts fail to settle the matter. In this connection, one might consider extending the mandate of the Permanent Forum on Indigenous Issues. This forum, established in 2000 and consisting of eight members with an indigenous background and eight members nominated by governments, has thus far had a mandate that can best be described as covering the making of studies and recommendations. In the future, however, in the view of the AIV, it would make sense to give the Permanent Forum quasi-judicial powers, analogous to those of the UN Human Rights Committee under the International Covenant on Civil and Political Rights, whose members are independent. However, other constructions might also be considered.

The second reason for the European Union and the Netherlands to take a more active stance lies in the *process* of the Declaration's conclusion. As we have said, after ten years of debate, agreement has been reached on only a few articles. Furthermore, the Working Group's last report, which refers to its last meeting (to date), in September 2003, contains little that gives reason for optimism. For instance, the Latin American group noted 'that progress had been made during the session and that concerns and interests had been identified which would make it easier to find solutions leading to the adoption of the declaration'.<sup>10</sup> In the view of the AIV such words are more appropriate at the beginning of such a process than ten years down the line. Many states and indigenous representatives believe that the lack of progress has everything to do with the way the Working Group operates. It spends much of its time taking stock, and rarely tables text proposals to resolve real or apparent conflicts.

Given the above, the Netherlands, in its current EU Presidency role, should call for the Working Group's mandate to be extended for a further three years (2005-2007), with the possibility of meeting two to three times a year if necessary. The AIV would strongly recommend that the EU lead the way by living up to its responsibility in this matter. However, should this lead to considerable delays, the AIV would recommend that the Dutch government take full advantage of the scope offered by the Common Foreign and Security Policy to attempt to achieve some momentum in this dossier, either independently or with other like-minded countries. In assigning administrative roles within the Working Group, it must be borne in mind that *immediate* initiatives are needed to resolve the conflicts. The aim should be for the Declaration to be adopted in 2008, 60 years after the Universal Declaration of Human Rights. In the AIV's view, only if this proves impossible should the Netherlands accept that the debate on the Draft Declaration cannot be brought to a successful conclusion. However, in the AIV's estimation, the Netherlands will then have done everything that might reasonably be expected, given its policy on the matter to date, of a state which still has a reputation as a bridge-builder in indigenous circles.

10 UN document E/CN.4/2004/81, p. 19.

## Previous reports published by the Advisory Council on International Affairs

- 1 AN INCLUSIVE EUROPE, *October 1997*
- 2 CONVENTIONAL ARMS CONTROL: urgent need, limited opportunities, *April 1998*
- 3 CAPITAL PUNISHMENT AND HUMAN RIGHTS: recent developments, *April 1998*
- 4 UNIVERSALITY OF HUMAN RIGHTS AND CULTURAL DIVERSITY, *June 1998*
- 5 AN INCLUSIVE EUROPE II, *November 1998*
- 6 HUMANITARIAN AID: redefining the limits, *November 1998*
- 7 COMMENTS ON THE CRITERIA FOR STRUCTURAL BILATERAL AID, *November 1998*
- 8 ASYLUM INFORMATION AND THE EUROPEAN UNION, *July 1999*
- 9 TOWARDS CALMER WATERS: a report on relations between Turkey and the European Union, *July 1999*
- 10 DEVELOPMENTS IN THE INTERNATIONAL SECURITY SITUATION IN THE 1990s: from unsafe security to unsecured safety, *September 1999*
- 11 THE FUNCTIONING OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, *September 1999*
- 12 THE IGC AND BEYOND: TOWARDS A EUROPEAN UNION OF THIRTY MEMBER STATES, *January 2000*
- 13 HUMANITARIAN INTERVENTION, *April 2000\**
- 14 KEY LESSONS FROM THE FINANCIAL CRISES OF 1997 AND 1998, *April 2000*
- 15 A EUROPEAN CHARTER OF FUNDAMENTAL RIGHTS?, *May 2000*
- 16 DEFENCE RESEARCH AND PARLIAMENTARY SCRUTINY, *December 2000*
- 17 AFRICA'S STRUGGLE: security, stability and development, *January 2001*
- 18 VIOLENCE AGAINST WOMEN: LEGAL DEVELOPMENTS, *February 2001*

\* Issued jointly by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV).



- 19 A MULTI-TIERED EUROPE: the relationship between the European Union and subnational authorities, *May 2001*
- 20 EUROPEAN MILITARY-INDUSTRIAL COOPERATION, *May 2001*
- 21 REGISTRATION OF COMMUNITIES BASED ON RELIGION OR BELIEF, *June 2001\*\**
- 22 THE WORLD CONFERENCE AGAINST RACISM AND THE RIGHT TO REPARATION, *June 2001*
- 23 COMMENTARY ON THE 2001 MEMORANDUM ON HUMAN RIGHTS POLICY, *September 2001*
- 24 24 A CONVENTION, OR CONVENTIONAL PREPARATIONS? The European Union and the ICG 2004, *November 2001*
- 25 INTEGRATION OF GENDER EQUALITY: a matter of responsibility, commitment and quality, *January 2002*
- 26 THE NETHERLANDS AND THE ORGANISATION FOR SECURITY AND COOPERATION IN EUROPE IN 2003: role and direction, *May 2002\*\**
- 27 BRIDGING THE GAP BETWEEN CITIZENS AND BRUSSELS: towards greater legitimacy and effectiveness for the European Union, *May 2002*
- 28 AN ANALYSIS OF THE US MISSILE DEFENCE PLANS: pros and cons of striving for invulnerability, *August 2002*
- 29 PRO-POOR GROWTH IN THE BILATERAL PARTNER COUNTRIES IN SUB-SAHARAN AFRICA: an analysis of poverty reduction strategies, *January 2003*
- 30 A HUMAN RIGHTS BASED APPROACH TO DEVELOPMENT COOPERATION, *April 2003*
- 31 MILITARY COOPERATION IN EUROPE: possibilities and limitations, *April 2003*
- 32 BRIDGING THE GAP BETWEEN CITIZENS AND BRUSSELS: towards greater legitimacy and effectiveness for the European Union, *April 2003*
- 33 THE COUNCIL OF EUROPE: less can be more, *October 2003*
- 34 THE NETHERLANDS AND CRISIS MANAGEMENT: three issues of current interest, *March 2004*

\*\* Also available in French and Russian.

## **Advisory letters issued by the Advisory Council on International Affairs**

The enlargement of the European Union, *10 December 1997*

The UN Committee against Torture, *13 July 1999*

The Charter of Fundamental Rights, *9 November 2000*

The Dutch presidency of the EU in 2004, *15 May 2003\*\*\**

The results of the Convention on the Future of Europe, *28 August 2003*

From internal to external borders. Recommendations for developing a common European asylum and immigration policy by 2009, *12 March 2004*

\*\*\* Joint report by the Advisory Council on International Affairs (AIV) and the Advisory Committee on Aliens Affairs (ACVZ).