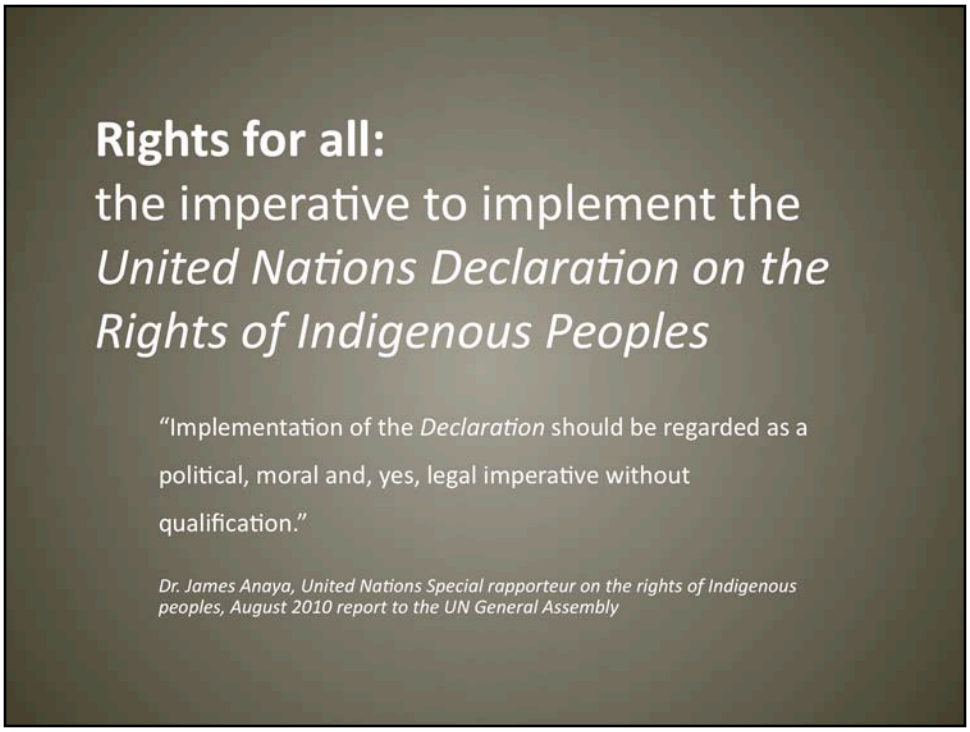


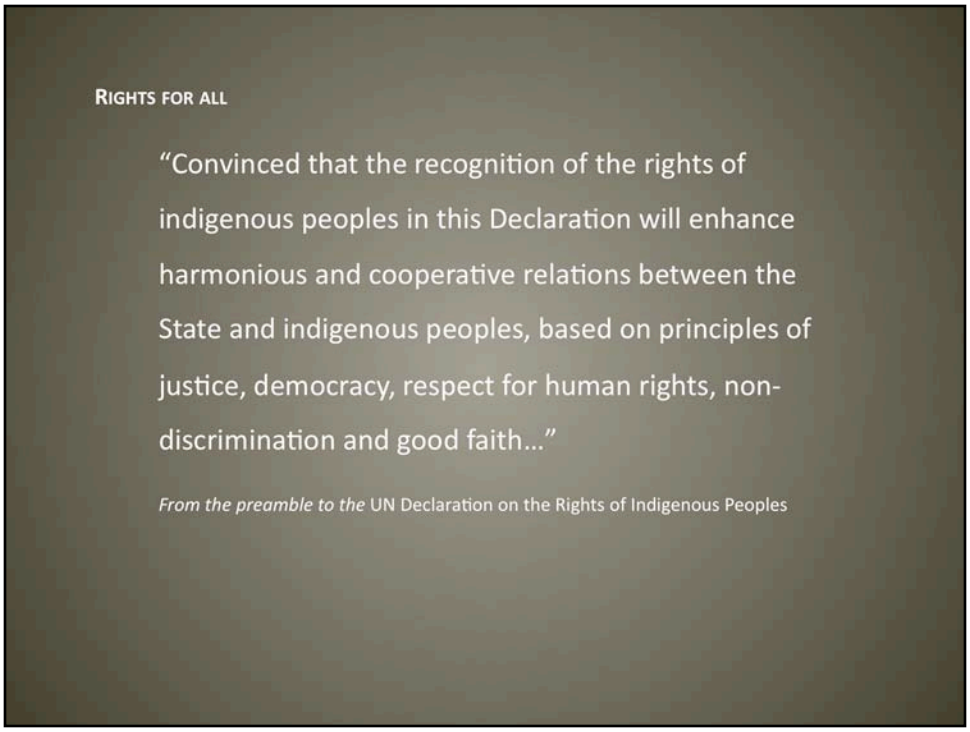
In this presentation, I want to outline an argument for why implementation of the UN Declaration on the Rights of Indigenous Peoples is – as James Anaya has said – a political, moral and legal imperative.

I will be speaking from the perspective of someone who was involved in the advancement of the Declaration at the United Nations and who has worked directly with a wide range of Indigenous peoples in Canada and around the world trying to address some of the really pressing and urgent human issues faced by their communities.

There are two main points to my argument.

The first is that the content of the *Declaration* per se is hardly radical, in the sense that some of its opponents have claimed. In fact, what I want to show is that the provisions of the Declaration are very much in the mainstream of a half century of progressive development of global human rights standards.

The second point that I want to make is that what is genuinely radical about the is the political, moral and legal assertion that Indigenous peoples must not be excluded from the rights guaranteed to all in the established body of global norms and and that these rights must be made meaningful in the lives of Indigenous peoples. I want to show why this assertion is both urgently necessary and potentially transformative in relation to the unacceptable status quo facing Indigenous peoples in Canada and around the world.



If you work in the area of human rights, or are familiar with other instruments going back to the Universal Declaration of Human Rights, you're likely to find that much of the language of the UN Declaration on the Rights of Indigenous Peoples is very familiar.

This is absolutely intentional.

The process of developing the Declaration was unique in the history of the United Nations in that it was the first time that the rights holders themselves, the intended beneficiaries of the human rights instrument, were direct participants in the drafting and negotiation. This was absolutely crucial to ensuring that the provisions corresponded to the real world needs of Indigenous peoples.

However, it was established from the outset that the provisions of the Declaration must either reflect rights already recognized in international law or that Indigenous peoples would have to convince states that these provisions were necessary in order to apply those existing standards to the specific situations of Indigenous peoples.

One of the elements of the Declaration that has attracted the greatest controversy is the affirmation of free, prior and informed consent, which includes the right of Indigenous peoples to say no to activities that would have a negative impact on their rights. The government of Canada, for example, continues to object to the FPIC provisions, despite its November 2010 endorsement of the Declaration.

FPIC, however, is a familiar and accepted concept in many contexts including research and medical ethics.

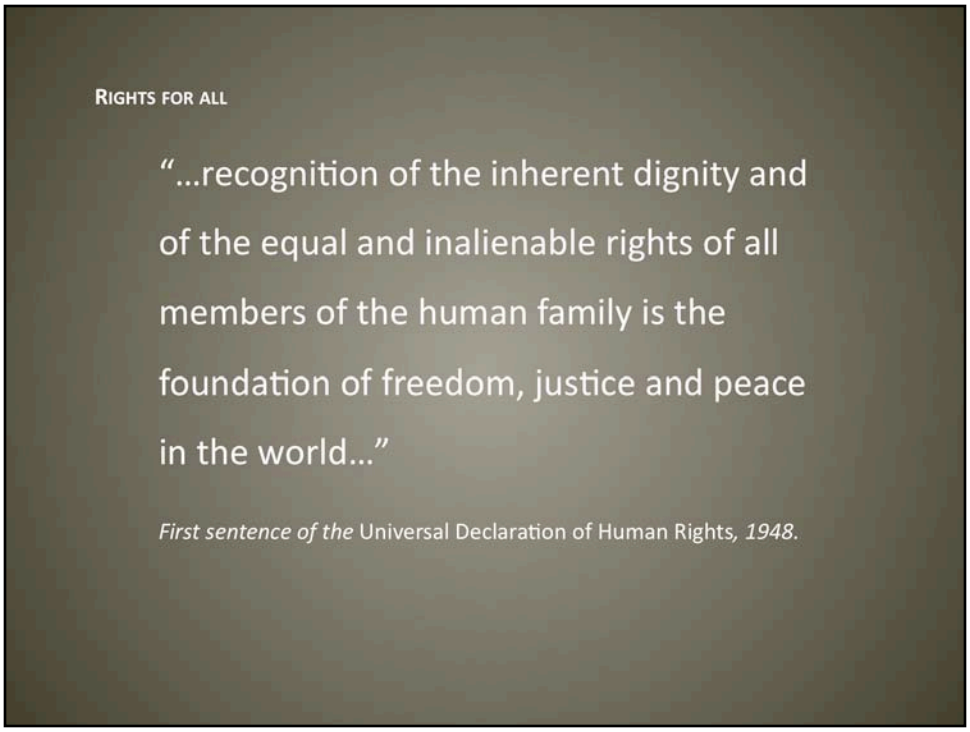
FPIC is also clearly established in the international human rights system.

The UN Committee on the Elimination of Racial Discrimination is the independent expert body established to interpret the Convention on the Elimination of All Forms of Racial Discrimination and to oversee state compliance with the legal obligations they've agreed to under this Convention. A decade before the adoption of the UN Declaration, the Committee issued General Recommendation XXIII, which found that the consent of Indigenous peoples was a necessary corollary and safeguard for the rights established in that Convention.

Other human rights bodies, at the level of the United Nations and the OAS, have repeatedly come to the inclusion that a high standard of protection is required for the rights of Indigenous peoples, particularly in relation to lands and resources, and that part of this protection is the right of free, prior and informed consent.

Other human rights bodies, at the level of the United Nations and the OAS, have repeatedly come to the inclusion that a high standard of protection is required for the rights of Indigenous peoples, particularly in relation to lands and resources, and that part of this protection is the right of free, prior and informed consent.

As was recently noted by the IFC, the private investment arm of the World Bank, many multilateral banks and international industry associations have either adopted or are considering adoption of FPIC.

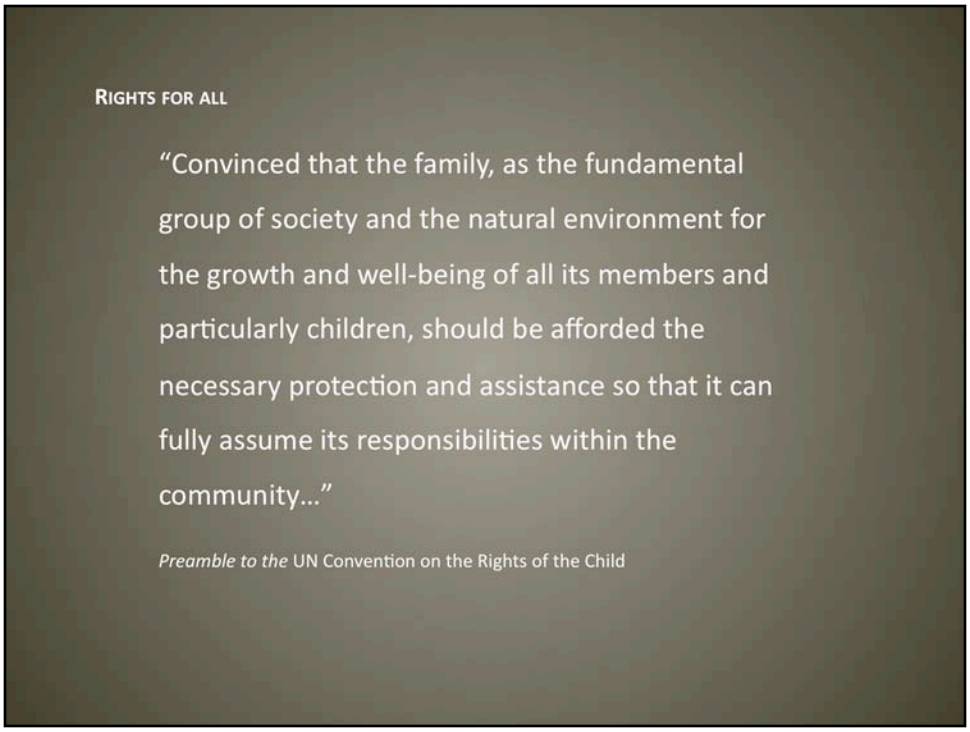


It's also been argued that the Declaration on the Rights of Indigenous Peoples stands apart from the larger body of human rights norms and standards in that it recognizes both individual and collective rights – the individual rights of Indigenous women, men and child and the collective rights of Indigenous societies, nations and communities.

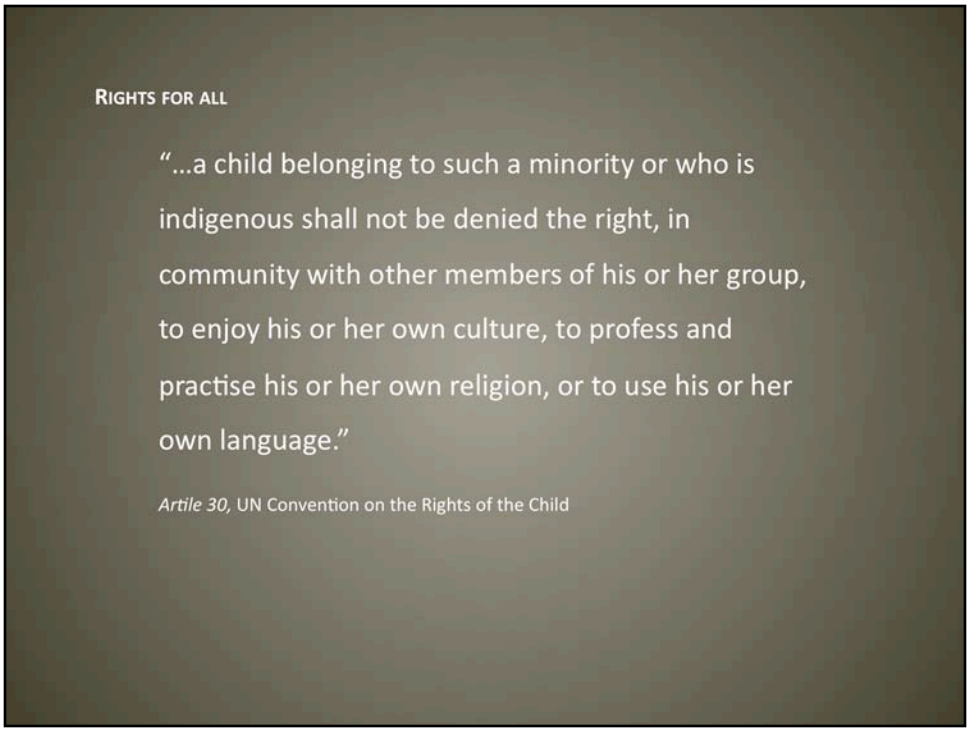
The fact that the Declaration links individual and collective rights is part of what makes the Declaration so relevant to the situation of Indigenous peoples. But it is not unique in doing so.

The prohibition against negative discrimination is at the core of the human rights discourse. And the positive right to freely participate in the cultural life of one's community has also been repeatedly affirmed.

When you look at how these rights are articulated and applied in the international human rights system, you can see a clear understanding that these rights cannot be guaranteed for the individual in isolation but require the elaboration of protections at a more collective level.

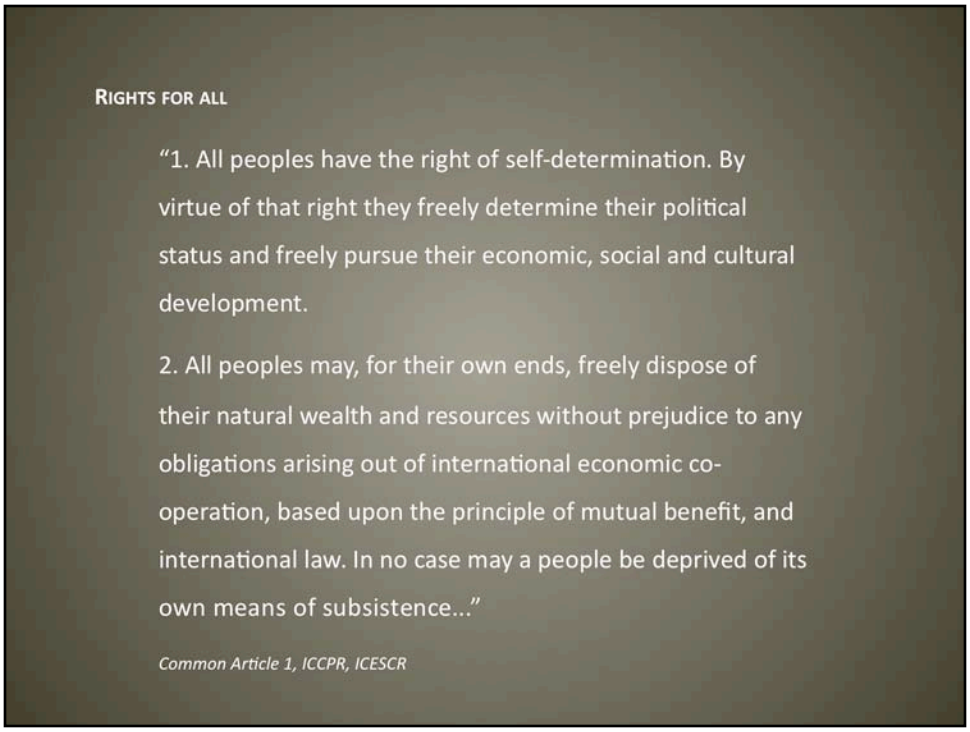


An interesting example is in the area of children's rights. The Convention on the Rights of the Child expressly states that the "best interests of the child" is the measuring post for all government policies and actions affecting the lives of children. But it also puts the interests of the children in the context of the life of the family – a collective identity if you will that the Convention explicitly states must also be protected.



The Convention on the Rights of the Child is also a good example of the way that international human rights instruments have identified that many rights can only be enjoyed in community with others.

The Convention on the Rights of the Child is the most widely ratified international human rights treaty. It was also the first widely ratified international human rights treaty to specifically refer to Indigenous peoples.



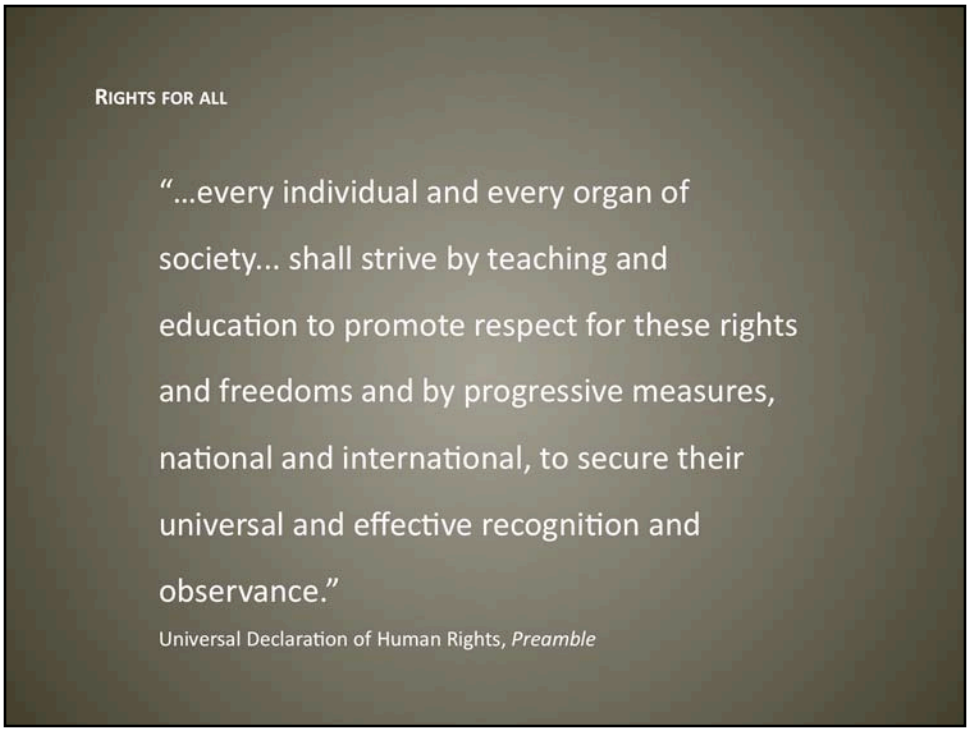
Of course, the two international human rights Covenants, the Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, begin with important collective rights of peoples.

Common article 1 is usually looked at primarily in terms of the right of self-determination. However, when you look at the article, you can see that other elements are also affirmed as an integral part of this right, including the right to development, control of natural resources and the right to subsistence.

For a long time, during the negotiation of the UN Declaration, there was a lot of controversy around the right of self-determination. Some states were insisting that the right guaranteed to all peoples in the two covenants could not be applied to Indigenous peoples. At one point, even the chair of the Working Group said that the Declaration would never move ahead unless Indigenous peoples accepted a statement of lesser, more limited form of self-determination. This was despite the agreed methodology of not asserting new rights.

The impasse over self-determination was largely overcome when Indigenous peoples were able to convince most states that their intention was not to subject the Declaration to extreme interpretations. This was accomplished partly by moving the discussion of self-determination beyond the narrow dimension of secession that had preoccupied many states and partly by the inclusion of other provisions that explicitly stated that all rights in the Declaration were to be interpreted in relation to other rights and to the established principles of the UN system.

But most importantly, I think states were shamed out of taking a position that the Declaration would discriminate against Indigenous peoples by denying them a right guaranteed to all.

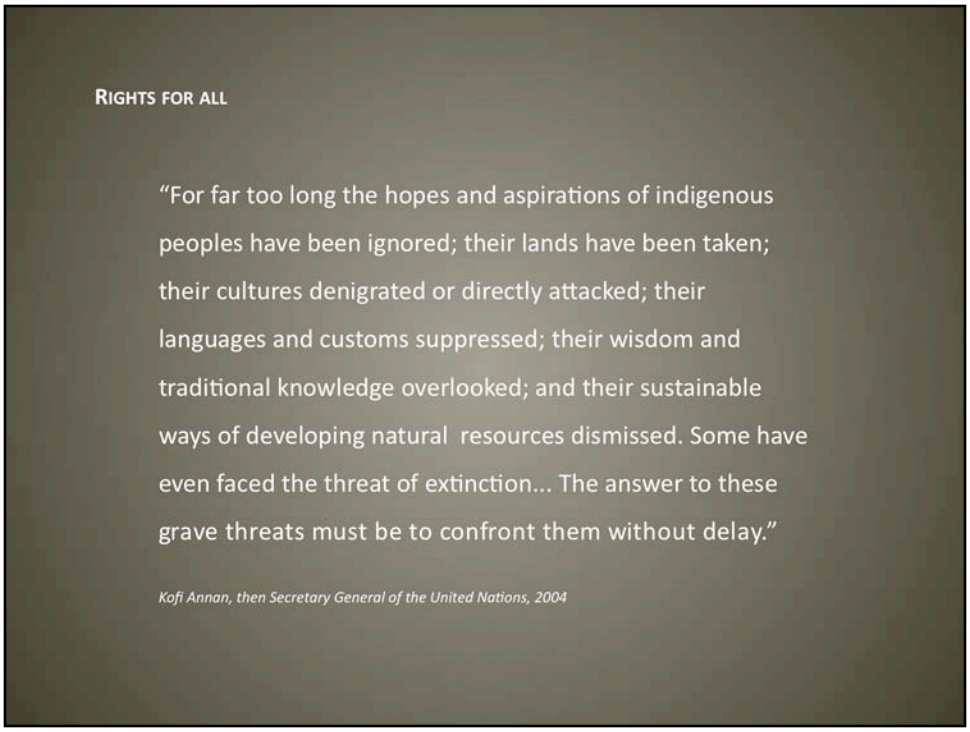


This comes to the heart of what I wanted to talk about.

The human rights discourse appeals to a consensus that transcends ideologies, religions and borders. Here is a set of standards that nation states have agreed to uphold. They are to be guaranteed to all, without exception, on the basis of our common humanity.

Yet, the very opposite is often true. While the notion of human rights is almost universally endorsed, there are always excuses why the protection and fulfillment of rights should be denied to specific people and communities, because of who they are or what they believe in.

We know that in an everyday sense as blaming the victim. Women who are targeted for sexual violence are told they 'asked for it.' I have heard variations of this from the survivors of political torture who recall their torturers telling them they are 'getting what they deserve.'



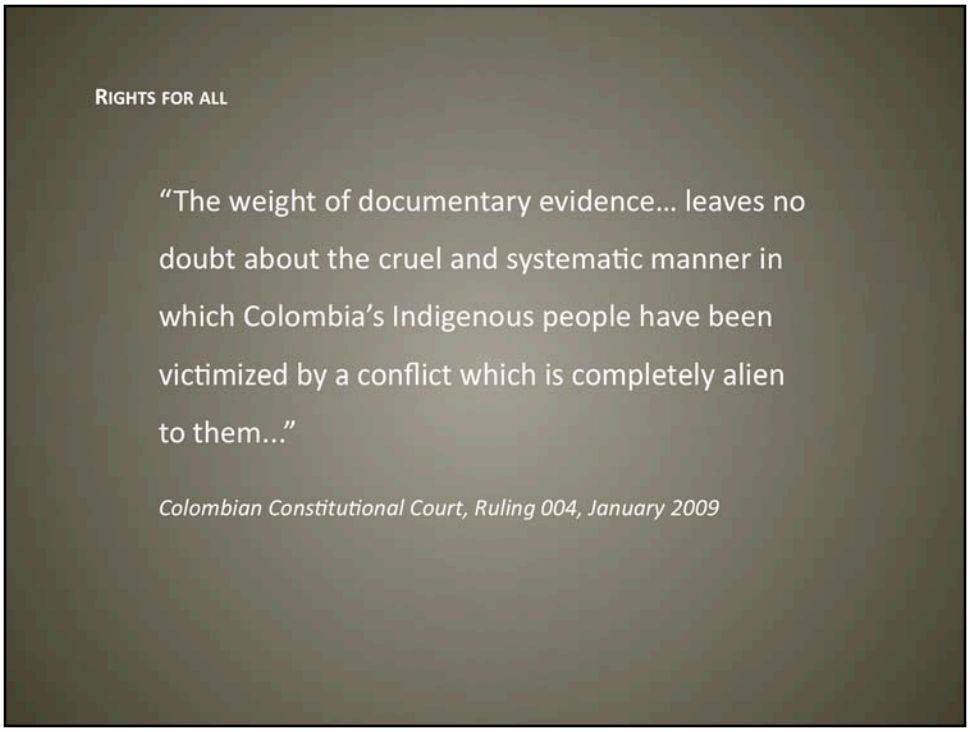
For Indigenous peoples around the world, centuries of racism – and of other sectors of society benefitting from the dispossession of Indigenous peoples – has created a deeply entrenched zone of exclusion from human rights protection.

Indigenous peoples are consistently among the most impoverished and frequently victimized members of the societies in which they live. Yet the specific situation of Indigenous peoples has been largely absent in both the development discourse and the human rights discourse.

Part of the fundamental value of the UN Declaration on the Rights of Indigenous Peoples lies in its clear assertion that the Indigenous peoples have rights that are recognized in the international community and which states are accountable to uphold.

I believe that the adoption of the Declaration has already made a difference in how the rights of Indigenous peoples are talked about around the world. This panel itself could be taken as one indication of the dialogue that the adoption of the Declaration has helped to open.

If time permits, I'd like to give two examples of why we need to go further and begin the concrete implementation of the Declaration.



The first example that I would like to give comes from Colombia.

In 2009, the Colombia Constitutional Court concurred with evidence that at least 32 Indigenous peoples in Colombia are on the verge of utter eradication as a consequence of attacks and forced displacement. Indigenous peoples in Colombia are not simply got in the cross-fire of the ongoing armed conflict, they are being deliberately targeted by paramilitaries and armed opposition groups. They are being forcibly driven from the land by the threat of massacres and there is a well-established pattern of killings and disappearances of community leaders who speak out for their rights.

Significantly, protective measures ordered by the Colombian Constitutional Court have gone substantially unimplemented – despite the status of the Court in the domestic legal system.

The National Indigenous Peoples' Organization of Colombia, ONIC, has launched a global campaign to pressure on the government of Colombia to implement the Constitutional Court ruling. Through this campaign they are also trying to advance the implementation of the UN Declaration.

I think it's really telling that in the midst of a truly desperate situation of violence, oppression and the very real threat of genocide, Indigenous peoples in Colombia see the implementation of the Declaration as a priority.

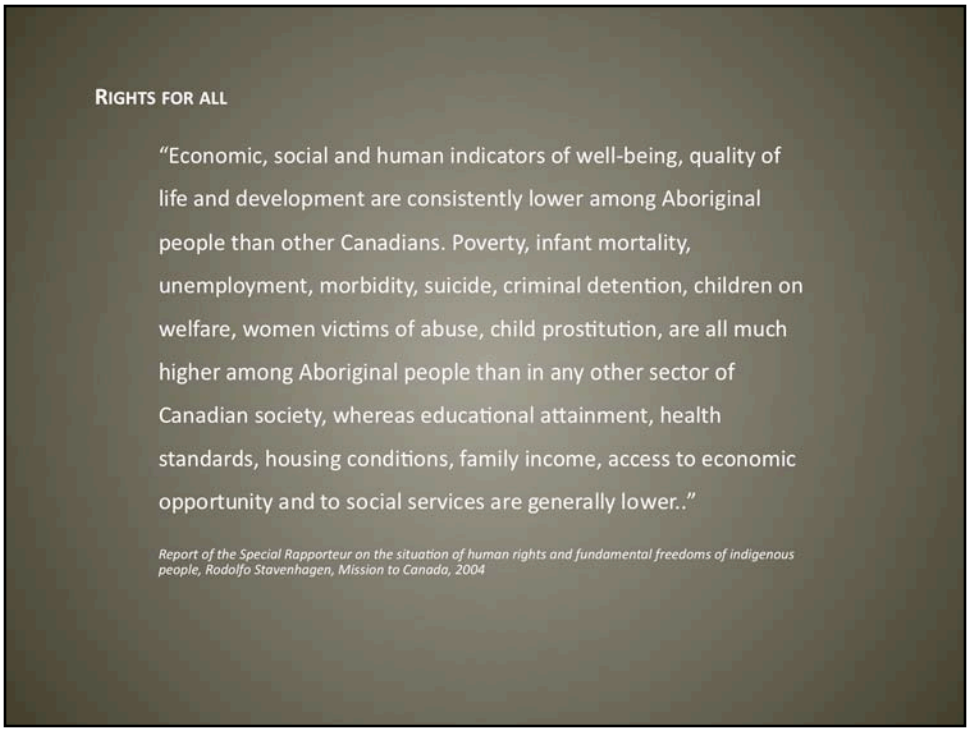
There are a number of reasons for this.

One is that provisions of the Declaration, developed over a period of more than two decades with the direct participation of Indigenous leaders, academics and activists, directly reflect the real world needs of Indigenous peoples. The militarization of Indigenous territories, the forced uprooting of Indigenous communities, the struggle to maintain cultures and traditions, and the specific threats facing women and others at greatest risk of human rights violation: each of these concerns is the subject of specific provisions in the Declaration.

A second is that the human rights discourse represents a relatively neutral reference point for appealing for state actios. After all, human rights instruments approved by states themselves. This is particularly important in a violently charged political context such as Colombia.

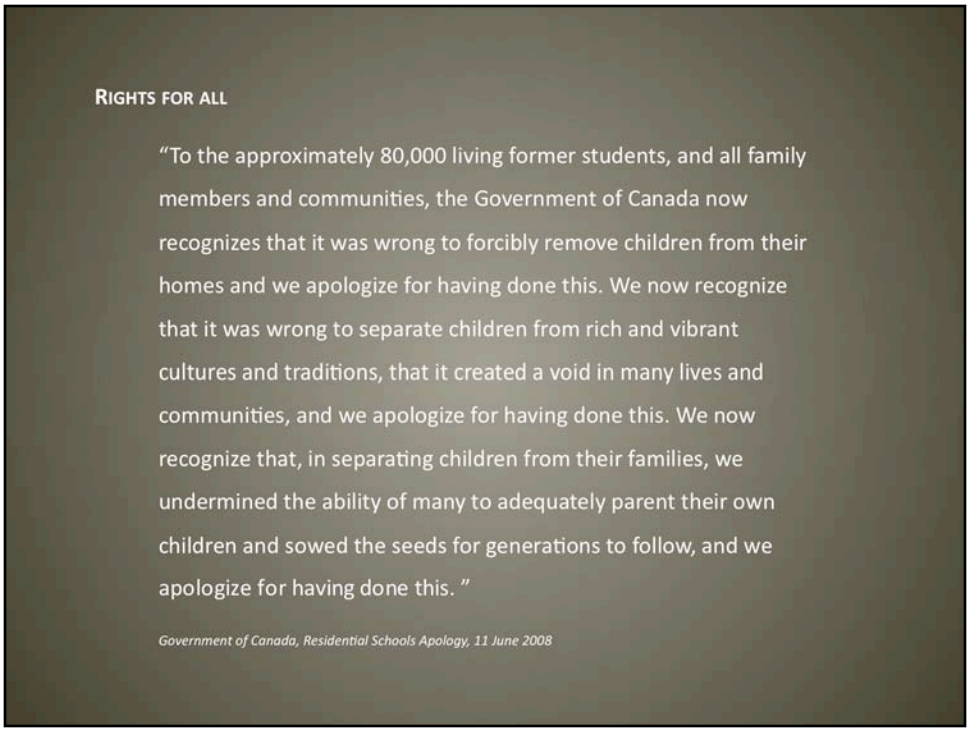
And here the Declaration has a particular significance as it explicitly names the survival and well-being of Indigenous peoples as a goal of human rights protection. In Colombia, as in many places in the world, this is a very powerful message. As I've said, while the basic premise of human rights is the inherent dignity and worth of all, there are always excuses or rationalizations to deny these protections to specific people, because of who they are, because of where they live or what they believe. And Indigenous peoples have been among the most often excluded, The Declaration stands up to all of that.

Finally, the Declaration, like other human rights instruments, transcends national borders, so that when the state is unresponsive, as it often is to the appeals of Indigenous peoples, there is the possibility of using the human rights framework to bring pressure through the engagement of international, whether the that's the moral condemnation of UN human rights bodies or the concrete pressure that might be excerpted by political allies and investors.



Turning then to Canada, it's quite apparent that there is a profound gap in the basic quality of life between Indigenous and non-Indigenous peoples as a whole. I don't think is likely any disagreement that the status quo is simply not acceptable.

Having said that, I want to give an example of just how hard the federal government works to maintain that status quo, and just how far it's willing to compromise basic human rights in order to do so.



The example that I want to use is the situation of First Nations children in state care.

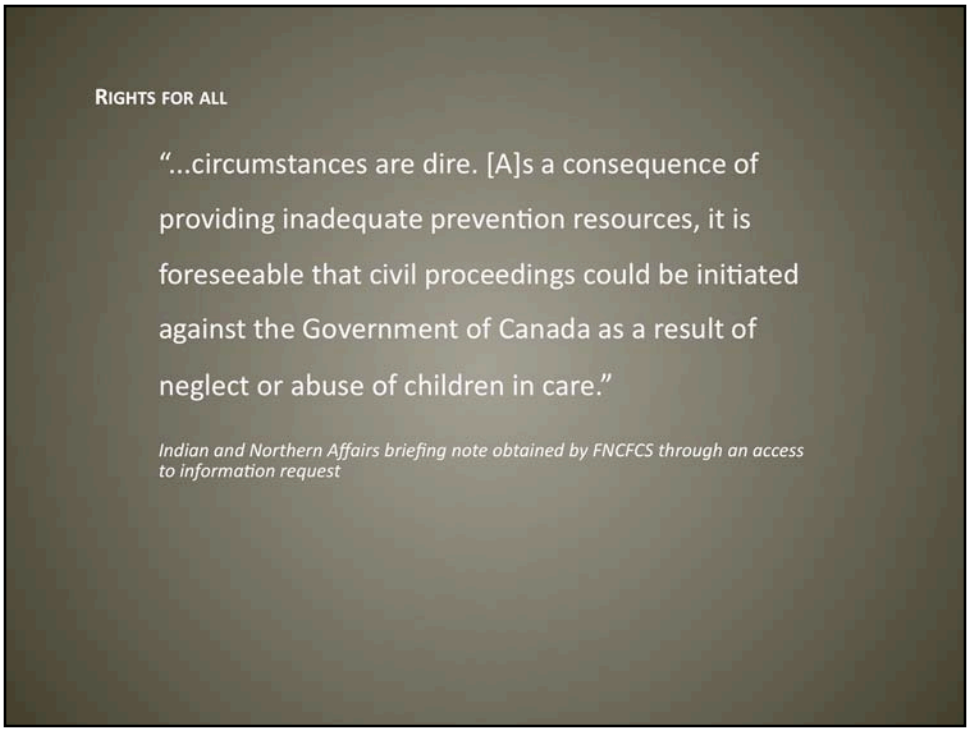
One of the things that was admirable about the residential school apology in 2008 was that it acknowledged both the abuse inflicted upon individual children and the harm that was caused by the systematic separation of these children from their families, communities and cultures.

When the apology was made, the last federally-run residential school had been closed for more than a decade, yet there were more First Nations in state care than ever before.

There are currently more than 8,000 First Nations children were in the care of child welfare services in Canada. Proportionally this is 8 times the rate of removal for non-Indigenous children. And the numbers might be much higher, because of inconsistencies in the way the numbers get reported from jurisdiction to jurisdiction.

Some of these children were taken from their homes to protect them from abuse. But most had been removed because of "neglect." This could mean a lot of things. There could be inadequate food in the house. The home might be badly run down or overcrowded. Their parents might be failing to make sure their kids get to school. Or as the apology states, the residential school experience had undermined their ability to adequately parent their own children.

In predominantly non-Aboriginal communities, where the provincial or territorial governments fund the provision of child welfare services, children's services try to respond to situations of neglect by a variety of early intervention strategies to shore up and support the capacity of families to meet their children's needs. The removal of the child is understood to be a last resort only.



The underfunding and its consequences has been confirmed by two reports by the Auditor General of Canada, by statements from the provinces, by studies carried out by the federal government and by internal departmental briefing notes that Dr. Cindy Blackstock of the First Nations Child and Family Caring Society obtained through an access to information request.

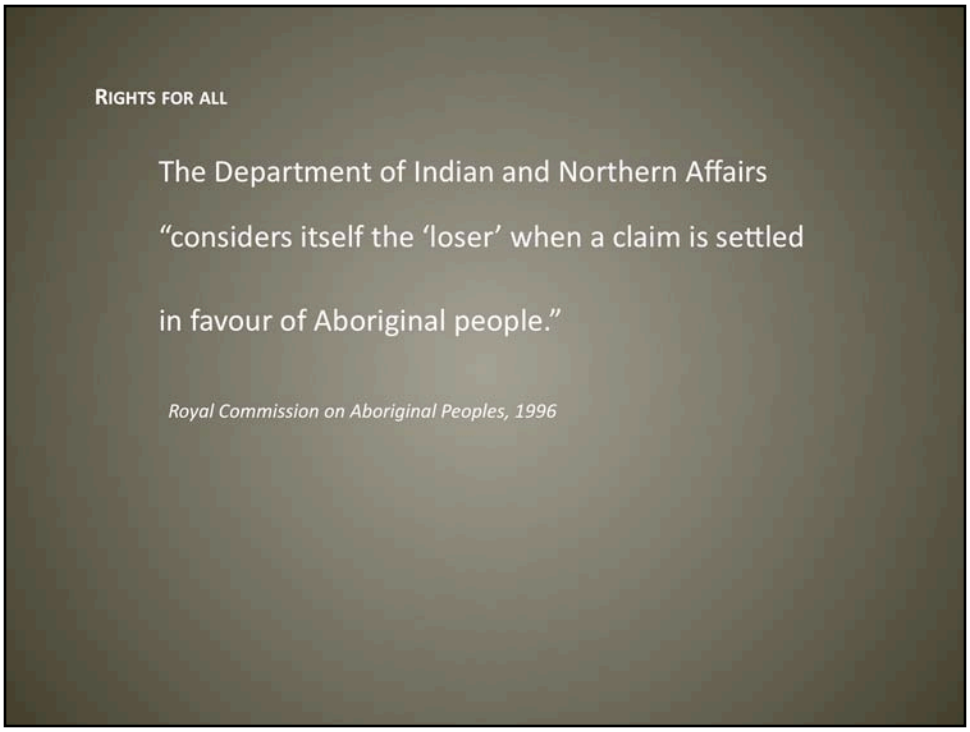
There are a couple of things worth highlighting in this statement.

The first is the implicit acknowledgement that putting First Nations into children into state care is not necessarily removing the threat of abuse or neglect.

The second is that the dire situation being referred to is not the health and safety of these children, but the potential for litigation.

While it's not surprising that government departments assess the risk of litigation, we should be asking whether the government bureaucracy sees Indigenous people primarily as citizens whose rights government is obligated to both honour and promote, or as potential court room adversaries. In fact, what I would like to suggest is that the federal government's adversarial approach actually drives Indigenous peoples into long and costly court proceedings when the fulfillment of their rights should be understood as matter of course as a state obligation

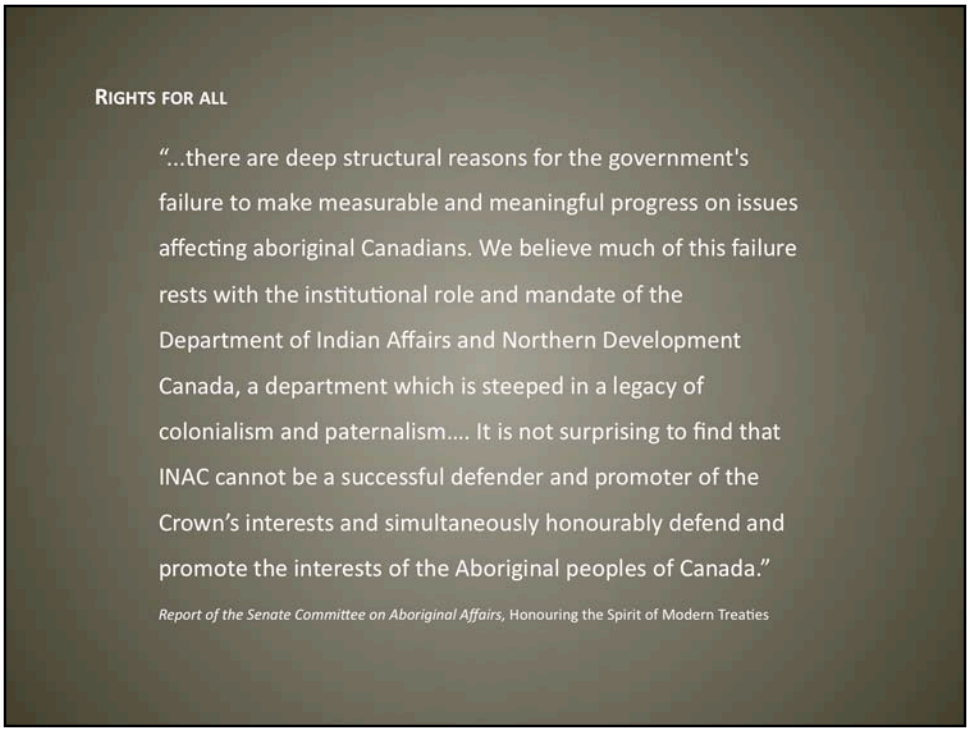
Certainly, this is the conclusion reached by the UN Special Rapporteur after looking into Canadian government response to a long-standing, unresolved land claim, that of the Lubicon Cree of northern Alberta.



This was also the conclusion reached 15 years ago by the Royal Commission on Aboriginal Peoples in relation to the land claims system as a whole.

Despite the affirmation of Aboriginal rights in the Canadian Constitution, the highest law in the land, and despite a wealth of court decisions elaborating on those rights, the Department of Indian and Northern Affairs and Justice Canada are consistent in fighting tooth and nail to minimize any acknowledgement of Aboriginal rights, to minimize government commitments, even to the point of making the surrender or non-assertion of inherent rights a condition for the finalization of treaty negotiations.

Take the case of First Nations child welfar.



Cindy Blackstock and the First Nations Child and Family Caring Society worked for 10 years to bring forward solutions that would close the gap in services for on reserve children. When the government demonstrated repeatedly that it was not prepared to move forward with the solutions advocated by First Nations' organizations, the Child and Family Caring Society and the Assembly of First Nations launched a discrimination complaint that was reviewed by the Canadian Human Rights Commission and then brought to the Human Rights Tribunal.

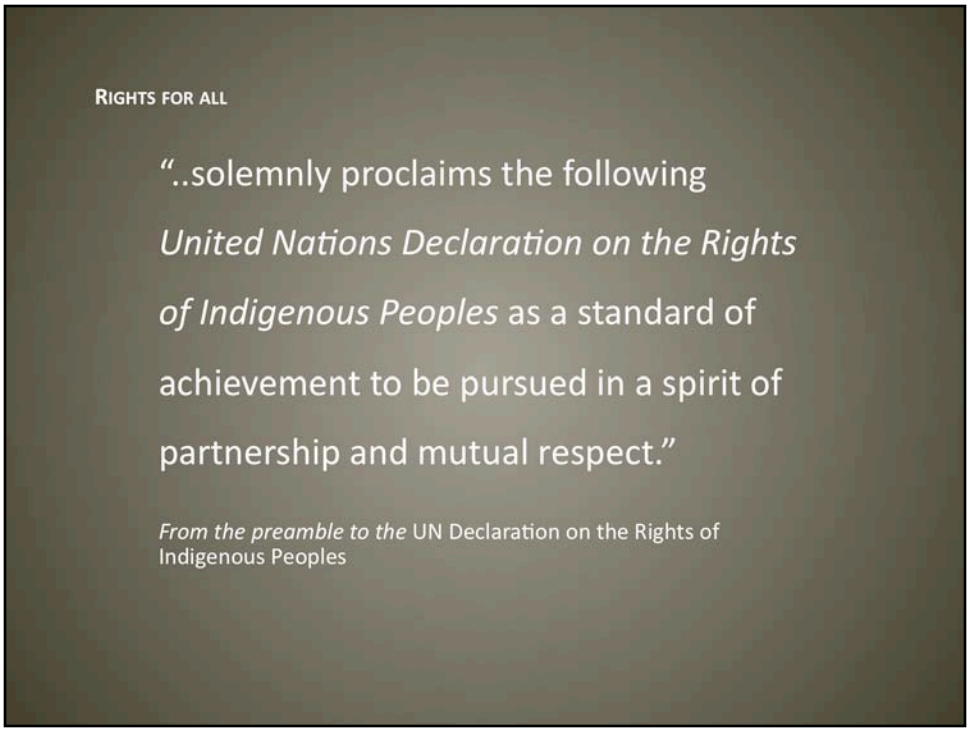
You may be aware that the Canadian Human Rights Act used to include a clause that effectively barred most complaints if they related to the administration of the Indian Act. The government of the day is responsible for removing that exemption and presumably is strongly in support of applying the Act on reserve.

However, the federal government has actually fought very hard to prevent the Tribunal hearing the child welfare. The government went twice to federal court to ask that the case be thrown out. When this failed, they were successful in arguing a motion to dismiss before the Tribunal itself. The complainants have now appealed this decision.

It's important to note that four years after the complaint was first filed, the actual merits of the case, whether or not First Nations children are suffering as the consequence of discrimination, has never been examined by either the Tribunal or the coourt. And if the federal government prevails, the merits will never be examined.

What the federal government has done is to argue that the case is outside the jurisdiction of the Tribunal. The arguments tat they've put forward are very troubling for the integrity of the Canadian Human Rights act and its application in Canada.

First of all the government argued that the prohibition of discrimination in services



At the same time, what this also shows is the urgency of putting the relationship between the federal government and Indigenous peoples on a radically different footing.

I would like to suggest that UN Declaration – which has been endorsed by Indigenous leaders across Canada, by the Canadian Parliament, and by the government itself - provides that framework. The first task of the government should be to sit down with Indigenous peoples and develop priorities and a timeline to actually move ahead with implementation.