



UNIVERSITY OF
TECHNOLOGY SYDNEY



Summary of the UN Declaration on the Rights of Indigenous Peoples

A Briefing Paper
Prepared by Rachel Davis
on behalf of the
Jumbunna Indigenous House of Learning
University of Technology Sydney
November 2007

Summary of the UN Declaration on the Rights of Indigenous Peoples

1. Overview

More than two decades in the making, the UN Declaration on the Rights of Indigenous Peoples is a major achievement by Indigenous peoples in the face of state reluctance, and sometimes active resistance, to address the issues contained in it. The Declaration goes beyond previous international statements on Indigenous rights, especially in key areas like self-determination, rights to lands, territories and resources, cultural integrity, and respect for existing treaty rights. Given its history however, it is not surprising that the legal implications of the Declaration are proving controversial. While the Declaration on its face is a non-binding instrument, the question is whether its provisions reflect existing customary international law (and thus, bind states regardless) or whether they simply suggest its likely development. An expert body has already been set up to consider this and the debate will no doubt take time to resolve. Meanwhile, the Declaration provides a clear international standard against which state behaviour can be judged by Indigenous peoples and their supporters, and held to be wanting.

2. Brief procedural history

In 1982, the UN Economic and Social Council established a Working Group on Indigenous Populations with the task of producing a declaration on the rights of Indigenous peoples. A "Draft Declaration on the Rights of Indigenous Peoples" (Draft Declaration) was agreed on in 1993, and approved by the Working Group's parent body, the Sub-Commission on the Protection and Promotion of Human Rights in 1994. It was then forwarded for consideration by the UN Commission on Human Rights, which established its own Working Group to consider the document.

The Commission was replaced in 2006 by the Human Rights Council, which, in its first substantive decision on 26 June 2006, adopted a revised text of the Draft Declaration by a vote of

30 in favor, 2 against, and 12 abstentions, and submitted the text to the General Assembly (GA).¹ Given the general support for the Draft Declaration in the Council, it was expected that it would be formally adopted by the GA at the start of its 61st session in November 2006. However, at this stage in the process, a number of states in the UN's African Group withdrew their support for the draft. While not all the Group initially agreed with the objections of some of its members, the Group eventually agreed to act as a voting bloc in dealing with the Draft Declaration. In December 2006, Namibia proposed a successful resolution deferring the vote on the Draft Declaration to the end of the 61st session in September 2007.² There was also a small number of states who had objected to the Declaration during its consideration by the Human Rights Council and continued to do so (some of whom eventually voted against it in the GA).

Between late 2006 and September 2007, Indigenous peoples and states supporting the Draft Declaration engaged in intense dialogue with the African Group. In early September, an agreement was reached between the state co-sponsors of the Draft Declaration and the African Group on nine amendments to the text as adopted by the Human Rights Council in June 2006. The Global Indigenous Peoples' Caucus Steering Committee on the Draft Declaration gave its approval to this amended text, which was then put before the GA.

On 13 September 2007, the GA adopted the amended text as the Declaration on the Rights of Indigenous Peoples (Declaration). Of the states present, 143 voted in favour, 4 voted against (Australia, Canada, New Zealand and the US) and 11 abstained.³

¹ Resolution 2006/2 (29 June 2006).

² UN Doc A/RES/61/178 (20 December 2006).

³ UN Doc A/RES/61/295 (13 September 2007).

3. Legal Significance

As a resolution of the GA, the Declaration does not, on its own, have legally binding effect unless it, or individual articles within it, can be said to reflect existing customary international law. At the same time, as a near unanimous resolution of the GA, the Declaration offers strong evidence of the likely development of customary international law, and helps hasten that development.

(a) Under international law

To constitute customary international law, a norm must be backed, first, by widespread and sustained state practice and second, by evidence that states are, or consider themselves to be, legally bound by it (also known as *opinio juris*). Some authoritative commentators have argued that a number of the principles in the Declaration reflect existing norms of customary international law,⁴ but others, including states, strongly disagree, arguing that the way that certain principles have been formulated in the Declaration, particularly in their application to Indigenous peoples, is not supported by state practice.

Several member states, including those voting in favour of the Declaration in the GA, issued statements at the time of voting purporting to “clarify” their interpretations of specific rights such as self-determination, and key concepts, like that of collective rights.⁵ In addition, the text of the Declaration is already quite complex as a result of successive compromises over its drafting history.

For all these reasons, determining to what extent each individual article in the Declaration can be said to reflect customary international law will be a slow process, and the International Law

⁴ See generally S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004). See also, Siegfried Wiessner, “Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis” (1999) 12 *Harvard Human Rights Journal* 57; S James Anaya and Robert A Williams Jr, “The Protection of Indigenous Peoples’ Rights over Lands and Natural Resources Under the Inter-American Human Rights System” (2001) 14 *Harvard Human Rights Journal* 33, cited in <<http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>>.

⁵ For example, the UK voted in favour of the Declaration while rejecting the concept of collective rights except in the case of self-determination. It also said that it regarded Article 3 as elaborating a “new” right to self-determination that would apply only to Indigenous peoples, and (presumably?) would be more limited in nature.

Association has appointed an expert Committee on the Rights of Indigenous Peoples (chaired by Prof S James Anaya) to do exactly this.

(b) Under domestic law

The Declaration has no immediate legal effect in Australia; even if it were a binding instrument (like a treaty), it would still require ratification by the Australian government and incorporation of its principles through legislation before it would take effect in national law. However, to the extent that its principles can be shown to reflect existing customary international law, Australia would be expected to respect them unless it can demonstrate that it has maintained a position as a “persistent objector” (which it has certainly attempted to do since the Coalition came to power in 1996). However, even persistent objector status would not be sufficient if a principle can be shown to be part of the special category of customary international law norms that are considered non-derogable (known as *jus cogens*), meaning that they can only be changed by the evolution of a contradictory norm of equal strength and cannot be “opted out of” in any other way. The ILA committee will be exploring exactly these issues.

(c) Development of the law

In the interim, the Declaration is an important, and emphatic, normative statement by the international community which is capable of speeding up the formation (or “crystallisation”) of customary international law and exerting what Anaya calls “a pull towards compliance”.⁶ It also forms a solid basis for future calls for a binding Convention in this area. Even before its adoption by the GA, the Declaration in its draft form was being drawn on by Indigenous peoples, NGOs and some states; since its adoption two months ago, the Declaration has already been cited by the Supreme Court of Belize in determining the land rights of the Maya peoples of Southern Belize under the constitution of Belize and relevant international law.⁷

⁶ S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004), p 62.

⁷ See <http://www.law.arizona.edu/depts/ipip/advocacy/maya_belize/index.cfm?page=advoc> for discussion of the case and a copy of the judgment.

4. Major Principles

The following outlines some of the central principles contained in the Declaration concerning: non-discrimination and fundamental rights, self-determination (including autonomy and participation rights), cultural integrity, rights to lands, territories and natural resources, and other rights relating to socio-economic welfare. (The ordering is not intended to suggest relative importance.) Some of the main provisions dealing with the Declaration's interpretation and implementation are then discussed.

(a) Non-discrimination and fundamental rights

Article 1 provides that Indigenous peoples and individuals are entitled to the full enjoyment of all the human rights and fundamental freedoms recognised in international law, and also to the right to be free from discrimination in the exercise of them (Article 2). Some articles mention specific rights that are to be enjoyed by Indigenous individuals without discrimination, including: the right to life, liberty and security (Article 7(1)); the possession of a nationality (Article 6); fundamental labor rights (Article 17); and the right to physical and mental health (Article 24). Some of these provisions also mention Indigenous peoples collectively (see Articles 7(2) and 17).

(b) Self-determination

One of the key principles in the Declaration, for which Indigenous peoples consistently fought, is Article 3 on the collective right to self-determination. Self-determination is found in both of the major international human rights covenants, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the Declaration mirrors their language. Common Article 1 of the Covenants provides that "all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Article 3 of the Declaration adopts this language and applies it specifically to Indigenous peoples.

There is substantial disagreement at the international level over what self-determination requires in any particular context, and especially over how the right to self-determination interacts with another fundamental principle, state sovereignty, as expressed through the protection of a state's territorial integrity and its political unity.

(i) Competing principles

The central amendment made to the Declaration as a result of the African Group's objections concerns state sovereignty. Article 46(1) now provides that nothing in the Declaration may be:

construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

The African Group also proposed amendments to the Declaration's Preamble (primarily a tool for interpreting the intentions of the parties signing onto or supporting an international instrument) to bolster this change. These amendments involved removing a paragraph referring to the right of Indigenous peoples to "freely determine their relationships with States", inserting a reference to the 1993 "Vienna Declaration and Programme of Action" (which recognises the principle of territorial integrity of states), and inserting a paragraph emphasising the wide variation in the situations of Indigenous peoples.

On the one hand then, the Declaration as adopted by the GA imposes constraints on self-determination; on the other, this simply replicates existing tensions in international law, leaving potential conflicts between the principle of self-determination and that of state sovereignty to be addressed on a case-by-case basis. Further, as the Indigenous Peoples' Caucus Steering Committee pointed out in its report on the African Group's proposed amendments, it remains to be seen how Article 46 will interact with the main provisions on lands and resources (Article 26) and on existing treaty rights (Article 37), which were left untouched.⁸

(ii) Autonomy and participation rights

Article 4 states that Indigenous peoples have "the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions". While Indigenous peoples "have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" they retain "their right to

⁸ Global Indigenous Peoples' Caucus Steering Committee, "The Declaration on the Rights of Indigenous Peoples: Report of the Global Indigenous Peoples' Caucus Steering Committee", 31 August 2007, p 5.

participate fully, *if they so choose*, in the political, economic, social and cultural life of the State” (Article 5, emphasis added).

The division between matters that can be described as “internal” to a people and those that involve their status or relations with other peoples, and are therefore “external”, has been criticised.⁹ Its use in the Declaration has been seized on by those claiming that the right of self-determination in Article 3 does not extend to “external” self-determination (a claim made by the US but also by some states who voted in favour of the Declaration, such as the UK). However, Article 36 recognises Indigenous peoples’ right to maintain and develop relations with their own members and with other peoples across international borders – a key element of “external” self-determination – so the issue remains open.¹⁰

With respect to participation, Indigenous peoples have the right to participate in decision-making in matters that would affect their rights, through their chosen representatives (Article 18). More specifically, law and policy-makers are required to engage in good faith consultation with Indigenous peoples with the aim of obtaining their “free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them” (Article 19). In particular, Indigenous peoples are entitled to be “actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programs through their own institutions” (Article 23). Indigenous peoples are entitled to “determine the structures and to select the membership of their institutions in accordance with their own procedures” (Art 33(2)).

(c) Cultural integrity

Indigenous peoples have the collective right to live in peace, free from acts of genocide and other forms of violence (Article 7). Indigenous peoples, individually and collectively, have the right to be free from forced assimilation or destruction of their culture (Article 8), and states must prevent against and provide redress for acts that damage their cultural integrity (such as forced transfer, dispossession of lands, territories and resources and discriminatory propaganda).

⁹ See Anaya, note 6 above, pp 104-106.

¹⁰ Significantly, the African Group sought to restrict the wording of Article 36 but was unsuccessful.

Indigenous peoples have the right to determine their own identity and membership, and to determine the responsibilities of individuals to their communities (Art 35). Indigenous individuals are entitled to belong to an Indigenous community or nation, and no discrimination of any kind may be directed against them for exercising this right (Article 9).

Indigenous peoples have the right to practice and revitalise their cultural traditions and customs in all their manifestations (Article 11). The Declaration also protects Indigenous peoples' rights (including intellectual property rights) over their cultural heritage, traditional knowledge and traditional cultural expressions (Article 31). States are required to take effective measures to recognise and protect these rights.

Several articles deal with the rights of Indigenous peoples in relation to specific cultural issues including:

- the maintenance and development of their religions, including the control and repatriation of ceremonial objects and human remains (Article 12);
- the maintenance and development of their histories, languages and other systems for transmitting cultural knowledge (Article 13);
- the right to education in their own cultures and languages (Article 14);
- the encouragement of respect for their distinct cultures and the reflection of them in broader education and public information programs (Article 15);
- the creation of Indigenous media and Indigenous access to non-Indigenous media (Article 16); and
- access to traditional medicines and the maintenance of traditional health practices (Article 24).

Again, states are required to take effective measures in respect of these rights, and in some cases, have specific responsibilities, for example, to provide interpretation services under Article 13.

Cultural integrity is a clearly established norm in the international human rights framework but it is therefore bounded by that same framework. Accordingly, Article 34 provides that Indigenous peoples' have the right to maintain and promote all aspects of their culture "in accordance with international human rights standards". This issue is discussed further below.

(d) Lands, territories and resources

Indigenous peoples have consistently articulated the centrality of control over their lands, territories and natural resources as crucial to self-determination and cultural integrity, and this has been recognised by various international bodies. Relevantly, the African Group's initial attempts to amend the lands and resources provisions in the Draft Declaration were subsequently dropped.

(i) Rights of ownership and control

The key provision in the Declaration on this topic is Article 26. It provides that “Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired”, and are entitled to “own, use, develop and control” such lands, territories and resources. States must give legal recognition and protection to these lands, territories and resources, with “due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”.

Indigenous peoples may not be forcibly removed from their lands or territories (Article 10). Relocation requires the free, prior and informed consent of the affected peoples, “after agreement on just and fair compensation”, and “where possible, with the option of return”. Where their lands or territories have been “confiscated, taken, occupied, used or damaged” without such free, prior and informed consent, Indigenous peoples are entitled to redress (Article 28). Redress may include restitution of the lands in question, rights over lands “equal in quality, size and legal status”, monetary compensation or other appropriate forms.

Regarding development of Indigenous lands, Article 32 provides that Indigenous peoples have the right to formulate their own priorities and strategies for the development or use of their lands, territories and resources. Importantly, the Declaration adopts the principle of the free, prior and informed consent of the affected peoples to any project affecting their lands, territories or resources, and requires states to provide appropriate redress and measures to mitigate adverse effects in such cases.¹¹

(ii) Preservation and protection

¹¹ Article 32 actually says “lands, territories and other resources” – it is not clear whether this is intended to be different in scope from “lands, territories and resources”, which is used in the other articles on this topic.

The Declaration acknowledges the importance to Indigenous peoples of maintaining and strengthening their relationship with their lands, territories and resources and their need to uphold their responsibilities to future generations in this respect (Article 25). Related to this, Indigenous peoples are entitled to assistance in protecting and conserving their lands (Article 29(1)).

The Declaration states that no hazardous materials shall be stored or disposed of on Indigenous peoples' lands without their free, prior and informed consent, and that where this does occur, provision must be made to address the health needs of the community concerned. Military activities may only take place with their consent; where there is "a significant threat to [a] relevant public interest", the requirement of consent may be waived but states must undertake "effective consultations" with the affected peoples (Article 30).

States must establish, in cooperation with the Indigenous peoples concerned, a fair, independent and transparent process to recognise and adjudicate their rights with respect to their lands, territories and resources, again, giving due recognition to their "laws, traditions, customs, and land tenure systems" (Article 27).¹² Indigenous peoples are entitled to participate in this process.

(e) Socio-economic well-being

Article 21 states that Indigenous peoples have the right to the improvement of their social and economic conditions and provides that states take effective measures "and, where appropriate, special measures" to ensure continuing improvement. Particular attention is to be given to the needs of Indigenous elders, women, youth, children and persons with disabilities.¹³ States are enjoined to take special care to protect Indigenous women and children from violence and discrimination (Article 22(2)).¹⁴

The Preamble acknowledges that the historic injustices suffered by Indigenous peoples have prevented them from exercising fully their right to development. Article 23 states that Indigenous peoples are entitled to determine and develop their own priorities and strategies for exercising

¹² It is not clear whether this is intended to be substantively different to the matters to be taken into consideration under Article 26, which do not include Indigenous peoples' "laws".

¹³ The need for special attention to be paid to these groups is reiterated in Article 22(1).

¹⁴ Special mention is also made of the need for protection of children's labor rights, and their right to education in their own culture (Articles 17 and 14(3)).

this important right. Article 20 provides that Indigenous peoples have the right to freely engage in and develop, among other things, their traditional and other economic activities, and that Indigenous peoples deprived of their means of subsistence and development are entitled to redress.

(f) Implementation and interpretation

The rights recognised in the Declaration are intended to constitute a minimum standard for the “survival, dignity and well-being” of Indigenous peoples (Article 43). Further, nothing in the Declaration may be construed as diminishing the rights Indigenous peoples already have now or may acquire in the future. (Article 45).

(i) Existing treaty rights

Together with the provisions on self-determination and lands and resources, another key principle in the Declaration is the preservation and protection of Indigenous peoples’ rights under existing treaties, agreements and other constructive arrangements. This is recognised as an “urgent need” in the Preamble, and provided for in Article 37 which states:

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive agreements concluded with States or their successors and to have States honor and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements, and constructive arrangements.

Treaties and other such agreements between Indigenous peoples and states are typically interpreted by the courts of one or other parties (and most often by those of the state concerned). So international acknowledgement of the principle of respect for existing agreements, even in a non-binding form, constitutes valuable guidance that may be taken into consideration by domestic courts (depending on the relevant domestic rules about the recognition and use of international sources).

(ii) Human rights considerations

Building on the specific qualification that the right to cultural integrity must be exercised with respect for other principles of international human rights law (discussed above), Article 46 expands this qualification to cover all the rights contained in the Declaration. It provides that the Declaration must be read in accordance with principles of justice, democracy, respect for human rights, equality and non-discrimination, as well as the principles contained in the UN Charter. However, any limitations placed on the exercise of Declaration rights as a result must be “strictly necessary” for securing respect for the rights and freedoms of others and for meeting the “most compelling requirements of a democratic society”.

Article 44 specifically states that the rights contained in the Declaration are equally guaranteed to male and female Indigenous individuals.

(iii) State responsibilities

States are required, in consultation with Indigenous peoples, to take appropriate measures (including national legislation) to achieve the goals of the Declaration, and to provide Indigenous peoples with access to financial and technical assistance for the enjoyment of the rights contained in it (Articles 38-39). The international community more broadly, through the UN and its agencies, is also expected to contribute (Articles 41-42). Note that the Human Rights Council is currently considering how to promote implementation of the Declaration, and has made this issue part of the renewed 3-year mandate of the Special Rapporteur on Indigenous Peoples.

Indigenous peoples are entitled to access to adequate grievance and dispute resolution mechanisms, as well as to “effective remedies for all infringements of their collective and individual rights” (Article 40). Such mechanisms must give “due consideration” both to the laws and customs of the Indigenous peoples concerned and to international human rights norms.