

INDIGENOUS STRUGGLES IN STANDARD-SETTING: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

MEGAN DAVIS*

[For over twenty years, indigenous peoples have worked toward the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. When the Declaration was passed on 13 September 2007, it was a triumph for indigenous peoples who had struggled with the rigidities of standard-setting in the UN system. The drawn out process of standard-setting was also a reflection of the complex issues that Member States had to grapple with, including acceptance of indigenous peoples' right to self-determination in international law as well as recognition of indigenous peoples' right to lands, territories and resources. This article describes the long process towards the Declaration for indigenous peoples and states, focuses on the frustrations of UN standard-setting for indigenous peoples and explains the importance of the Declaration for indigenous Australia.]

CONTENTS

I	Introduction.....	2
II	The Historical Development of the <i>Declaration on the Rights of Indigenous Peoples</i>	4
	A Who are Indigenous Peoples?.....	4
	B Standard-Setting in the UN Working Group on Indigenous Populations.....	6
	C Participation in the Working Group	8
III	The Politics of the Indigenous Declaration.....	9
	A The Controversy of the Working Group's Procedures	9
	1 The Skill of the Chairperson-Rapporteur	9
	2 The Indigenous 'No Change' Position	11
	3 Breaking the Deadlock	13
	4 The Breakthrough.....	15
	5 Some Observations on the Process.....	16
	B Adopting the Declaration: The African Delay	18
	1 The Advisory Opinion of the African Commission on Human Rights	19
	C Reflections on the Most Controversial Provisions	20
	1 Indigenous Peoples' Right to Self-Determination.....	20
	2 The Self-Determination Compromise	22
	3 Translating Self-Determination into Domestic Systems: What Does It Mean?	23
	4 Collective Rights	24
	5 Land and Resources	25
IV	The Way Forward	27
	A The Legal Status of the Declaration	27
	1 Immediate Impact.....	28

* Director, Indigenous Law Centre, and Senior Lecturer, Faculty of Law, University of New South Wales. Ms Davis is a UN Indigenous Fellow of the Office of the High Commissioner for Human Rights and participated in the Commission on Human Rights Working Groups elaborating the Draft Declaration in Geneva from 1999–2004. She is a member of the International Law Association Indigenous Rights Committee which is currently compiling an official commentary on the Declaration.

2	From a Declaration to a Convention?	29
3	The Impact of the Declaration on Australian Law	30
B	The Federal Government's Position — Explaining the Delay	30
V	Conclusion	33

I INTRODUCTION

The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted on 13 September 2007 as a non-binding, aspirational declaration of the General Assembly.¹ The adoption of the Declaration was a triumph for indigenous peoples after persevering for more than 20 years to secure an international instrument aimed at recognising the distinct cultural rights of indigenous peoples and providing redress for the injustice of dispossession. It was also a triumph for the United Nations, which had made the adoption of such a declaration the major objective of the UN International Decade of the World's Indigenous Peoples (1995–2004).²

Even so, the Commission on Human Rights' open-ended inter-sessional Working Group elaborating the Draft Declaration ('WGDD') laboured for over a decade to negotiate the final draft.³ The protracted and polemical debate that defined 11 years of drafting resulted in only two articles being provisionally adopted between the first drafting session in November 1995 and the 10th session in 2004.⁴

This commentary describes the long journey toward the Declaration undertaken by the international indigenous peoples movement. Since its early engagement with the UN in the 1970s, an international legal instrument has been a major goal of the movement. As an indigenous lawyer and academic who participated in the drafting process, this commentary aims to provide an insight into UN standard-setting from an indigenous perspective. Indigenous peoples' reflections on standard-setting in the UN system are important because the development of the Declaration was the first time that states had drafted a human rights instrument directly with the rights-holders empowered by the instrument. As a consequence, the divergent expectations of the Member States and indigenous peoples collided, resulting in a drawn-out and often tense process. While there has been significant discussion on the Declaration in draft form, its adoption provides an opportunity to expound upon indigenous peoples' experiences of standard-setting in the UN human rights system.⁵

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, 107th plen mtg, UN Doc A/RES/61/295 (13 September 2007).

² *International Decade of the World's Indigenous People*, GA Res 52/108, UN GAOR, 52nd sess, 70th plen mtg, UN Doc A/RES/52/108 (18 February 1998) [6] ('*International Decade of the World's Indigenous People*').

³ See generally Victoria Tauli-Corpuz, 'Message of Victoria Tauli-Corpuz, Chairperson of the UN Permanent Forum on Indigenous Issues, on the Occasion of the Adoption by the General Assembly of the Declaration on the Rights of Indigenous Peoples' (Press Release, 13 September 2007) 1.

⁴ Articles 5 and 43 were 'non controversial articles' passed in November 1997.

⁵ See generally S James Anaya, *Indigenous Peoples in International Law* (2004); Alexandra Xanthaki, *Indigenous Rights and the United Nations Standards: Self-Determination, Culture and Land* (2007); Irene Bellier, 'The Declaration on the Rights of Indigenous Peoples and the World Indigenous Movement' (2005) 14 *Griffith Law Review* 227; Jeff J Corntassel and

Part II of this commentary will trace the development of indigenous engagement with the UN and eventually the proposal for a declaration. Then, Part III will unmask the complex politics of the WGDD, revealing indigenous frustrations with the process and explaining how the impasse between states and indigenous peoples at the WGDD was disrupted in the final years, avoiding closure by the Council on Human Rights. This part explores two less-examined issues in the literature on the Draft Declaration: the role of the Chairperson of the WGDD and the indigenous ‘no change’ negotiating strategy. These examples are pivotal because they contributed to the initial slow progress and yet, in the end, the reversal of the indigenous ‘no change’ strategy and the Chairperson’s last minute, innovative working methods converged to create momentum for the Working Group.

Due to the lack of consensus on the substantive issues of self-determination, collective rights and land, the Chairperson of the WGDD attempted to reconcile the divergent interests of indigenous peoples and states in a ‘Chairperson’s text’ that was submitted to the Council on Human Rights and eventually transmitted to the General Assembly. However, during the debate in the Third Committee of the General Assembly (Social, Humanitarian and Cultural Committee), indigenous peoples faced another setback as the African Group delayed consideration of the Declaration for a year while seeking legal advice on the implications of self-determination and collective rights for African countries.⁶ Part III concludes by describing how the African groups’ concerns were addressed and the Declaration adopted.

Part IV is a reflection on the most controversial provisions of the Declaration, the right to self-determination, collective rights and lands, territories and resources. This section reveals the chasm between states and indigenous peoples during the drafting sessions but posits that since the adoption of the Declaration the legal environment has changed for both indigenous peoples and the states.

Part V concludes by addressing some of the issues for Australia in endorsing the Declaration. The Declaration is non-binding and aspirational and does not require ratification through Australia’s treaty process. However, the Federal Government has not yet endorsed the Declaration despite an election commitment to do so in 2007.⁷ This delay is causing anxiety in Aboriginal and Torres Strait Islander communities who have relied on international law to close

Tomas Hopkins Primeau, ‘Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”’ (1995) 17 *Human Rights Quarterly* 343; Caroline E Foster, ‘Articulating Self-Determination in the Draft Declaration on the Rights of Indigenous Peoples’ (2001) 12 *European Journal of International Law* 141; Stefania Errico, ‘The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview’ (2007) 7 *Human Rights Law Review* 741, 755.

⁶ *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994: Amendments to the Draft Resolution A/C.3/61/L.18/Rev.1/Namibia [on behalf of the Group of African States]*, UN GAOR, 3rd Comm, 61st sess, Agenda Item 68, UN Doc A/C.3/61/L.57/Rev.1 (21 November 2006) (‘*African Group Amendments*’).

⁷ Australian Labor Party, *Election Platform 2007 — Aboriginal Peoples and Torres Strait Islanders* (2007) <http://www.alp.org.au/platform/chapter_13.php#13aboriginal_peoples_and_torres_strait_islanders> at 23 September 2008.

the protection gap in human rights pertaining to indigenous peoples.⁸ The Australian Government has stated that it will endorse the Declaration but it is currently undergoing consultations with states, territories and other stakeholders regarding its impact. This is unusual given the Declaration will have no legal effect in Australian law. It does, however, illustrate the political sensitivity of indigenous rights in Australia. Further, the caution may be compounded by community confusion and ambiguity surrounding the concept of customary international law.⁹ The commentary concludes by suggesting the practical use of the Declaration for the state and for Aboriginal and Torres Strait Islander peoples in Australia.

II THE HISTORICAL DEVELOPMENT OF THE *DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES*

A *Who are Indigenous Peoples?*

The first serious response by the UN to the issue of indigenous peoples was when the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities commissioned the Special Rapporteur, José Martínez Cobo, to conduct a comprehensive study of discrimination against indigenous peoples.¹⁰ The Cobo Study was the first of its kind in the world and provided a detailed survey of the ways in which indigenous peoples suffer discrimination in the areas of health, housing, education, cultural rights, land rights, political rights and the administration of justice. One of the most influential outcomes of the study was Cobo's comprehensive definition of indigenous peoples. Cobo constructed a 'working definition' of indigenous peoples as

those which, having a historical continuity with pre-invasion and pre-colonial societies ... [who] consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.¹¹

⁸ See, eg, Australian Human Rights Commission, *Social Justice Report 2006*, ch 4 (International Developments on the Rights of Indigenous Peoples — Closing the 'Protection Gap'); Gillian Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the *Native Title Amendment Act 1998* (Cth)' (1999) 23 *Melbourne University Law Review* 372.

⁹ See generally Adam Gartrell, 'Opposition Indigenous Law Claims "Wrong"', *The Australian* (Sydney, Australia) 10 March 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23350257-12377,00.html>> at 23 September 2008; Glenn Milne, 'UN Puts Skids Under Bipartisanship', *The Australian* (Sydney) 10 March 2008 <<http://www.theaustralian.news.com.au/story/0,25197,23346288-33435,00.html>> at 23 September 2008; Keith Windschuttle, 'A Depressing New Agenda for Aboriginal Politics', *Quadrant* (Sydney, Australia) June 2008, 46.

¹⁰ José Martínez Cobo, Special Rapporteur, *Study of the Problem of Discrimination Against Indigenous Populations — Volume 5: Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4 (March 1987).

¹¹ *Ibid* [379]. The report continues:

While this definition is the most frequently cited, it is technically not an official definition of indigenous peoples and there is no definitive characterisation.¹² According to the UN Permanent Forum on Indigenous Issues, no formal universal definition of the term is necessary and for practical purposes the Cobo definition is an accepted understanding only.¹³ For some states, the Cobo definition is utterly unacceptable, in particular Asian and African Member States, which have argued in the past that no indigenous peoples exist in their regions and that 'indigenous' groups are actually minority groups.¹⁴ The lack of a formal definition informed the African Group's decision to defer consideration of the Draft Declaration in 2006.¹⁵

During the two decades over which the Cobo Study was undertaken, indigenous peoples began to form alliances with civil society groups and their

This historical continuity may consist of the continuation, ... into the present, of one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc); (d) Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general or normal language); (e) Residence in certain parts of the country, or in certain regions of the world; [and] (f) Other relevant factors.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference': at [380]–[382].

¹² The other legal definition of 'indigenous peoples' is enumerated in art 1(1) of the International Labour Organisation *Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries*, opened for signature 27 June 1989, 28 ILM 1382 (1989) (entered into force 5 September 1991) ('*ILO Convention 169*):

- (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) Peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Article 2 provides that '[s]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply'.

¹³ UN Secretariat of the Permanent Forum on Indigenous Issues, 'The Concept of Indigenous Peoples' (Background Paper to Workshop on Data Collection and Disaggregation for Indigenous Peoples, New York, US, 19–21 January 2004) UN Doc PFII/2004/WS.1/3 <http://www.un.org/esa/socdev/unpfii/documents/workshop_data_background.doc> at 23 September 2008.

¹⁴ See generally *ibid*; Sarah Pritchard, 'Working Group on Indigenous Populations: Mandate, Standard-Setting Activities and Future Perspectives' in Sarah Pritchard (ed), *Indigenous Peoples, United Nations and Human Rights* (1998) 42.

¹⁵ *African Group Amendments*, above n 6.

voice and presence at UN human rights forums increased.¹⁶ This advocacy led to widespread dissemination of information about the dispossession of indigenous peoples' lands. The purview of this advocacy was that dispossession did not conclude with colonisation as there are continuing, contemporary manifestations of dispossession. The stories told by indigenous representatives revealed a remarkably similar impact of colonisation upon indigenous peoples' lives worldwide.¹⁷ Regardless of the diverse economic, political and social situations in which the world's indigenous peoples live, the narrative of the indigenous plight reflected loss of lands, loss of autonomy and control, loss of languages and discrimination in municipal laws and policies. The UN has estimated the world's indigenous population to be over 300 million in over 70 different countries, and indigenous lobbying focused on ways in which the UN could provide greater scrutiny of the way in which states treat indigenous peoples behind the shield of state sovereignty.¹⁸ This lobbying led to the establishment of the UN Working Group on Indigenous Populations ('WGIP'), the first human rights mechanism established to consider indigenous issues.

B *Standard-Setting in the UN Working Group on Indigenous Populations*

The WGIP was established by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities in 1982 as authorised by the UN Economic and Social Council ('ECOSOC').¹⁹ It was comprised of five independent members and its mandate was to review 'developments pertaining to the promotion and protection of the human rights and fundamental freedoms of [i]ndigenous populations ... [and] to give special attention to the evolution of standards concerning the rights of such populations'.²⁰

The first aspect of the WGIP mandate — the review of developments — enabled the WGIP to gather information about the historical and contemporary experiences of indigenous peoples through their oral and written interventions. This information gathering was aided by a flexible working procedure and

¹⁶ For a concise history, see Joshua Cooper, 'Persistent Resistance: UN and the Non-violent Campaign for the Human Rights of Indigenous Peoples' (2003) 22(3) *Social Alternatives* 17. See generally Anaya, above n 5; Ravi de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (2006); Xanthaki, above n 5; Rhiannon Morgan, 'Advancing Indigenous Rights at the United Nations: Strategic Framing and Its Impact on the Normative Development of International Law' (2004) 13 *Social and Legal Studies* 481; Elsa Stamatopoulou, 'Indigenous Peoples and the United Nations: Human Rights As a Developing Dynamic' (1994) 16 *Human Rights Quarterly* 58.

¹⁷ See, eg, UN Commission on Human Rights, *Discrimination against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Eleventh Session*, 45th sess, Agenda Item 14, UN Doc E/CN.4/Sub.2/1993/29 (23 August 1993).

¹⁸ UN Office of the High Commissioner for Human Rights, *Fact Sheet No 9 (Rev 1): The Rights of Indigenous Peoples* (1997), available from <<http://www.ohchr.org>> at 23 September 2008; Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' (1999) 12 *Harvard Human Rights Journal* 57; Russel L Barsh, 'Indigenous Peoples: An Emerging Object of International Law' (1996) 80 *American Journal of International Law* 369.

¹⁹ *Study of the Problem of Discrimination against Indigenous Populations*, ESC Res 1982/34, ESCOR, 28th plen mtg, UN Doc E/RES/1982/34 (7 May 1982) ('*Study of the Problem of Discrimination*'). See generally Anaya, above n 5, 221–2.

²⁰ *Study of the Problem of Discrimination*, above n 19.

‘innovative rules’ that enabled widespread indigenous participation.²¹ This flexible and innovative Working Group engendered a casual environment that permitted frank and fearless discussion about the conduct of states that would not ordinarily be permitted in UN mechanisms further up the UN hierarchy. The latter aspect of the mandate — standard-setting — led to the development of the Declaration.

It was during its fourth session in 1985 that the WGIP resolved to elaborate an international instrument on indigenous rights.²² The purpose of this would be to address the protection gap in international human rights law of legal standards pertaining to indigenous peoples.²³ Even though the drafting was formally undertaken by the five independent members of the WGIP, indigenous peoples participated actively in the drafting of the text.²⁴

The standard-setting mandate enabled the expert members to substantively respond to the issues that indigenous peoples had raised during their oral and written interventions. The Draft Declaration²⁵ produced by the expert members was lengthy and over-elaborated for an international human rights instrument. Burger acknowledged that the draft, with its 19 preambular paragraphs and 45 articles, was ‘unusually long — undoubtedly a result of its efforts to encompass all the diverse experiences brought to the attention of the Working Group’.²⁶ Indigenous peoples were proud that each article was a reflection on the

²¹ See generally Xanthaki, above n 5; Sarah Pritchard (ed), *Indigenous Peoples, United Nations and Human Rights* (1998); Sarah Pritchard, ‘The United Nations and the Making of a Declaration on Indigenous Rights’ (1997) 89 *Aboriginal Law Bulletin* 4.

²² UN Commission on Human Rights, *Report of the Working Group on Indigenous Populations on Its Fourth Session Annex II: The First Principles Drafted for the Future Declaration*, UN Doc E/CN.4/Sub.2/1985/22 (27 August 1985).

²³ *Ibid.*

²⁴ See generally, Russel L Barsh, ‘Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and the Irresistible Force’ (1996) 18 *Human Rights Quarterly* 782; Sarah Pritchard, ‘Declaration on Rights of Indigenous Peoples — Drafting Nears Completion in UN Working Group’ (1993) 60 *Aboriginal Law Bulletin* 9, 10. According to Julian Burger, who oversaw the Indigenous Unit at the UN Office of the High Commissioner for Human Rights in Geneva and the UN Secretariat for the WGIP, indigenous activists from different regions of the world ‘found the time to travel to the United Nations office in Geneva to offer their views and suggestions to the five-member expert Working Group’: Julian Burger, ‘The United Nations Draft Declaration on the Rights of Indigenous Peoples’ (1996) 9 *St Thomas Law Review* 209, 209.

²⁵ Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Resolution 1994/45: Draft United Nations Declaration on the Rights of Indigenous Peoples*, 46th sess, 36th mtg, UN Doc E/CN.4/SUB.2/RES/1994/45 (26 August 1994), annex (*Draft United Nations Declaration on the Rights of Indigenous Peoples*) (‘Draft Declaration’).

²⁶ Julian Burger, ‘The United Nations Draft Declaration on the Rights of Indigenous Peoples’, above n 24, 210.

experiences of indigenous peoples both historically and today:

Every paragraph of the Draft Declaration is based upon known instances of the violations of the human rights of indigenous peoples. There is nothing theoretical, abstract, or speculative about the substantive content of the Draft Declaration. The Draft Declaration began from a cry from the indigenous peoples for justice, and it is drafted to confirm that the international standards which apply to all peoples of the world apply to indigenous peoples. It is an inclusive instrument, meant to bring indigenous peoples into the purview of international law as subjects of international law.²⁷

The final text of the Draft Declaration was concluded by the WGIP in 1993 and was followed by a technical review by the Secretariat.²⁸ Finally, in 1995, the Commission on Human Rights ('CHR') established an open-ended, inter-sessional working group to elaborate a draft declaration.²⁹

C Participation in the Working Group

The WGDD, as a CHR working group, would normally require indigenous peoples to have ECOSOC non-governmental organisation consultative status. This consultative status is vital to the capacity of indigenous peoples to participate in the more restrictive UN bodies such as ECOSOC.³⁰ In the case of the WGDD (like the innovative working procedures of the WGIP) special arrangements were made to enable broad indigenous participation with observer status for indigenous observers.³¹

A specialist procedure was agreed upon permitting those without ECOSOC consultative status to apply to the Indigenous Secretariat at the Office of the High Commissioner of Human Rights for authorisation to attend the WGDD.³² In determining authorisation, the Secretariat took into consideration the objectives and expertise of the indigenous organisation and consulted the relevant Member State. The UN Voluntary Fund for Indigenous Populations,

²⁷ Mathew Coone Come, Grand Chief of the Grand Council of the Crees, at a seminar organised by the Aboriginal and Torres Strait Islander Commission, Sydney, 1995, as cited in Sarah Pritchard and Charlotte Heindow-Dolman, 'Indigenous Peoples and International Law: A Critical Overview' (1998) 3 *Australian Indigenous Law Reporter* 473, 477.

²⁸ UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples Forty-Sixth Session*, 46th sess, Agenda Item 15, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994); UN Commission on Human Rights, *Further Promotion and Encouragement of Human Rights and Fundamental Freedoms, including the Question of the Programme and Methods of Work of the Commission: Report of the Secretary-General Forty-Ninth Session*, 49th sess, Agenda Item 11, UN Doc E/CN.4/1993/29 (15 January 1993).

²⁹ UN Commission on Human Rights, *Report of the Working Group on the Elaboration of a Draft United Nations Declaration on the Rights of Indigenous Peoples Fifty-Second Session*, 52nd sess, Agenda Item 3, UN Doc E/CN.4/1996/84 (4 January 1996) ('*Fifty-Second Session Report*').

³⁰ *Charter of the United Nations* art 71 states that '[t]he Economic and Social Council may make suitable arrangements for consultation with non-governmental organizations which are concerned with matters within its competence'.

³¹ *Establishment of a Working Group of the Commission on Human Rights To Elaborate a Draft Declaration in accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, ESC Res 1995/32, ESCOR, 52nd plen mtg, UN Doc E/CN.4/1995/32 (25 July 1995).

³² *Ibid.*

which had been established to fund activities in the International Decade of the World's Indigenous Peoples, provided the funding for indigenous peoples to attend the WGDD.

III THE POLITICS OF THE INDIGENOUS DECLARATION

A *The Controversy of the Working Group's Procedures*

From the outset, the WGDD faced ostensibly insuperable problems — a constant struggle between indigenous observers and Member States over content and process.

This section analyses the two main reasons behind the slow progress of the WGDD. It is divided into two parts, the first is a discussion of the role of the Chairperson in the protracted debate and the second is a discussion of the indigenous caucus's 'no change' negotiating strategy in the WGDD.

1 *The Skill of the Chairperson-Rapporteur*

Indigenous observers' relationship with Chairperson-Rapporteur Chavez was fraught with difficulties from the beginning. They found him to be inconsistent and that he gave excessive weight to the objections of Canada, Australia, New Zealand and the US (the CANZUS Group) in seeking consensus on the text. These states were perceived as being obstructionist in their conduct and as persistent objectors to provisions relating to the right to self-determination and lands, territories and resources.

One of the major clashes between Member States and indigenous observers emerged in the seventh session when indigenous observers raised concerns with the Chairperson about the states' private drafting sessions, conducted during the two weeks allocated by the UN for the WGDD.³³ These 'informal' consultations also involved the drafting of 'non-papers', which were, in fact, an alternative text to the Draft Declaration. These 'informal' consultations and 'non-papers' led to heated debate about the good faith and transparency of the process.³⁴

Informal consultations and private meetings are not uncommon in UN multilateral conferences. However, indigenous peoples argued that it was expensive for them to travel to Geneva to attend the meetings and therefore discussions should occur in the plenary meeting.³⁵ By 2002, these 'informals' were being entrenched as the usual method of work of the WGDD, with the full support of the Chairperson. Indigenous peoples reminded Member States that they travelled to Geneva each year to debate the original Sub-Commission text and found it frustrating to spend each day waiting as states privately drafted an alternative text and then submitted what was referred to as 'non-papers' to the plenary meeting for debate.

³³ See generally UN Commission and Human Rights, *Summary of the Informal Intercessional Consultations Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995*, 59th sess, UN Doc E/CN.4/2002/WG.15/WP.4 (14 November 2002).

³⁴ See especially Megan Davis, 'The United Nations Draft Declaration 2002' (2002) 5(16) *Indigenous Law Bulletin* 6, 6–9.

³⁵ For an explanation of the importance of informal consultations and meetings in multilateral conferences, see Ronald Walker, *Multilateral Conferences: Purposeful International Negotiation* (2004) 202–5.

According to former Australian diplomat Ronald Walker, UN multilateral conferences are ‘encounters between human beings’ and, as meetings continue, the outcome can often depend on the atmosphere of the room and the ‘chemistry’ of the meeting:

this chemistry, the cumulative effect of successive incidents and many other disparate factors impact on the collective mood of the delegates and predispose them to disagreement or, alternatively, to mutual tolerance, accommodation and agreement.³⁶

Unfortunately for the Chair, the informal consultations conducted by states, however common these might be for multilateral diplomats within the UN system, were not conducive to a productive environment. For indigenous peoples, ‘informal’ consultations were a euphemism for state secrecy and a lack of transparency and consultation, which they considered to be the reasons for the situation indigenous peoples are in today.

In 2002, after protesting, indigenous people were eventually invited to attend the private government meetings without speaking privileges and were offered question time of 15 minutes at the end of each session. From that time on, states were more sensitive to indigenous concerns about using the allocated two weeks for the WGDD to conduct private, informal meetings. They still conducted ‘informals’ but not with such disregard for the time and expense indigenous observers had given to participating in plenary discussions in Geneva.

By 2004, however, indigenous observers had serious doubts about the Chairperson’s capacity to progress the WGDD. Indigenous observers had written a letter to the Chairperson-Rapporteur Chavez in 2003 raising concerns about his methods of work and actions as Chair.³⁷ One of their main complaints was his lack of leadership, which they believed had ‘contributed directly to the lack of progress’.³⁸ An example of this was that, prior to the 2003 WGDD, indigenous observers had worked hard on those articles that had the best chance of provisional adoption. Despite the fact that state proposals and indigenous peoples’ proposals had garnered ‘widespread support either publicly or behind the scenes’, the Chairperson-Rapporteur failed to acknowledge this consensus and failed to push for a provisional adoption.³⁹ According to indigenous peoples, ‘despite the upbeat dialogue and unprecedented confidence building measures that emerged between states and [i]ndigenous peoples on a range of articles ... you chose to overlook the opportunity to provisionally adopt any articles’.⁴⁰

The Chairperson’s aversion to seeking consensus was another of their major complaints. According to indigenous observers:

There is no clarity on this issue yet we are aware of the fact that the Working Group is not bound by unanimity in decision making in the CHR. The rules of procedure reflect that consensus does not mean unanimity. Therefore, we should not be drafting based upon the lowest common denominator. Rather, we have had

³⁶ Ibid 218.

³⁷ Letter from Indigenous Caucus of the Open-ended Intersessional Working Group on the Draft Declaration to Luis Enrique Chavez, Chairperson-Rapporteur, Open-ended Intersessional WGDD, Commission on Human Rights, July 2004 (copy on file with author).

³⁸ Ibid.

³⁹ Ibid.

⁴⁰ Ibid.

a number of opportunities last year and previously wherein it was possible to ‘provisionally’ adopt articles and allowing states to register their provisos. That is what provisional adoption actually is.⁴¹

The notion of consensus was a continuing problem throughout the 11 years. Indigenous observers knew from state interventions to the floor over the first nine years of the WGDD that the majority of states were committed and had no major conceptual problems with the Draft Declaration. The states who interjected and objected the most were the CANZUS group. Indeed, it was the US that was the sole and most frequent objector. For the Chairperson, even a sole US objection was evidence of non-consensus.⁴²

There existed a stark difference in expectations of states and indigenous observers. For indigenous observers, the US’s constant objections were frustrating and often without logical, legal basis.⁴³ Yet, according to Walker, in UN multilateral conferences it is accepted that

‘[b]y consensus’ means that no significant body of opinion voices objection to the decision ... No one would contest that the US alone constitutes such a body and US delegates frequently say, in the course of negotiation, ‘there is no consensus on that’ meaning, ‘the United States vetoes it’.⁴⁴

2 *The Indigenous ‘No Change’ Position*

Having considered the role of the Chairperson in the slow progress of the WGDD, the strategy of the indigenous observers will now be examined. The text of the Draft Declaration was over-elaborated in parts, contained some fundamental errors of grammar, inconsistencies and repetitive language. Although early on it was clear that the majority of states were supportive of the idea and spirit of a declaration on indigenous rights, the inconsistencies meant that many states ‘were eager to push for changes’ while remaining supportive of the spirit of the Declaration.⁴⁵ In contrast, many members of the indigenous caucus called for the immediate adoption of the Draft Declaration as adopted by

⁴¹ Ibid.

⁴² The following exchange illustrates the inconsistency in Chavez’s approach to consensus. In this example, indigenous peoples and many states were pushing for the provisional adoption of preambular paragraph one of the Draft Declaration as only the UK and the US were objecting to it. Willie Littlechild QC, a Cree Indian observer, asked for a point of clarification on the Chair’s refusal to provisionally adopt the preambular paragraph given it had consensus approval from all but the US and UK.

Chair: First of all its [sic] not 2 its [sic] 3 maybe the Russian delegation has objections (??) and there may be more

Russia: The Russian delegation is prepared to adopt it without any changes.

Chair: I view silence as being support so don’t take floor [sic] if you do support it ...
Transcript of Commission on Human Rights Working Group, 10th sess, Day One, Afternoon Session (Recorded by Megan Davis and Ruth McCausland, 15 February 2005) (copy on file with author).

⁴³ See US Mission to the UN, Department of State, ‘Explanation of Vote by Robert Hagen, US Advisor, on the Declaration on the Rights of Indigenous Peoples to the UN General Assembly’ (Press Release, 13 September 2007).

⁴⁴ Walker, above n 35, 160.

⁴⁵ Xanthaki, above n 5, 104.

the Sub-Commission without debate or amendment.⁴⁶ These two positions collided and prevented any progress on the Declaration from 1995 to 2004. For this reason, it is important to understand the philosophy behind the indigenous ‘no change’ policy.

From the outset, indigenous observers displayed a strong emotional attachment to the original text because many felt that any amendment would corrupt the original text, diminishing the achievements of those indigenous leaders who participated in WGIP drafting — many of whom had since deceased. While the first WGDD was relatively uneventful and the least controversial articles were provisionally adopted,⁴⁷ during the second WGDD the indigenous caucus adopted a ‘no change’ policy⁴⁸ and called for the immediate adoption of the text ‘without change, amendment or deletion’.⁴⁹ Eventually the indigenous observers staged a walk-out because of disagreement about the proposed work agenda and by the third session the indigenous position to reject any amendment to the text and adopt a ‘no change’ policy was entrenched.

The ‘no change’ policy resulted in the rejection of any suggestions for amendment to the original text. The caucus argued that any indigenous participation in plenary debate over alternative language would sanction changes to the text and mean that all aspects of the Declaration would be up for negotiation. The caucus members felt it would be ‘tantamount to tacit endorsement of the inevitability of textual change, and to shift power to those States most aggressively seeking to dismember the existing Declaration’.⁵⁰ Indigenous observers also argued that there was a risk of indigenous rights being formally derogated in international law through a weaker and watered down text.

The WGDD conference room dynamics were complex. They involved states who found indigenous observers to be ‘difficult to work with, inflexible and unwilling to seek compromises’ and indigenous peoples who found states to be non-transparent and untrustworthy.⁵¹ Before progress could be made on the text, flexibility would be needed on both sides. Indigenous observers would have to be more flexible in their negotiating strategy and states would have to modify their faithful adherence to multilateral conference procedure so as to be more inclusive of and transparent to indigenous observers.

⁴⁶ Sarah Pritchard, *Setting International Standards: An Analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples* (2nd ed, 1998) 10.

⁴⁷ UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32*, 54th sess, Agenda Item 23, UN Doc E/CN.4/1998/106 (15 December 1997) (‘Fifty-Fourth Session Report’).

⁴⁸ UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32*, 55th sess, Agenda Item 15, UN Doc E/CN.4/1999/82 (20 January 1999).

⁴⁹ *Statement of Indigenous Peoples Caucus to the Chairperson of the Intersessional Open-Ended Working Group Established to Elaborate a Draft Declaration on the Rights of Indigenous Peoples* (21 October 1996), as cited in Sarah Pritchard, ‘The United Nations and the Making of a Declaration on Indigenous Rights’, above n 21, 7.

⁵⁰ ‘The response of Indigenous representatives at CHRWG 5 to the States’ alternate texts’: *ibid.*

⁵¹ Julian Burger, ‘Standard-Setting: Lessons Learned for the Future’ (Paper presented at the International Council on Human Rights Policy and International Commission of Jurists Workshop, Geneva, Switzerland, 13–14 February 2005).

3 *Breaking the Deadlock*

The first attempt to break the deadlock created by the ‘no change’ position was manufactured by Mick Dodson, the Human Rights and Equal Opportunity Commission (‘HREOC’) Aboriginal and Torres Strait Islander Social Justice Commissioner and former consultant to the Aboriginal and Torres Strait Islander Commission. Dodson attempted to shift the indigenous position by suggesting a negotiating framework upon which changes could be made to the text. This framework, which became known as the Dodson Principles, was predicated upon the standard-setting principles set out by the General Assembly in 1986.⁵² The Dodson Principles emphasised that the textual amendment of the draft Declaration must be founded on the basis of a very high presumption of the integrity of the existing text.⁵³ The Principles asserted that, in order to ‘rebut that presumption, any proposed change must be shown to be’:

- 1 Reasonable;
- 2 Necessary; and
- 3 Improve and strengthen the existing text.

In addition, any proposal must be consistent with the fundamental principles of:

- 1 Equality;
- 2 Non-discrimination; and
- 3 The absolute prohibition of racial discrimination.⁵⁴

Despite this attempt, Dodson’s proposal failed to shift the position of the indigenous caucus, even though by this stage many indigenous observers were becoming publicly critical of the strategy.⁵⁵ For example, in 2004, the Asian Indigenous and Tribal Peoples Network submitted a statement to the Chairperson

⁵² *Setting International Standards in the Field of Human Rights*, GA Res 41/120, UN GAOR, 40th sess, 97th plen mtg, UN Doc A/RES/41/120 (4 December 1986). These stated that any amendments should:

- (a) Be consistent with the existing body of international human rights law;
- (b) Be of fundamental character and derive from the inherent dignity and worth of the human person;
- (c) Be sufficiently precise to give rise to identifiable and practicable rights and obligations;
- (d) Provide, where appropriate, realistic and effective implementation machinery, including reporting systems; [and]
- (e) Attract broad international support.

See also *Fifty-Fourth Session Report*, above n 47, 6.

⁵³ UN Commission on Human Rights, *Written Statement Submitted by the Aboriginal and Torres Strait Islander Commission*, 57th sess, Agenda Item 15, UN Doc E/CN.4/2001/NGO/54 (23 January 2001) 2.

⁵⁴ *Ibid* 2.

⁵⁵ UN Commission on Human Rights, *Written Statement Submitted by the Asian Indigenous and Tribal Peoples Network (AITPN)*, 60th sess, Agenda Item 15, UN Doc E/CN.4/2004/NGO/138 (9 March 2004).

on the obstinacy of the indigenous position:

The adoption of the 'no change' position by the Indigenous Caucus appears to be unreasonable, even to sympathetic countries ... It is a delusion to think that Indigenous peoples' cause is advanced by sticking to present stalemate situation [sic] ... Unless something drastic happens, after the deluge of the International Decade, the [WGDD] will end up being a damp squib. Ultimately, it all boils down to whether Indigenous peoples will give up their infamous 'no change' position.⁵⁶

Until then such public criticism by an indigenous representative had been unheard of, although privately some sympathetic states did believe that '[i]ndigenous obduracy ... plays into the hands of the States that are the least willing to compromise'.⁵⁷

Eventually the 'no change' position was abandoned and indigenous observers participated in amending the text. This was partly informed by the impending conclusion of the Indigenous Decade and the uncertainty surrounding the new Human Rights Council, which would replace the CHR. There was anxiety about whether or not the Council would renew the mandate given no progress had been made for nine years.

There remained internal division in the indigenous caucus over this decision and there were continuing attempts by some indigenous observers to suspend the WGDD. The International Indian Treaty Council ('IITC') had supported the 'no change' position and, in 2005, in response to the developing Chairperson's text, wrote to the CHR to request that the process be suspended. The IITC letter stated that

the process which has developed over the last few years in the Intersessional Working Group is not in the best interests of Indigenous Peoples, as it provides a few States with the opportunity to weaken and undermine the Draft Declaration.⁵⁸

Nevertheless the IITC position was rebutted by the Inuit Circumpolar Conference, the Grand Council of the Crees and other indigenous organisations on the basis that any recess would hamper the momentum that had been achieved in 2004 with the abandonment of the 'no change' policy.⁵⁹

The new-found willingness to negotiate and participate in drafting workshops alongside states was not without controversy within indigenous circles. Many indigenous observers who supported the 'no change' policy began to argue in the indigenous caucus that they had stronger legal rights to protection within their

⁵⁶ Ibid [4].

⁵⁷ Burger, 'Standard-Setting: Lessons Learned for the Future', above n 51.

⁵⁸ Letter from the International Indian Treaty Council and Others to the United Nations Commission on Human Rights, 15 March 2005, available from <<http://www.pcpd.org.nz/ddrip/letter.html>> at 23 September 2008.

⁵⁹ Dalee Sambo Dorough and Romeo Saganash, 'Urgent Call to Defend the Rights of Indigenous Peoples — Grand Council and Inuit Circumpolar Conference Refute Call by International Indian Treaty Council to Suspend Indigenous Rights Standard-Setting Process at UN for Up To Three Years' (Press Release, 30 March 2005). See also UN Commission on Human Rights, *Effective Functioning of Human Rights Mechanisms: Joint Written Statement Submitted by American Indian Law Alliance and Inuit Circumpolar Conference, Non-Governmental Organizations in Special Consultative Status and Grand Council of the Crees, a Non-Governmental Organization on the Roster*, 59th sess, UN Doc E/CN.4/2003/NGO/120 (12 March 2003).

own states (that is, by means of treaties, constitutional recognition and statutory recognition) and, therefore, would not support the redrafting of the text. The indigenous Australia delegation, along with some Pacific Islands, were isolated from this discussion, as they came from states that have neither treaties, constitutional recognition nor a charter of rights enshrining non-discrimination.

The policy of 'no change' was a significant factor in the slow progress of the WGDD. The policy was unsustainable and it reflected the markedly divergent expectations of the indigenous peoples and Member States in terms of human rights standard-setting. The indigenous caucus strategy reflected the suspicion and distrust that most indigenous communities felt toward the state. Indigenous oral interventions frequently alluded to the state's failure to honour treaty agreements and referred to the wealth of many states, especially the CANZUS states, that had been acquired through the dispossession of indigenous lands. On the other hand, Member States, expert in multilateral diplomacy, would never adopt an international instrument without substantive debate and amendment.

The UN is, after all, primarily a body of member states and each year it conducts thousands of multilateral conferences. Walker has written one of the few texts analysing UN multilateral conference procedure.⁶⁰ He notes that 'the procedures and processes of such meetings are distinctive, as are the strategies and skills which participants must deploy if they are to achieve their objectives'.⁶¹ While the 'no change' policy enabled the indigenous caucus to demonstrate the lack of trust indigenous communities have for the state, over time it became an untenable strategy.

4 *The Breakthrough*

It was not until 2004 that significant advances were made by the WGDD in breaking the impasse between states and indigenous peoples.⁶² The WGDD began poorly with the Chairperson's inconsistency over the working method. As it progressed, however, the Chairperson initiated more effective conference room techniques to break the impasse between indigenous peoples and the states. While one indigenous Australian observer, Bill Smith, suggested the Chairperson get out the 'butcher's paper' to identify agreement on proposals, the Chair used methods such as the use of an overhead projector and pen to highlight agreed language. The Chairperson also broke up the plenary meeting into small working parties to work on clusters of articles. In some cases he deliberately coupled those states and indigenous observers together who were most diametrically

⁶⁰ See Walker, above n 35.

⁶¹ *Ibid* xix.

⁶² UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Tenth Session*, 61st sess, Agenda Item 15, UN Doc E/CN.4/2005/89 (28 February 2005).

opposed to each others' position. As Burger observed of this breakthrough:

confidence building requires time for the exchange of views ... only in the last year or so have small meetings with indigenous and governmental facilitators become the norm. Confidence building implies small groups, frank discussions and co-operation on end results and, above all, a greater emphasis on informal procedures and facilitation outside the plenary.⁶³

The role of the Chair in multilateral conferences is pivotal to building momentum and Chavez displayed skill towards the end of the process in achieving momentum after a decade of impasse. Over the decade, he developed the confidence to deal with the room dynamics of Member States and indigenous observers and demonstrated flair in 'coaxing agreement' between indigenous observers and states and managing the interventions of uncommitted or obstructive delegations.⁶⁴ However, credit must be given to the indigenous caucus as abandoning the 'no change' position was also pivotal to gaining momentum.⁶⁵ The Chairperson's flexibility and the indigenous caucus's change of heart resulted in a spirited environment in which the Chair was able to commence drafting the Chairperson's text to formulate a compromise among states and indigenous peoples.⁶⁶

While the Chair's skill developed over the course of the 11 years, the end product — the Chairperson's text — was controversial among both states and indigenous peoples. The Chairperson's text, when eventually submitted to the Human Rights Council, had not been subject to a general debate and had not been seen by many indigenous peoples. Chavez conceded that it did not achieve consensus but 'a wide support'.⁶⁷ The Chairperson also alluded to the difficulty of the working procedures stating that the WGDD was unique in the UN system and, given its *sui generis* procedures, the solution appropriate for the WGDD could not be used as a precedent for other UN working groups with more 'traditional participation'.⁶⁸

5 Some Observations on the Process

The 'no change' policy aside, it was inevitable that this Declaration would be a drawn out and fractured process.⁶⁹ The issues of indigenous peoples strike at

⁶³ Julian Burger, 'Standard-Setting: Lessons Learned for the Future', above n 51.

⁶⁴ For a discussion of the process of 'coaxing agreement', see Walker, above n 35, 219–20.

⁶⁵ Ibid 212–13.

⁶⁶ See especially UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995: Chairperson's Summaries of Proposals*, 62nd sess, UN Doc E/CN.4/2005/WG.15/CRP.7 (20 December 2005).

⁶⁷ 'Closing Comments of Chairperson Luis Enrique Chavez', quoted in Indigenous Peoples Centre for Documentation, Research and Information, *Update 70: July/August 2006* (2006) 8, available from <<http://www.docip.org>> at 23 September 2008.

⁶⁸ Ibid.

⁶⁹ Although it seems the indigenous 'no change' strategy was largely responsible for the prolonged process in the WGDD, the length of time was not novel to the UN standard-setting system. Declarations that have taken over a decade to negotiate include the: *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, GA Res 53/144, UN GAOR, 3rd Comm, 53rd sess, 85th plen mtg, Agenda Item 110(b), UN Doc A/RES/53/144 (8 March 1999); *Declaration on the Protection of All Persons from*

the very core of the Westphalian state system and state sovereignty. Indigenous rights pertaining to consultation and participation, and more substantive rights relating to land, territories and resources are inextricably linked with dispossession and the exclusion of indigenous peoples from the institutions of the colonising state. While the power imbalance weighed in favour of Member States in the WGDD, the strength of indigenous interventions based on historical narratives was powerful and influential to many states.

The clash of expectations between indigenous observers and experienced multilateral diplomats was stark throughout the 11 years of drafting. As Mary Robinson, the High Commissioner for Human Rights, acknowledged at the third CHR Working Group, this was ‘an unusual standard-setting activity by which governmental delegations have an opportunity to discuss directly with the beneficiaries of the Draft Declaration’.⁷⁰ Yet, as Sarah Pritchard, legal advisor to the Aboriginal and Torres Strait Islander Commission, observed of the early negotiations in the Working Group, ‘[w]hilst the level of technical expertise required to engage in such dialogue created difficulties for some delegations, indigenous participants demonstrated considerable skill and erudition in their interventions’.⁷¹

Despite the fact the Declaration is a non-binding instrument with weak provisions for enforcement, such an instrument is drafted to create norms of behaviour by which states can be guided. The power of this is that certain behaviour as a result of the non-binding instrument may become a norm. However, to get to that point, states need to be comfortable with the standards that are recognised in any draft text. In adopting a ‘no change’ position, indigenous strategy failed to appreciate this.

Today, indigenous peoples are working toward implementation of the Declaration. Currently work is being done with the UN Permanent Forum on Indigenous Issues (‘UNPFII’) to determine how the Declaration should be implemented by the UN and its agencies. The UNPFII is also discussing how the Declaration’s implementation by Member States can be assessed and how state practice can be formally monitored. Moreover there is a new UN mechanism that has been established in Geneva. This mechanism replaces the WGIP which was abolished by the ECOSOC. As the UNPFII does not have a standard-setting mechanism then this new mechanism will set about the task of what further standards need to be developed in international law pertaining to indigenous rights. Given that the WGDD has been the biggest hurdle for indigenous peoples since they began their international activism, it is likely that the next instrument

Enforced Disappearance, GA Res 47/133, UN GAOR, 3rd Comm, 47th sess, 92nd plen mtg, Agenda Item 97(b), UN Doc A/RES/47/133 (12 February 1993); *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities*, GA Res 47/135, UN GAOR, 3rd Comm, 47th sess, 92nd plen mtg, Agenda Item 97(b), UN Doc A/RES/47/135 (3 February 1993).

The UN does not have a time frame in which instruments should be drafted although the UN Commission on Human Rights did determine in 2000 that a ‘time-frame should not in principle exceed five years’: UN Commission on Human Rights, *Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights*, 56th sess, 67th mtg, UN Doc E/CN.4/DEC/2000/109 (26 April 2000) 10.

⁷⁰ *Fifty-Fourth Session Report*, above n 47, 8.

⁷¹ Sarah Pritchard, ‘Commission on Human Rights Working Group (CHRWG) Third Session 27 October–7 November 1997’ (1998) 4(10) *Indigenous Law Bulletin* 4, 5.

to be negotiated will not be as lengthy as the Declaration now embeds indigenous rights in international law.

B *Adopting the Declaration: The African Delay*

In 2005, Chavez sent the Chairperson's text to the new Human Rights Council and, in its first session in June 2006, it adopted the text with a vote of 30 in favour, two against and 12 abstentions.⁷² The text then moved to the General Assembly where it was sent to the Third Committee to be considered. Indigenous peoples expected the Declaration to be passed in 2006. However, in the Third Committee there was a lack of consensus and it was scuttled by an African coalition who sought deferral of the Declaration. The African concerns mirrored the controversies of the WGDD: self-determination, collective rights and the definition of indigenous peoples.

Namibia proposed an amendment that the Third Committee defer consideration of the Declaration for a year.⁷³ The Committee decided to allow this proposal 'to allow time for further consultations thereon'.⁷⁴ Rwanda, for example, intervened in the debate, stating that the Declaration

established divisive policies and set a bad precedent. It isolated groups and incited them to establish their own institutions alongside central existing ones. That would weaken [African] States as a whole and hinder their recovery processes.⁷⁵

Furthermore the African group questioned the right to self-determination and asked whether it

may be wrongly interpreted and understood as the granting of a unilateral right to self-determination and a possible cessation [sic] to a specific section of the national population, thus threatening the political unity and territorial integrity of any country.⁷⁶

This was frustrating for the indigenous observers because the African Group never participated in the working groups that drafted the text.⁷⁷ Even though CANZUS were typically obstructionist, the African Group's proposal to defer was disheartening to indigenous peoples because they had never attended the

⁷² See UN Human Rights Committee, *Third Periodic Reports of States Parties Due in 1998 — Addendum (Venezuela)*, UN Doc CCPR/C/VEN/98/3 (30 March 1999) 3; UN Human Rights Committee, *Fourth Periodic Reports of States Parties Due in 1998 — Addendum (Peru)*, UN Doc CCPR/C/PER/98/4 (17 March 1999) 3–4.

⁷³ *African Group Amendments*, above n 6. The UN Third Committee adopted the Namibian amendment by a recorded vote of 82 in favour, 67 against and 25 abstentions.

⁷⁴ *Ibid.*

⁷⁵ *Third Committee Approves Draft Resolution on Right to Development: Votes to Defer Action concerning Declaration on Indigenous Peoples*, 61st sess, 3rd Comm, 53rd mtg, UN Doc GA/SHC/3878 (28 November 2006).

⁷⁶ As cited in African Commission on Human and Peoples' Rights, *Advisory Opinion of the African Commission On Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples* (adopted by the 41st ord sess, 16–30 May 2007) 5 ('*African Commission Advisory Opinion*').

⁷⁷ One indigenous leader argued that '[i]t's the US, Canada, Australia and New Zealand who are responsible for this': Haider Rizvi, *UN Delays Vote on Native Self-Determination*, *Inter Press Service* (Italy) 28 November 2006 <<http://www.ipsnews.net/news.asp?idnews=35638>> at 23 September 2008. A Mexican diplomat was also quoted as saying, '[i]t seems strange to ask for more time, as 24 years worth of negotiations have taken place'.

decade-long WGDD. CANZUS opposition was expected but the opposition of the African Group was not. In 2006, indigenous peoples expected that the Declaration would be adopted by the Third Committee and the General Assembly.

1 *The Advisory Opinion of the African Commission on Human Rights*

The Assembly of the African Union identified the key questions to be further examined in consultations: the definition of indigenous peoples; self-determination; ownership of land and resources; establishment of distinct political and economic institutions; and national and territorial integrity.⁷⁸ These issues reflected the major sticking points over the 11 years that the Declaration was being drafted. The African Commission on Human and Peoples' Rights ('ACHPR') requested the Working Group of Experts on Indigenous Populations to respond to the concerns of the African Group with regard to the Declaration, which was handed down in an Advisory Opinion in May 2007.⁷⁹

The ACHPR held that a definition of indigenous peoples was not necessary as there is no universally agreed definition, and it was more constructive 'to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa'.⁸⁰ In addressing the concern that recognising 'indigenous peoples' may equate to special treatment of indigenous peoples over other citizens, the Advisory Opinion invoked the international law of substantive equality stating that the recognition or identification of indigenous peoples is not about 'protecting the rights of a certain category of citizens over and above others', nor does it 'create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized'.⁸¹

In relation to concerns about self-determination and territorial integrity, the Advisory Opinion reiterated the consensus that had been achieved in the Working Group that self-determination can only be exercised in the context of art 46 of the Declaration, the savings clause, which reaffirms the extract on territorial integrity from the *Declaration on Friendly Relations*.⁸² The ACHPR held that art 46 was consistent with the African Commission's jurisprudence on the inviolability of borders acquired at independence of the African Member States and respect for their territorial integrity.⁸³ The ACHPR also acknowledged the evolution of the right to self-determination in international law and referred to the 'visibility' of the claims made by indigenous peoples in international law and that these claims were clearly made 'according to the modalities which are

⁷⁸ Assembly of the African Union, *Decision on the United Nations Declaration on the Rights of Indigenous Peoples*, 8th ord sess, AU Doc Assembly/AU/Dec141(VIII)Add.6 (29–30 January 2007).

⁷⁹ *African Commission Advisory Opinion*, above n 76.

⁸⁰ *Ibid* 3.

⁸¹ *Ibid* 13.

⁸² *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*, GA Res 2625, UN GAOR, 6th Comm, 25th sess, 1883rd plen mtg, UN Doc A/RES/2625 (24 October 1970) ('*Declaration on Friendly Relations*').

⁸³ *African Commission Advisory Opinion*, above n 76, 5.

compatible with the territorial integrity of the Nation States to which they belong'.⁸⁴

As a result of the Advisory Opinion, the African states successfully inserted into the preamble: '[r]ecognizing that the situation of [i]ndigenous peoples varies from region to region and from country to country'.

With the African concerns assuaged, on 13 September 2007, the General Assembly adopted the Declaration by vote (at the insistence of CANZUS) with 143 states in favour, 4 against and 11 abstentions.

C Reflections on the Most Controversial Provisions

1 Indigenous Peoples' Right to Self-Determination

For indigenous peoples, the right to self-determination is the cornerstone of the Declaration⁸⁵ and without states' acceptance of the right to self-determination the catalogue of rights protected in the body of the Draft Declaration cannot be effective.⁸⁶ Article 3 of the Draft Declaration recognised that '[i]ndigenous 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'.⁸⁷

Many states agreed with this position.⁸⁸ For those states that objected, their concerns were based mostly on issues of state sovereignty and territorial integrity. There were also concerns about non-interference and the financial implications of many socio-economic dimensions of self-determination.⁸⁹

Advocacy for the recognition of the indigenous right to self-determination and its elaboration in the Draft Declaration suffered from the legacy of decolonisation in international law. Self-determination for indigenous peoples was still viewed by many states as synonymous with decolonisation and a threat to the territorial integrity and sovereignty of states. To counter the dominant decolonisation construct of self-determination, indigenous observers pointed to the fact that many scholarly commentators support the position that the right to

⁸⁴ Ibid 6.

⁸⁵ Noted explicitly by Venezuela, in particular, as well as other states: Pritchard, *Setting International Standards*, above n 46, 46.

⁸⁶ 'The right of self-determination is the heart and soul of the declaration. We will not consent to any language which limits or curtails the right of self-determination': Pritchard, 'Working Group on Indigenous Populations', above n 14, 46.

⁸⁷ Draft Declaration, above n 25, art 3.

⁸⁸ Such as Bolivia, Colombia, Cuba, Fiji, Finland, Guatemala, Mexico, Norway, Pakistan and Switzerland: Xanthaki, above n 5, 110.

⁸⁹ See, eg, *Fifty-Second Session Report*, above n 29; *Fifty-Fourth Session Report*, above n 47; UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32*, 56th sess, Agenda Item 15, UN Doc E/CN.4/2000/84 (6 December 1999) ('*Fifty-Sixth Session Report*'); UN Commission on Human Rights, *Working Group of the Commission on Human Rights to Elaborate a Draft Declaration in accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994*, CHR Res 2001/58, 57th sess, 76th mtg, UN Doc E/CN.4/RES/2001/58 (4 April 2001). For an excellent discussion of this issue, see Catherine J Iorns, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty' (1996) 24 *Case Western Reserve Journal of International Law* 199.

self-determination, as articulated in the *UN Charter*, cannot be limited to the colonial context.⁹⁰

Literal as well as more comprehensive interpretation supports the evidence that the words ‘*all* peoples have the right ...,’ in Article 1 refer to any people irrespective of the international political status of the territory it inhabits. It applies, then, not only to the peoples of territories that have not yet attained political independence, but also to those of independent and sovereign states.⁹¹

Indigenous observers also drew attention to the fact that while some scholars argue that the right to self-determination is *jus cogens*, ‘this evaluation is also rejected by some’.⁹² As a peremptory norm, this would mean that the right to self-determination cannot be derogated by states.⁹³ Despite the legal authority raised by indigenous observers in the Working Group, concerns remained regarding potential destabilisation of states. Establishing an effective and persuasive legal argument to underpin indigenous peoples’ claim to the right to self-determination has been a factor in the slow development of indigenous rights in international law.

Interestingly, one of the most effective arguments was indigenous observers’ articulation of the evolving right of democratic governance in international law. The development of this right signalled a change in the international understanding of the right of self-determination as a right to decolonisation to a right of democracy, which indigenous peoples seized upon. They pinpointed voluminous scholarship positing self-determination as the right of peoples to determine their political destiny ‘in a democratic fashion and is therefore at the core of the democratic entitlement’.⁹⁴ This norm was said to be derived from the international principle of the right to self-determination, the ‘oldest aspect of the democratic entitlement’.⁹⁵ The norm of democratic governance is also said to derive from the right to political participation as established in the *UN Charter*,

⁹⁰ James Crawford, ‘The Right to Self-Determination in International Law’ in Philip Alston (ed), *Peoples’ Rights* (2001) 7, 27.

⁹¹ Antonio Cassese, ‘The Self-Determination of Peoples’ in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (1981) 92, 94 (emphasis in original).

⁹² Karl Doehring, ‘Self-Determination’ in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (1995) 56, argues that ‘no one can challenge the fact that, in light of contemporary international realities, the principle of self-determination necessarily possesses the character of *jus cogens*’: at 70.

⁹³ Hector Gros Espiell, Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Doc E/CN.4/Sub.2/405/Rev.1 (1980) 12.

⁹⁴ Thomas Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 *American Journal of International Law* 46, 52. For discussion, see also Gregory H Fox, ‘The Right to Political Participation in International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 48; James Crawford, ‘Democracy and the Body of International Law’ in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 91; Roland Rich, ‘Bringing Democracy into International Law’ (2001) 12(3) *Journal of Democracy* 20; Henry Steiner, ‘Political Participation As a Human Right’ (1988) 1 *Harvard Human Rights Yearbook* 77.

⁹⁵ Franck, above n 94, 52.

art 21 of the *Universal Declaration of Human Rights*⁹⁶ and art 25 of the *International Covenant on Civil and Political Rights*.⁹⁷

Particularly attractive was the idea that self-determination could facilitate special political arrangements in order to enhance the way in which indigenous peoples determine their lives within the state. The idea of secession has never been seriously entertained by the activists in the international indigenous movement — though it certainly has been by various indigenous groups around the world. The Declaration seeks to assist states in the implementation of the indigenous right to self-determination within a democratic system without disrupting public institutions or the rule of law.

2 *The Self-Determination Compromise*

The Chairperson attempted to assuage the fears of those states primarily concerned about self-determination — the US, Australia and New Zealand — by creating an additional art 3 *bis* and inserting the language of a modified form of art 31 of the draft to accompany the self-determination provision.⁹⁸ Article 3 *bis* (which later became art 4) read:

Indigenous peoples, in exercising their right to self-determination, 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.⁹⁹

In this way, the language of art 3 *bis* explicitly limited the right to self-determination to internal aspects of self-determination. Indigenous observers originally objected to the qualifying of self-determination because the Declaration, when adopted, would be already subject to existing international law. Yet the combination of art 3 and art 3 *bis* seemed to ease many states' concerns about sovereignty and territorial integrity.

In addition, in order to counter state fears about secession, indigenous peoples also supported a qualification to art 3 with the explicit inclusion of the territorial safeguard clause from the *Declaration on Friendly Relations* in the text.¹⁰⁰ Explicit reference to the *Declaration on Friendly Relations* was made in art 46,

⁹⁶ GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (10 December 1948).

⁹⁷ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (see especially art 25). See also Human Rights Committee, *General Comment No 25: The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art 25)*, 57th sess, UN Doc CCPR/C/21/Rev.1/Add.7 (12 July 1996).

⁹⁸ UN Commission on Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples Forty-Sixth Session*, 46th sess, Agenda Item 15, UN Doc E/CN.4/Sub.2/1994/2/Add.1 (20 April 1994). Article 31 of the Draft Declaration reads:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

⁹⁹ UN Commission on Human Rights, *Report of the Working Group Established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 on its Eleventh Session*, 61st sess, Agenda Item 15, UN Doc E/CN.4/2006/79 (22 March 2006).

¹⁰⁰ Above n 82.

which was designed to guarantee the territorial integrity of states. In fact, art 46, known as the ‘savings clause’, has become a catch-all provision to arrest state fears about the implications of the recognition of cultural rights for municipal legal systems and concerns about the impact of the *United Nations Declaration on the Rights of Indigenous Peoples*¹⁰¹ upon the rule of law. Article 46 renders all the articles subject to existing international and domestic law.¹⁰²

3 *Translating Self-Determination into Domestic Systems: What Does It Mean?*

The remaining articles in the operative section of the text explain what the right to self-determination means in actual practice. As stated above, the right to self-determination is the cornerstone of the Declaration and is reflected in its provisions. The Declaration is a very clear exercise in translating the right to self-determination from international law into the domestic context.

In translating self-determination under art 3 into practical steps, the Declaration combines positive rights for indigenous peoples and negative rights for states that are divided into a number of themes: threats to the survival of indigenous peoples;¹⁰³ cultural, religious, spiritual and linguistic identity;¹⁰⁴ education and public information;¹⁰⁵ participatory rights;¹⁰⁶ and land and resources.¹⁰⁷ The most important provision after art 3 is art 4, because it observes that in exercising the right to self-determination indigenous peoples do have the right to ‘autonomy or self-government’ in relation to their internal cultural and local affairs. Importantly, it also recognises that indigenous peoples are entitled to ways and means for financing their autonomous functions. As an aspirational

¹⁰¹ Above n 1.

¹⁰² Article 46 reads:

- 1 Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or 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.
- 2 In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
- 3 The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.

¹⁰³ *United Nations Declaration on the Rights of Indigenous Peoples*, above n 1, art 43.

¹⁰⁴ *Ibid* arts 11–13.

¹⁰⁵ *Ibid* arts 14–15.

¹⁰⁶ *Ibid* arts 5, 18, 27, 41.

¹⁰⁷ *Ibid* arts 8, 10, 25–6.

instrument, this gives states an idea of the way in which self-determination can be realised through indigenous institutions.¹⁰⁸

The Declaration also gives guidance to states on how these substantive rights can be implemented within domestic legal and political systems. One of the main mechanisms for achieving that is art 37 which recognises the right of indigenous peoples to conclude treaties, agreements or other constructive arrangements with states. This is important in terms of the treaty debate in Australia as it is currently viewed through a prism of territorial integrity. Article 38 also provides that the state, in cooperation with indigenous peoples, shall take appropriate measures, including legislative measures, to achieve the ends of the Declaration. However it does not mean that states must take legislative measures to implement the Declaration, such an interpretation being at odds with the aspirational nature of a non-binding international instrument.

4 *Collective Rights*

The Declaration recognises the collective rights of indigenous peoples, which creates a tension between the traditionally individual nature of Western human rights discourse and indigenous peoples' rights. For some states, collective rights were controversial, given the relationship between collective and individual rights, and for others, like Australia, collective rights were already part of the domestic legal system.¹⁰⁹ Indigenous peoples referred to the extensive jurisprudence from the UN human rights supervisory bodies establishing the importance of recognising indigenous peoples' right to self-determination as a collective group in order to enjoy fundamental individual human rights as well as

¹⁰⁸ Some of the manifestations of the theme of self-determination in the Declaration in arts 11–13 include indigenous peoples having the right to practice and revitalise cultural traditions and customs as well as the right to maintain, protect and develop past, present and future manifestations of indigenous culture (archaeological and historical sites, artefacts, performing arts or literature). This also means that states should assist indigenous peoples in maintaining and protecting religious and cultural sites and recognising the right to the repatriation of human remains.

Articles 14–18 iterate what indigenous-specific rights to education, information and labour rights means for indigenous peoples and states in the domestic context. This includes the right of all children to education by the state as well as the right to establish and control indigenous educational systems and institutions. Importantly, this also includes the right of indigenous children living outside their community to be provided with access to education in their own culture and language.

Articles 18–23 are a cluster of participatory rights that elaborate upon how self-determination can be exercised through economic and social rights. This bundle enables the state to take special measures for immediate, effective and continuing improvement of economic and social conditions of indigenous peoples, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. In Australia, for example, many of these measures are already taken and therefore it is clear that many of these rights can be and have been implemented by many states.

Articles 31–6 explain how the right to self-determination can be implemented in relation to indigenous peoples determining their own strategies to maintain, control, protect and monitor internal matters to the group on issues such as culture, education, information, media, housing, employment, social welfare, economic activities, land and resources, and the environment. This section also empowers indigenous peoples with the right to promote and maintain traditional judicial customs, procedures and practices.

¹⁰⁹ For example, through the *Native Title Act 1993* (Cth). For a discussion of the controversy over collective rights, see *Fifty-Second Session Report*, above n 29.

resolving the tension between individual and collective rights.¹¹⁰ The indigenous observers referred to a number of international instruments to support the argument that collective rights were already recognised in international law.¹¹¹

Nevertheless, collective rights remained controversial throughout the WGDD's discussions; in particular, the use of the word 'peoples' attracted considerable debate early in the talks. The enormous amount of time and energy taken to resolve the 'peoples' debate required the Secretariat to ensure that the letter 's' was bracketed in the word 'peoples' and the official UN report of the WGDD was always qualified by the following statement:

This report is solely a record of the debate and does not imply acceptance of the usage of either the expression 'indigenous peoples' or 'indigenous people' [by all governments]. In this report both terms are used without prejudice to the positions of particular delegations, where divergence of approach remains.¹¹²

5 *Land and Resources*

Articles 24–30 relate to land and resources and reflect the importance of land and the environment to indigenous peoples and the survival of their culture. The land and resource cluster also relates to the militarisation of indigenous lands; free and prior informed consent; and principles of land conservation, restoration and protection of the environment. The importance of indigenous peoples'

¹¹⁰ See generally *General Recommendation XXI on the Right to Self-Determination*, as contained in annex VIII(B) of the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 51st sess, Supp No 18, UN Doc A/51/18 (30 September 1996); UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Australia*, UN Doc A/55/40 (24 July 2000) [3]; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Mexico*, UN Doc CCPR/C/79/Add.109 [19]; UN Human Rights Committee, *Concluding Observations of the Human Rights Committee: Canada*, UN Doc CCPR/C/79/Add.105 [8]; UN Human Rights Committee, *Report of the Human Rights Committee*, UN GAOR, 50th sess, Supp no 40, UN Doc A/50/40 (30 October 1995) [175];

¹¹¹ UN Commission on Human Rights, *Report of the Working Group on the Elaboration of a Draft United Nations Declaration on the Rights of Indigenous Peoples*, 58th sess, UN Doc E/CN.4/2002/98 (6 March 2002) [34].

The indigenous observers relied on the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 211, arts 1(a), 2, 4(a), 14 (entered into force 4 January 1969) ('*CERD*') and the *ILO Convention 169*, above n 12.

The 1986 *African Charter on Human and Peoples' Rights*, opened for signature 27 June 1981, 1520 UNTS 217, arts 19, 20, 21, 22, 23, 24 (entered into force on 21 October 1986) provide recognition of indigenous peoples' claims to collective rights, whilst the *Convention on Biological Diversity*, opened for signature 5 June 1992, 1760 UNTS 142 (entered into force 29 December 1993) (inter alia) also affirms collective rights.

¹¹² See *Fifty-Second Session Report*, above n 29.

relationship to land is reflected in the preamble:

Concerned that Indigenous peoples have suffered from historic injustices as a result of, inter alia, the colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of Indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources ...¹¹³

As with many of the clusters in the Declaration, this one contains rights that are already recognised in other international instruments.¹¹⁴ The most controversial articles on land and resources are arts 25 and 26.

Most states supported the spirit of the articles but felt they required more precision in their drafting because of the implications of these rights for domestic land tenure systems. The US believed the language to be too broad and imprecise, while other states such as Australia and Canada argued that the articles needed to be amended in light of their own domestic land laws.¹¹⁵

The most controversial article in the WGDD was art 27, which recognised the right to restitution of the lands, territories and resources which indigenous peoples have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without free and fair compensation. This article raised concerns among states about the different legal implications of the word 'restitution' in different legal systems, such as the civil and common law systems. Article 28 in the Declaration is novel in that it recognises the right to redress that may include restitution when lands, territories and resources have been confiscated, occupied, used or damaged without free, prior and informed consent. Where restitution is not possible there is a right to just, fair and equitable compensation.

The notion of 'free, prior and informed consent' is contentious in this cluster because of the ambiguity of its definition. Recognised to varying degrees in international law, the principle requires that indigenous peoples are consulted on the decisions that affect their communities.¹¹⁶

Substantively, the principle of free, prior and informed consent recognizes [i]ndigenous peoples' inherent and prior rights to their lands and resources and respects their legitimate authority to require that third parties enter into an equal and respectful relationship with them based on the principle of informed consent.

¹¹³ *United Nations Declaration on the Rights of Indigenous Peoples*, above n 1, preamble.

¹¹⁴ The land and resources section draws heavily from the *ILO Convention 169*, above n 12.

¹¹⁵ Sarah Pritchard, *Setting International Standards*, above n 46, 186.

¹¹⁶ See, eg, *ILO Convention 169*, above n 12, arts, 6, 7, 15. In *General Recommendation XXIII, on the Rights of Indigenous Peoples*, as contained in annex V of the *Report of the Committee on the Elimination of Racial Discrimination*, UN GAOR, 52nd sess, Supp No 18, UN Doc A/52/18 (1 January 1997), the Committee on the Elimination of Racial Discrimination calls upon States to 'ensure that members of Indigenous peoples have rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent': at [4(d)]. See also the *Commentary on the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 55th sess, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/38/Rev.2 (26 August 2003) [10(c)].

Procedurally, free, prior and informed consent requires processes that allow and support meaningful choices by [i]ndigenous peoples about their development path.¹¹⁷

The principle of free, prior and informed consent in particular has become significant for indigenous peoples in their dealings with the World Bank and transnational corporations. The WGIP had suggested that the notion of free, prior and informed consent should itself be the subject of a standard-setting exercise and the Permanent Forum on Indigenous Issues has prioritised it as one of its objectives in the *Programme of Action* for the Second International Decade of the World's Indigenous People.¹¹⁸ While it is not intended to be a right of veto over land development, some indigenous peoples do regard it as a quasi-veto right. Its ambiguity is why it was one of the controversial principles in the land and resources clusters and indeed why there are many ongoing attempts to define it internationally.

IV THE WAY FORWARD

A *The Legal Status of the Declaration*

Generally, a declaration of the UN General Assembly is non-binding (or 'soft') international law. The text of the Declaration creates no new rights in international law as many of its articles are contained in other international agreements, nor does it create any binding legal obligations in domestic legal systems. It is aspirational and provides a framework that states can adopt to underpin their relationship with indigenous peoples and may guide them in the development of domestic law and policy. The *United Nations Declaration on the Rights of Indigenous Peoples* recognises putative international norms as well as evolving human rights standards pertaining to indigenous peoples.¹¹⁹ The Declaration is also replete with rights that are not commonly accepted as legal standards. It is an over-elaborated text and, in some ways, expands upon the content of rights more broadly than any declaration that exists in international law.

Certain commentators have posited that some of the articles in the Declaration already constitute emerging customary international law of indigenous peoples' rights;¹²⁰ however, it cannot be said that the entire text does so. Anaya is optimistic about the way in which an emergent rule can crystallise into a binding

¹¹⁷ UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples in relation to Development Affecting Their Lands and Natural Resources That Would Serve As a Framework for the Drafting of a Legal Commentary by the Working Group on This Concept, Submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation*, 22nd sess, Agenda Item 5, UN Doc E/CN.4/Sub.2/AC.4/2004/4 (8 July 2004) [13].

¹¹⁸ *Draft Programme of Action for the 2nd International Decade of the World's Indigenous People, Report of the Secretary-General*, UNGAOR, 60th sess, UN Doc A/60/270 (18 August 2005) [9]. See generally, UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, *Report of the Working Group on Indigenous Populations on its 22nd Session*, 56th sess, UN Doc E/CN.4/Sub.2/2004/28 (3 August 2004) [51].

¹¹⁹ See Anaya, above n 5, 61–72. See generally Wiessner, above n 18.

¹²⁰ See, eg, Anaya, above n 5, 65.

norm of customary law. According to Anaya, ‘interactive patterns around concrete events are not the only — or necessarily required — material elements constitutive of customary norms’.¹²¹ Anaya argues that

[w]ith the advent of modern international intergovernmental institutions and enhanced communications media, states and other relevant actors increasingly engage in prescriptive dialogue. Especially in multilateral settings, explicit communication of this sort may itself bring about a convergence of understanding and expectation about rules ... [i]t is thus increasingly understood that explicit communication among authoritative actors, whether or not in association with concrete events, is a form of practice that builds customary rules.¹²²

In support of Anaya’s position, many indigenous and non-indigenous commentators refer to the fact that the Declaration, when in draft form, was used extensively by indigenous advocates and by international bodies and organisations as well as by governments in municipal contexts.

1 *Immediate Impact*

In May 2008, the Committee on the Elimination of All Forms of Racial Discrimination referred to the Declaration in its comments on US obligations under the *CERD*.¹²³ In this case the Committee had received complaints about nuclear testing and dangerous waste storage on Native American lands. The Committee stated that:

While noting the position of the State party with regard to the United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295), the Committee finally recommends that the declaration be used as a guide to interpret the State party’s obligations under the Convention relating to indigenous peoples.¹²⁴

This is an important comment from the Committee because the US was an objector to the Declaration, yet the Committee still regarded it as relevant to the implementation of the *CERD*.

The Supreme Court of Belize also applied the principles of the Declaration as a framework for determining land rights. One month after the adoption of the Declaration by the General Assembly, the Supreme Court of Belize handed down a decision relating to Mayan rights to lands and resources, applying the Declaration.¹²⁵ Chief Justice Conteh found that Belize was obligated by its Constitution and by international law to recognise, respect and protect Maya customary land rights.¹²⁶ In finding that there was overwhelming evidence of Mayan customary land tenure, Conteh stated that Belize would be

unwilling, or even loath to take any action that would detract from the provisions of [the] Declaration importing as it does, in my view, significant obligations for

¹²¹ Ibid 62.

¹²² Ibid.

¹²³ Above n 111.

¹²⁴ UN Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, 72nd sess, UN Doc CERD/C/USA/CO/6 (8 May 2008) 10.

¹²⁵ *Aurelio Cal v Attorney-General of Belize* Claim 121/2007 (Supreme Court, Belize, 18 October 2007) [133].

¹²⁶ Ibid [134].

the State of Belize in so far as the indigenous Maya [sic] rights to their lands and resources are concerned.¹²⁷

This decision was transmitted throughout indigenous networks globally and arguably gives weight to Anaya's version of Franck's 'pull toward compliance',¹²⁸ the idea that explicit communication among authoritative actors is a form of practice that may bring about a convergence of understanding and expectation that builds customary rules.¹²⁹

In fact, Anaya and Wiessner argue that there is already a distinct body of customary law that accords with the indigenous right to 'demarcation, ownership, development, control and use of the lands they have traditionally owned or otherwise occupied and used'.¹³⁰ Their study involved a global survey of state practice relating to indigenous land recognition. They argue that, regardless of the CANZUS objections to the Declaration, that does not diminish the contribution those states have already made to global state practice when it comes to recognition of indigenous land. This customary norm of state practice was referred to by the Inter-American Court of Human Rights in the *Awas Tingni* decision.¹³¹ Thus, while it is true the Declaration is non-binding in and of itself, state behaviour clearly demonstrates that aspects of its operative provisions relating to land may already be state practice, which is a result of indigenous land laws already recognised by Member States, including the objectors to the Declaration at the General Assembly.¹³² This state practice developed over a long time and has developed independent of the Declaration. For example in Australia, the High Court's decision in *Mabo v Queensland [No 2]*,¹³³ the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Native Title Act 1993* (Cth) have contributed to this developing customary norm independent of the Declaration.

2 *From a Declaration to a Convention?*

The international indigenous movement has indicated a preference for the Declaration to remain non-binding in international law. Many indigenous peoples believe that to move toward a convention on the rights of indigenous peoples would be detrimental to indigenous rights because such a convention would be unlikely to attract enough signatures to become an international instrument.

¹²⁷ Ibid [133].

¹²⁸ Franck, above n 94, 56.

¹²⁹ Anaya, above n 5, 62.

¹³⁰ S James Anaya and Robert A Williams, 'The Protection of Indigenous Peoples Rights over Lands and Natural Resources under the Inter-American Human Rights System' (1999) 14 *Harvard Human Rights Journal* 33; S James Anaya and Siegfried Wiessner, 'The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment', *Jurist* (US) 3 October 2007 <<http://www.law.arizona.edu/news/Press/Anaya100307.pdf>> at 23 September 2008.

¹³¹ *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-Am Court HR (ser C) No 79 ('*Awas Tingni*'); S James Anaya and Claudio Grossman, 'The Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua: A New Step in the International Law of Indigenous Peoples' (2002) 19 *Arizona Journal of International and Comparative Law* 1.

¹³² Anaya and Grossman, above n 131.

¹³³ (1992) 175 CLR 1.

3 *The Impact of the Declaration on Australian Law*

While it is true that the Declaration is non-binding and has no effect in domestic law, there are ways in which the Declaration may have some effect in Australia. The most obvious is that politically the Declaration will have strong moral value. Moreover, it will have important educative value for the Indigenous community as well as the broader Australian community, explaining in detail what self-determination means in practice.

Nevertheless, the Declaration will be an important source for the judiciary. The Declaration provides an instructive list of standards that is increasingly practised by Member States, UN agencies and human rights advocates.¹³⁴ It is the case in Australia that international law may be used by courts when attempting to construe the meaning of a statute or in cases of statutory ambiguity.¹³⁵ In decisions like *Polites* and *Teoh*,¹³⁶ it was apparent that, when interpreting ambiguous statutory provisions consistently with international law, it does not require incorporating international obligations into domestic legislation in order to give effect to the principle of statutory interpretation.

In *Police v Abdulla*, Perry J referred to the *ILO Convention 169*, which has not been ratified by Australia:

Section 11 of the *Criminal Law (Sentencing) Act* makes it plain that a sentence of imprisonment must be regarded as a sentence of last resort. In the case of Aborigines this is reinforced by provisions to be found in [the *ILO Convention 169*] ... Australia is not a party to the Convention. But it is an indication of the direction in which international law is proceeding. In the area of human rights particularly, Australian courts should always be prepared to take into account international instruments where they identify precepts of universal application, at least where they are not in conflict with the domestic laws of this country.¹³⁷

However, it will have important interpretative value as evidence of general principles of international law.

B *The Federal Government's Position — Explaining the Delay*

In Australia, the Federal Government's position on the Declaration has depended on the government of the day. From the outset of the WGDD, the federal Labor Government was supportive of the Declaration and of self-determination:

Since 1991, we have made statements in the WGIP in favour of the use of the term self-determination in the Draft Declaration. We have done so on the basis that the principles of territorial integrity of states is sufficiently enshrined

¹³⁴ *United Nations Declaration on the Rights of Indigenous Peoples*, above n 1.

¹³⁵ In circumstances of statutory ambiguity, legislation may also be interpreted in accordance with customary international law: see *Polites v Commonwealth* (1945) 70 CLR 60, 69 (Latham J) ('*Polites*'). In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492, Gleeson CJ commented that

where legislation has been enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention, in cases of ambiguity a court should favour a construction which accords with Australia's obligations.

¹³⁶ *Polites* (1945) 70 CLR 60; *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 278 (Deane and Mason JJ) ('*Teoh*').

¹³⁷ *Police v Abdulla* (1999) 106 A Crim R 466, 472 (Perry J).

internationally that a reference to self-determination in the Draft Declaration would not imply a right of secession.¹³⁸

With the election of the Liberal Coalition in 1996, the position held by Federal Government changed. In 1998, One Nation was a new political force in Australia and the new Federal Government immediately responded by registering its own concern about the possibility of an indigenous secessionist movement in Australia arising out of any acknowledgement of the right of self-determination in the Declaration. Foreign Minister Alexander Downer stated that it was better to use the word 'self-management' rather than 'self-determination', as the term 'self-determination' leaves an impression 'that we are prepared to have a separate indigenous state'.¹³⁹ The Draft Declaration remained a controversial instrument for the entirety of the Howard Government's term in power. The Australian Treaties Council, which was established by the Howard Government to provide greater scrutiny of international law instruments following the Hawke and Keating Labor Governments, met only once, and this was in the context of the WTO and the Draft Declaration in 2003.¹⁴⁰ The Howard Government maintained a strict alliance with the other CANZUS states in opposing the Declaration ultimately voting against it in the General Assembly in 2007.

The current Federal Government, elected on 24 November 2007, has not yet endorsed the Declaration, despite its open commitment to do so whilst in opposition. This was reflected in its election platform: 'Labor will endorse the UN Declaration on the Rights of Indigenous Peoples and be guided by its benchmarks and standards'.¹⁴¹

The current Federal Opposition has expressed concern about the Government's intention to endorse the Declaration. Despite it being a non-binding Declaration, the Opposition argues that the Declaration would elevate Aboriginal customary law above domestic law.¹⁴² The legal advice prepared by shadow Attorney-General George Brandis raises concerns that the Declaration could crystallise into customary international law which would 'go well beyond the rights recognised in Australian domestic law and thus may help to create a jurisprudence that is fundamentally out of step with an ongoing legal dialogue within Australia'.¹⁴³ As explained above, while there is evidence of crystallising custom in some areas of indigenous rights, this is not yet an accepted norm of state practice. Australia's democratically elected Parliament will always take precedent over the Declaration — that is a fundamental

¹³⁸ Statement by Mr Bill Barker on behalf of the Australian Delegation, Geneva, 21 November 1995. See also UN Commission on Human Rights, *Consideration of a Draft contained in the Annex to Resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Entitled Draft 'United Nations Declaration on the Rights of Indigenous Peoples': Information Received from the Government of Australia*, 52nd sess, UN Doc E/CN.4/1995/WG.15/2/Add 2 (30 November 1995).

¹³⁹ 'Downer Fears Phrase Will Split Australia', *The Age* (Melbourne, Australia) 22 August 1998, 7.

¹⁴⁰ Department of the Prime Minister and Cabinet, *Treaties Council Meeting Communique* (7 November 1997), cited in Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 440.

¹⁴¹ Australian Labor Party, above n 7.

¹⁴² Gartrell, above n 9.

¹⁴³ Milne, above n 9.

principle of the rule of law and of parliamentary sovereignty. Having said that, the Declaration should improve the relationship between indigenous Australians and the state. This is because the Declaration is an aspirational statement of the way in which the state and its indigenous peoples should engage.

On 16 May 2008, over 100 non-governmental organisations formally wrote to the Australian Government urging it to endorse the Declaration.¹⁴⁴ In response, the Government noted that it was studying the implications of the Declaration for Australia. The Federal Government noted that the Department of Families, Housing, Community Services and Indigenous Affairs was consulting with Australia's state and territory governments as well as with Indigenous organisations and other key stakeholders on the declaration.¹⁴⁵ The other stakeholders are presumably the mining industry who are particularly concerned about the cluster of articles pertaining to land, territories and resources (arts 24–30). There has also been speculation that other members of CANZUS have put pressure on the Australian Federal Government not to reverse its opposition to the Declaration.¹⁴⁶

Furthermore, the HREOC — which had previously indicated its willingness to adopt the Declaration in a rights-based approach — is requesting input from indigenous individuals and organisations about how the Australian Government 'ought to formally indicate their support for the Declaration'.¹⁴⁷ Nevertheless there is growing anxiety in the indigenous community about the delay. However, expectations are that the Australian Government will endorse the Declaration eventually.

If endorsed, the Declaration will be applied by the Federal Government in a rights-based approach to indigenous policy and reconciliation and similarly used by indigenous peoples and organisations in their dealings with the state. It would also be an instrument that public institutions — such as local government, the public service and state and federal governments — can use to frame their engagement with indigenous communities and in the development of laws and policies that impact upon indigenous peoples' lives. The underlying principles of the Declaration are about participation, engagement and consultation. In the absence of a treaty or constitutional recognition, the Declaration will become the primary basis upon which indigenous peoples conduct their affairs with the state — however, it is not a replacement for a treaty or constitutional recognition.

¹⁴⁴ See, eg, letter from Philip Lynch, Director, Human Rights Law Resource Centre and Megan Davis, Director, Indigenous Law Centre, to the Honourable Kevin Rudd MP, 16 May 2008 <http://www.ilc.unsw.edu.au/news_and_events/documents/Final%20UN%20Declaration%20on%20the%20Rights%20of%20Indigenous%20Peoples.pdf> at 23 September 2008.

¹⁴⁵ Letter from Jeff Roach, A/g Assistant Secretary, International Division, Department of the Prime Minister and Cabinet, to Megan Davis, 16 June 2008.

¹⁴⁶ Darren Dick, 'Challenges for Implementing the Declaration on the Rights of Indigenous Peoples in Australia' (Speech delivered at the Castan Centre for Human Rights Symposium on the United Nations Declaration on the Rights of Indigenous Peoples, Melbourne, Australia, 20 August 2008) <<http://www.law.monash.edu.au/castancentre/events/2008/ddick-paper.pdf>> at 23 September 2008.

¹⁴⁷ Tom Calma, 'Your Views Needed on Australia's Support of the Declaration of the Rights of Indigenous Peoples' (2008) *Human Rights and Equal Opportunity Commission*, <http://www.hreoc.gov.au/social_justice/declaration/comments.html> at 23 September 2008.

V CONCLUSION

The Declaration augments indigenous peoples' place within the international human rights framework and international law. It is a testament to the advocacy of indigenous representatives at the UN, who, despite some earlier poor strategic decisions, were able to shepherd the Declaration through the General Assembly to its adoption. The massive achievement of indigenous peoples must not be underestimated. It was not until the last two years of WGDD discussions that any major progress was made on the Declaration. Many indigenous leaders came and left impatient, frustrated by the 'no change' policy of indigenous peoples and the intransigent behaviour of the CANZUS alliance.

This commentary has emphasised the significance of the Declaration's adoption for indigenous peoples, both in Australia and worldwide, who maintain distinctive cultural and spiritual relationships to their traditional lands. The Declaration is also a triumph of the UN, which has demonstrated a commitment to the accommodation of indigenous peoples' issues within international law. The working groups involved fascinating battles between colonising states and those they had dispossessed. The debates over complex issues of sovereignty and self-determination and the tension between individual and collective rights are reflected in a text that propounds a binary iteration of culturally distinctive rights and restorative justice for historical wrongs. Mostly, the adoption of the Declaration was a victory for indigenous peoples who now have an international instrument that is imbued with an ongoing philosophical questioning of Westphalian sovereignty and the legitimacy of the statist system.¹⁴⁸ The Declaration will embolden the contemporaneous indigenous narrative of state dispossession that seeks redress for the gross violations of human rights that indigenous peoples were subjected to historically and that continue to this day.

¹⁴⁸ See generally Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003) 84–112.