MAORI LEGAL FORUM: UPDATE ON INTERNATIONAL DEVELOPMENTS RELATING TO INDIGENOUS PEOPLES

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I INTRODUCTION

Greetings.

If there is one thing to be said about Indigenous peoples' rights at an international level, it is this: the speed with which international institutions have evolved new, and expanded on pre-existing, international legal norms to recognise and protect Indigenous peoples' rights in the past 25 years is breathtaking. Some academics now argue that a number of norms are customary international law, and therefore binding in some states.[1]

These norms can be found in a myriad of different instruments, ranging from UN Special Rapporteur reports (noting that there have been numerous different Special Rapporteurs dealing with Indigenous peoples' rights),[2] to declarations on minorities,[3] to UNESCO recommendations on culture,[4] to human rights instruments,[5] to treaties on biological diversity,[6] to World Bank policy.[7] Some of these international

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1 James Anaya in particular: see *Indigenous Peoples in International Law* (2 ed, Oxford University Press, New York, 2004).

2 Including, by way of example, UN Sub-Commission on the Promotion and Protection of Human Rights "Indigenous Peoples' Permanent Sovereignty Over Natural Resources: Final Report by Special Rapporteur Erica-Irene A Daes" (14 July 2004) UN Doc E/CN.4/Sub.2/2004/30; UN Sub-Commission on the Promotion and Protection of Human Rights "Indigenous Peoples' and their Relationship to Land: Final Working Paper by Special Rapporteur Mrs Erica-Irene A Daes" (11 June 2001) UN Doc E/CN.4/Sub.2/2001/21; and UN Commission on Human Rights "Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples" (26 January 2004) UN Doc E/CN.4/2004/80.

3 See, in particular, the UN Declaration on the Rights of Persons Belonging to National, Ethnic, Religious and Linguistic Minorities GA Res 47/135; UN GOAR 47th Sess Supp 49 at 210, UN Doc A/47/49 (1992).

4 For example, see UNESCO Universal Declaration on Cultural Diversity UNESCO Rec of Gen Conf 31st Sess (2 Nov 2001).

5 See, for example, International Convention on the Elimination of All Forms of Racial Discrimination (4 January 1969) 660 UNTS 195; International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171; and the American Convention on Human Rights 1978 32 OAS Treaty Series, 1144 UNTS 123.

6 In, for example, the Convention on Biological Diversity, UN Conf on Environment and Development UNEP.Bio.Div./CONF.L21992 (1992), art 8(j).

legal norms emanate from so-called hard international law in, for example, widely ratified international human rights treaties, such as the Convention on the Elimination of Racial Discrimination.[8] These instruments have been interpreted by international and domestic tribunals in favour of Indigenous peoples' cultural, land and self-determination rights, as in CERD's foreshore decision.[9] Other norms are sourced in less legally binding international instruments and documents, a number of which are only just emerging, for example the UN Declaration on the Rights of Indigenous Peoples (the Declaration).[10]

As is perhaps apparent, norms have arisen out of the work of the UN human rights mandate. But, that is not their only source. The international institutions dealing with Indigenous rights have similarly proliferated, and now include bodies such as, and above-mentioned, the World Bank and the International Labour Organisation. In fact, the International Labour Organisation is the first and only institution to produce binding international treaties exclusively on the rights of Indigenous peoples, first in the 50s and then again in the late 1980s.[11]

Further, some international regional bodies – by that I mean international institutions set up in a particular region in the world - have developed their own norms relevant to Indigenous peoples.[12] Of particular note is the Organisation of American States, which includes the United States and Canada. It is drafting its own declaration on Indigenous peoples' rights. The Inter-American Court on Human Rights has recognised, and demanded demarcation of, Indigenous peoples' land rights held in accordance with Indigenous customary law in its application of human rights instruments. Its decisions are binding on states. Similarly, the African regional body now has a working group on Indigenous peoples.

My purpose here is to provide an update on where things are at for Indigenous peoples' rights under international law in two discrete areas: on the Declaration on the Rights of Indigenous Peoples (the Declaration), which was adopted a little over a month ago by the UN Human Rights Council; and the UN Permanent Forum on Indigenous Issues (UNPFII). First, I will provide an historical overview of where Indigenous peoples sit in the UN, then I will move to the UNPFII and finally the Declaration.

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7 World Bank, "Draft Operational Policy on Indigenous Peoples" <www.worldbank.org> (last accessed 10 March 2006).

8 See, for example, the human rights instruments, above n 5.

9 In, for example, *Mayagna (Sumo) Awas Tingni Community v Nicaragua* R (31 August 2001) Inter-Am Court H R (Ser C) No 79 (also published in (2002) 19 Arizona J Int'l and Comp Law 395). (For a full description of the proceedings leading to the decision, see S J Anaya and C Grossman, "The Case of *Awas Tingni v Nicaragua*: A New Step in the International Law of Indigenous Peoples" (2002) 19 Arizona J Int'l and Comp Law 1).

10 Sub-Commission on the Protection and Promotion of Human Rights Resolution 1994/45 (26 August 1994) E/CN.4/1995/2.

11 International Labour Organisation Convention 169.

12 Such as the American Convention on Human Rights, above n 5.

II WHERE INDIGENOUS PEOPLES SIT IN THE UN SYSTEM

Indigenous peoples have a long history with international law. In fact, contact between Indigenous peoples and European states is thought to have given rise to early international law in the 15th and 16th Centuries. Spanish theologians such as Vitoria maintained that European powers were required to respect Indigenous land ownership on contact.[13] Unfortunately, this maxim was more often honoured in its breach, but influenced international law founding fathers such as Grotius.

In more recent times, Indigenous peoples have brought their concerns to international fora, first to the League of Nations shortly after World War One, and then to the UN post World War 2. Ratana was one of the first Indigenous peoples' representatives to petition the League of Nations in the 1920s.

The UN focus on human rights opened a door for non-state actors as, to some extent, the protection of human rights internationally required a greater focus on states' behaviour within their borders - in other words, a reduction in states' sovereignty.

A watershed moment was the UN mandated voluminous *Study of the Problem of Discrimination Against Indigenous Populations* lodged with the then-titled Sub-Commission on the Prevention of Discrimination and Protection of Minorities between 1981 and 1983,[14] and the establishment of the UN Working Group on Indigenous Populations in 1982, known as WGIP for short.

[Illustration of the UN System]

Relevant:

- 6 institutions established by the UN Charter;
- UN Economic and Social Council (ECOSOC) in human rights matters;
- UN Human Rights Commission [state members];
- UN Sub-Commission on the Promotion and Protection of Human Rights [independent experts];
- UNPFII – advisory body to the UN Economic and Social Council; and
- WGIP - under the Sub-Commission. WGIP is made up of 5 experts on minorities' rights and selected by states. Its mandate is to:

    - to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of Indigenous peoples;

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13 S James Anaya "Indigenous Rights Norms in Contemporary International Law" (1991) 8 Ariz J Int'l & Comp L 1, 1. As is cited by Anaya in that article, Spanish theologian Bartoleme de las Casas famously documented atrocity against Indigenous peoples in the Americas in the early 1500s. See Bartoleme de las Casas *The Devastation of the Indies (1530s)* in Robert S Leiken & Barry Ruben (eds) *The Central American Crisis Reader: The Essential Guide to the Most Controversial Foreign Policy Issue Today* (1987) 51. For further discussion, see Andrew Huff "Indigenous Land Rights and the New Self-Determination" (2005) 16 Colo J Int'l Envtl L & Pol'y 295.

14 UN Doc E/CN.4/Sub.2/1986/7 & Adds. 1-4 (1986).

- to give attention to the evolution of international standards concerning Indigenous rights – it was here that the Declaration was first drafted.

Indigenous peoples and states participate. At some times, hundreds of Indigenous peoples have turned up to raise their concerns there.

- When the Declaration was approved by the Sub-Commission in 1994 and then moved up to the Human Rights Commission, the Human Rights Commission established the Working Group on the Declaration in 1995. States and Indigenous peoples negotiated the text of the Declaration from then until February 2006.

The UN has been recently reorganised. The UN Human Rights Council replaces the Human Rights Commission, and has been elevated to the same level as the ECOSOC. It is made up of 47 states' representatives. It met for the first time in June 2006, and passed the Declaration.

There will be a review of the Working Group's and Special Rapporteur's mandate in the near future, as the Human Rights Council considers rationalisation of the UN human rights institutions. There is a concern that the WGIP's mandate will not be continued as some states have expressed the view that there is overlap between institutions dealing with Indigenous peoples' issues. However, the WGIP has the power to review developments relating to Indigenous peoples' human rights and freedoms, which entitles it to review state domestic practice – a power that the UNPFII, for example, does not explicitly have. It is unlikely that the Working Group on the Declaration will be continued, as the Declaration goes to General Assembly for adoption later this year. The UNPFII has called on the Human Rights Council to include Indigenous peoples' participation in its review of human rights institutions.[15]

Every state will be subject to a "universal" human rights review by the Human Rights Council, a power that the Human Rights Commission did not have. The UNPFII has called on the Human Rights Council to examine the situation of Indigenous peoples in the course of those reviews.[16]

III THE UN PERMANENT FORUM ON INDIGENOUS ISSUES[17]

The idea for a UNPFII first arose at the World Conference on Human Rights in 1993 and was pursued in UN workshops in 1995 and 1997 in Denmark and Chile respectively. It was finally established in 2000 by the ECOSOC,[18] and met for the first time in 2002.

The make-up of the UNPFII is unique within the UN in that it includes representatives of non-state actors ie, Indigenous peoples. It is made up of 16 experts, 8 of whom are in essence appointed by regional Indigenous peoples' groups.

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15 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11, para 79, p 13.

16 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11, para 18, p 13.

17 See UN Permanent Forum on Indigenous Issues <http://www.un.org/esa/socdev/unpfii/> (last accessed 27 July 2006)

18 UN Economic and Social Council Resolution 2000/22 (28 July 2000).

They meet every year, usually in New York, although the possibility of hosting meetings elsewhere is available. The 2006 UNPFII recommended that the 2007 UNPFII take place in Bangkok, Thailand.

Indigenous peoples, NGOs, states, academics and other international institutions attend the UNPFII. The 2006 UNPFII hosted in excess of 1,200 individuals from the world-over. Unlike other UN meetings, the UNPFII is deliberately open, meaning it is comparatively easily for Indigenous peoples to get accreditation to attend. Maori have consistently attended, albeit in small numbers, since 2002. It was here, for example, that Te Runanga o Ngai Tahu first raised its concerns with the Foreshore and Seabed Bill.

The UNPFII's mandate is to advise the ECOSOC on Indigenous issues related to economic and social development, culture, the environment, education, health and human rights. It is required to:

- provide expert advice and recommendations on Indigenous issues to the Council, as well as to programmes, funds and agencies of the UN, through the Council;
- raise awareness and promote the integration and coordination of activities related to Indigenous issues within the UN system; and
- prepare and disseminate information on Indigenous issues.

Some Indigenous peoples and others are disappointed that the UNPFII's mandate does not include a state-monitoring function. Its recommendations are directed at the ECOSOC and other UN institutions rather than states. Nonetheless, the UNPFII has not shied away from commenting on state action vis a vis Indigenous peoples domestically.

The theme of the 2006 session of the UNPFII was the UN Millennium Development Goals, which focus on poverty eradication and development. It notes "there is a clear need to redefine approaches to the implementation of the Goals so as to include the perspectives, concerns, experiences and world views of Indigenous peoples."[19] And, it calls for the inclusion of Indigenous peoples in efforts to address and attain the Millennium Goals.[20]

Other highlights of the recommendations:

- a call on the Human Rights Council and the General Assembly to adopt the Declaration;[21]
- a call on the Human Rights Council to focus on Indigenous peoples' issues by making Indigenous issues a standing agenda item, including by strengthening the role of the Special Rapporteur on Indigenous Peoples;

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19 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11 3.

20 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11 para 27, 6.

21 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11, para 67, 13.

- a request to UNAIDS to engage with UNPFII to support efforts to address HIV/AIDS in Indigenous peoples' communities;[22]
- recommendations specific to Indigenous women, Indigenous children and African Indigenous peoples;
- support for, in particular, the Special Rapporteur's reports, including his recommendations in relation to New Zealand, and encourages the Human Rights Council to pay particular attention to the implementation of them;[23]
- recommendations relating to the Second UN Decade on Indigenous Peoples (eg greater coordination between states, Indigenous peoples and UN bodies).

The Chairperson has indicated that the UNPFII next year's work will focus on lands, territories and resources.

Reports from attendees at the UNPFII in May suggest that the Declaration was a hot topic. New Zealand, together with Australia and the United States, issued a statement opposing the text of Declaration, which I will mention in a moment. However, other governments spoke for adoption of the Declaration. UNPFII member Mick Dodson pointed out that New Zealand and other states opposing its adoption were in the minority.

IV THE DECLARATION

Here I outline:

- the history of the Declaration;
- its significance;
- the politics behind the Declaration;
- some of its provisions;
- the New Zealand government's objections to the Declaration; and
- some responses to the New Zealand's approach to the Declaration.

A History

The Declaration was first drafted by the WGIP in the late 80s and early 90s. Indigenous peoples and states had significant influence on the WGIP members. Indeed, the Declaration as drafted by the WGIP is a unique instrument given that non-state actors played an integral role.

It was then, as we have seen, approved by the Sub-Commission on the Protection and Promotion of Human Rights and forwarded to the Human Rights Commission for consideration.

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22 UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11 para 18, 5.

23 The Permanent Forum welcomes the report of the Special Rapporteur of the Commission on Human Rights on the situation of human rights and fundamental freedoms of Indigenous people on his visits to South Africa and New Zealand, and supports the recommendations contained therein (see E/CN.4/2006/78 and addenda). The Permanent Forum restates its support for the ongoing work of the Special Rapporteur. UN Permanent Forum *Report of the Fifth Session* (15-26 May 2006) UN Doc E/C.19/2006/11 para 70, 12. See also para 71.

The Human Rights Commission established the Working Group on the Declaration, which was made up of states, but Indigenous peoples participated. It was hoped, when the Working Group on the Declaration was established, that the Working Group would finalise the Declaration within 10 years, during the first UN Decade on Indigenous Peoples. It did not. The Human Rights Commission then extended the negotiations for one year. By February 2006, the majority of provisions were accepted by consensus. However, the Chair concluded that consensus on the content of all articles of the Declaration was unlikely, and there was insufficient state support for the version accepted by the Sub-Commission.[24] Based on the proposed amendments made by Indigenous peoples and states, the Chair proposed a compromise text on those articles not yet approved by consensus, which was forwarded to the Human Rights Council this June. It is referred to as the Chair's text. It had the support of the vast majority of states and the vast majority of Indigenous peoples, although some states, of which New Zealand is one, and some Indigenous peoples, have concerns with it – for completely different reasons of course.

The Declaration went to a vote at the Human Rights Council, with Canada and the Russian Federation blocking consensus adoption. There were 30 votes for, 2 against (Canada and the Russian Federation) and 12 abstentions and 3 absents (although there is some question whether those who are recorded as absent were actually abstaining). Those in favour included Central American and Caribbean, European Union and South American states. Many, but not all, African states abstained. New Zealand, Australia and the United States are not on the Human Rights Council so did not have a vote.

The Declaration is now headed to the General Assembly for adoption at the end of the year. New Zealand has already indicated that it will vote against it.

B Significance

What makes the Declaration unique, and so significant, is that it is the most comprehensive and progressive international document dealing with Indigenous peoples' rights. While human rights treaties, such as the Convention on the Elimination of Racial Discrimination, are useful to Indigenous peoples, they do not focus on collective Indigenous peoples' rights and Indigenous peoples' self-determination. Instead, human rights treaties are aimed at individuals and not collectives.

Declarations are not binding on states. However, they have a moral force. Most importantly, declarations can provide evidence of crystallised customary international law. It is difficult to get a clearer indication from states as to their understanding of the content of legal norms.

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[24] This must be seen in the light of consistent pressure on the Working Group to finalise the Declaration: See, for example, General Assembly A/RES/59/17424 February 2005, Commission on Human Rights Res. 2005/50 (2005) and UN Secretary-General on Second International Decade of the World's Indigenous People, May 2006.

Indeed, it has already been of value. New Zealand's Court of Appeal and the Waitangi Tribunal have both made positive reference to the Declaration even in its draft format.[25]

Lawyers can use it as a point of reference in submissions.

Other international institutions, such as the Special Rapporteur, the UN human rights treaty bodies and the UNPFII can utilise it as a benchmark against which to assess states' behaviour.

Finally, the Declaration will be an important tool to add legitimacy to Indigenous political claims and lobbying in, for example, negotiations on Treaty of Waitangi settlements and opposition to, say, the deletion of references to the principles of the Treaty of Waitangi in legislation.

C Politics Behind the Declaration's Negotiation

It is an understatement to posit that negotiations between states, between Indigenous peoples and states and, to a lesser degree, between Indigenous peoples have been tense. Indigenous peoples supported the Sub-Commission text of 1994.

A number of states did not accept the Sub-Commission's text, although some states, such as Guatemala, did. A group of Maori representatives walked out of the negotiations in the mid-1990s to protest against states' attempts to amend the Sub-Commission text. However, other Indigenous groups eventually and participated in the negotiation process by working with states to come up with amendments to meet states' concerns. By the February 2006 meeting of the Working Group on the Declaration, most states and Indigenous peoples had agreed to the wording of the majority of articles by consensus. Exceptions, as we will see, related mainly to self-determination, land rights and the so-called limitation article (article 45).

New Zealand has been an active participant throughout the negotiation process. It has suggested numerous amendments, the vast majority of which were rejected by both states and Indigenous peoples as watering down the text to an unacceptable degree.

Currently, New Zealand is aligned with the United States, Canada and Australia in rejecting the Chair's text. Canada was, until this year, a strong advocate for a strong Declaration. Its position was reversed just this year post the election of a conservative government. That group is in the clear minority and has upset Indigenous peoples the world over, not to forget other states that support the Chair's text of the Declaration.

It is anticipated that New Zealand, the United States, Australia, Canada and the Russian Federation will attempt to amend the Declaration before or during the meeting of the General Assembly, or call for an extension of negotiations.

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[25] See, for example, *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1993] 3 NZLR 553 (CA).

Members of Aotearoa Indigenous Rights Trust (AIR Trust), of which I am one, have participated in the Declaration negotiations in one form or another since 1998. AIR Trust has been the Maori group to most consistently attend over the past 8 years. It is made up of a group of what were rangatahi in 1998, and involved in the UN. The Trust's position has been to keep a watching brief on negotiations and to support the kaupapa of the Maori representatives before it, who had a broad Maori mandate, aware that the AIR Trust does not have a mandate to speak for Maori as a whole itself. This position is to support the Sub-Commission's text and to prevent any unacceptable amendments to the Declaration, but not to block any Indigenous consensus on amendments to the Declaration.

D Articles of the Declaration

I will discuss particular concerns with these articles after setting out the content of the Declaration.

In brief, the Declaration:

- expresses concern with colonial injustice and dispossession of Indigenous peoples;
- supports Indigenous peoples' collective and individual rights;
- affirms cultural rights in numerous areas including education, technology, traditional knowledge, cultural property, language, development, health and law;
- affirms Indigenous peoples' right to equality and other human rights;
- recognises treaties between Indigenous peoples and states can be a matter of international concern;
- envisages harmonious and cooperative relationships between states and Indigenous peoples;
- recognises Indigenous peoples' right to self-determination, including self-government and autonomy;
- prevents relocation of Indigenous peoples without their consent;
- recognises Indigenous political rights including participation and the retention of Indigenous political, economic and social systems;
- recognises Indigenous peoples' land rights and the right to redress; and
- confines limitations to the Declaration rights and freedoms to those that are determined by law and in accordance with international human rights obligations. Further, "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."

1 Self-determination

Sub-Commission Text	**Suggested Amendments**	**Chair's Text**
A3	**A3**	**A3**
Indigenous peoples have the right of self-determination. By virtue of that right they freely	Indigenous peoples have the right of self-determination. By virtue of that right they freely	Indigenous peoples have the right of self-determination. By virtue of that right they freely determine, their political status

determine their political status and freely pursue their economic, social and cultural development.	determine their political status and freely pursue their economic, social and cultural development. OR Indigenous peoples have the right of self-determination as enunciated in this article. a) By virtue of that right they freely participate in determining their political status and freely pursue their economic, social and cultural development. b) In exercising this right of self-determination, they have the right to **autonomy and self-management** in matters relating directly to their internal and local affairs. c) The right shall be exercised in accordance with rule of law with due respect to legal procedures and arrangements and in good faith. Source: Australia, New Zealand, United States	and freely pursue their economic, social and cultural development.
	A3 bis (former A31)	**A3 bis (former A31)**
	Indigenous peoples, **as a specific form of/ in** exercising their right to self-determination, have the right to autonomy or self-government in **~~all~~** matters relating to their internal and local affairs, as well as	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

	ways and means for financing **their** autonomous functions. Source: Informal Plenary 11th session **2. This right shall be exercised in accordance with the rule of law, with due respect to legal procedures and arrangements and in good faith.** Source: Russian Federation	functions.

In short, the content of article 3 of the Declaration comes from common article one of the International Covenants on Civil and Political Rights and Economic, Social and Cultural Rights. Endeavours to explicitly confine self-determination to internal self-government and internal autonomy in article 3 were rejected. However, what was article 31 of the Sub-Commission text was moved up to under article 3. It deals with autonomy and self-government in the exercise of the right to self-determination. States' territorial integrity is protected by article 45 of the Declaration - that the Declaration does not authorise any activity or act in contravention of the UN Charter. The UN Charter enshrines states' right to territorial integrity and political unity.

2 Land rights

A25	**A25**	**A25**
Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.	Indigenous peoples have the right to maintain and strengthen their distinctive spiritual ~~and material~~ relationship with their **traditionally owned or otherwise occupied and used** lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard. Source: Informal Plenary 11th session **2. The State shall, in conjunction with Indigenous peoples, take measures to facilitate the access of Indigenous**	Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

	peoples concerned to lands or territories not exclusively occupied or used by them, for carrying out their spiritual traditional activities. In this respect, particular attention shall be paid to the situation of nomadic peoples and shifting cultivators. Source: Mexico, Greece	
A26	**A26**	**A26**
Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, air, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land-tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.	Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess**/hold** by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be **conducted with due respect to/** in accordance with the customs, traditions and land tenure systems of the Indigenous peoples concerned. Source: Informal Plenary 11th session	Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect the customs, traditions and land tenure systems of the Indigenous peoples concerned.
	A26 bis	A26 bis
	States shall establish and	States shall establish and

	implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples´ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process. Source: Informal Plenary 11th session	implement, in conjunction with Indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to Indigenous peoples´ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.
	A26 ter	A26 ter
	In addition, effective measures shall be taken in appropriate cases to safeguard and legally recognize the right of the peoples concerned to use lands, territories and resources not exclusively owned, occupied, used or otherwise acquired by them, but to which they have traditionally had access for their subsistence and traditional activities. Source: Norway States shall take measures, as appropriate, to increase Indigenous peoples' ownership of or access to lands and resources, taking into account present and historical circumstances and their traditional use of land.	

	Source: Canada	
A27	A27	A27
Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status.	Indigenous peoples and/or individuals have the right to submit/ pursue claims for redress, by means that can include of restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Whenever possible, and unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate relief/ redress. Source: Informal Plenary 11th session	Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, of a just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In short, the land rights articles provide:

- an Indigenous peoples' right maintain and strengthen their spiritual relationship with traditionally owned, occupied and used lands (noting that the Chair omitted a reference to the material relationship with such lands from the Sub-Commission text) – article 25;
- an Indigenous peoples' right to lands, territories and resources traditionally owned, occupied and used– article 26;
- a specific Indigenous peoples' right to own, use, develop and control lands, territories and resources currently possessed by Indigenous peoples, and to state legal recognition of that ownership – article 26; and
- an Indigenous peoples' right to redress for lands, territories and resources confiscated, taken, occupied, used or damaged without the consent of Indigenous peoples. Redress to be restitution or, where that is not possible, compensation in the form of equivalent lands, monetary redress or other forms of appropriate

redress, unless otherwise agreed by the Indigenous peoples in question (the Sub-Commission text did not envisage monetary or "other forms of appropriate redress") – article 27.

E New Zealand, Australia and the United States Objections

Objections to the Chair's text from New Zealand et al centre on:[26]

- fear of Indigenous peoples' secession and disruption of state's territorial integrity and political unity;
- ambiguity in the text;
- unrealistic obligations on states;
- threats to 3rd Party rights – New Zealand in particular seems at pains to ensure that Indigenous peoples' rights do not result in discrimination against non-Indigenous peoples;
- a desire to protect Indigenous peoples' rights in other states; and
- the need for consensus and more time to discuss the text.

F Responses to the Government's Position

There are numerous responses to New Zealand's objections to the Declaration.

1 Legitimacy concerns

First, New Zealand's negotiating position on the Declaration lacks a good deal of legitimacy:

- it has not consulted with Maori, nor informed Maori of its position in relation to, the Declaration for in excess of 5 years. It has been asked to do so repeatedly. During that time, it has proposed numerous amendments to the Declaration.

- New Zealand and the states it has aligned itself with are the states that have been found by the Committee on the Elimination of Racial Discrimination to discriminate against Indigenous peoples in the past 7 years. Australia was found in breach of the International Convention on the Elimination of All Forms of Racial Discrimination in 1999, New Zealand in 2005 and the United States just in March this year.

- The Declaration has the support of numerous states against which New Zealand compares its protection of Indigenous peoples positively. New Zealand's concern for "other" Indigenous peoples in other states is thus obscure. It is illogical to undermine adoption of the Declaration, or attempt to water it down, in the interests of protecting other Indigenous peoples where it is alleged that greater human rights abuse occurs.

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[26] Expressed in, for example, comments made at the Human Rights Council in June 2006; a statement at the UN Permanent Forum on Indigenous Issues in May 2006; and statements made at the UN Working Group on the Declaration during the December 2005 and January-February 2006 sessions (all on file with the author).

2 The status of the Declaration

The Declaration is "only" a Declaration or, in the words of preambular paragraph 18, a "standard of achievement" to be pursued. Thus, New Zealand's serious concerns seem misplaced. They would be more appropriate in relation to a treaty, which would only be binding if ratified in any event.

The Declaration does not override existing "hard" international law that protects states' territorial integrity. For example, article 45 states that the Declaration cannot be interpreted to permit any activity or act contrary to the UN Charter. The UN Charter includes states' right to territorial integrity.

Similarly, non-Indigenous rights, including property rights, are protected in existing and *binding* international law, such as the Universal Declaration on Human Rights and other international human rights treaties including the International Covenant of Civil and Political Rights. Under article 45, all of the Declaration's articles can be limited in circumstances where it is necessary to uphold non-Indigenous rights.

3 Ambiguity

Ambiguity is common to all international instruments to some extent, as indeed with much domestic law. It is not fatal. Indeed, it is necessary in instruments that have universal application to different situations. Even New Zealand has explicitly recognised that some ambiguity is needed, itself noting that the US recognises American Indian self-determination, whereas New Zealand prefers the concept of Maori self-management.

Ambiguity also allows states to take a state-centric interpretation of the Declaration.

New Zealand et al seem to take a state "worst-case scenario", and at times contrived, interpretation of the Declaration in its objections to the Declaration.

Ambiguity will be resolved by the institutions with the authority to interpret them. The state will always have a strong influence on that interpretation, even when the ambiguity is to be resolved by international institutions.

4 Self-determination

A central platform of the Indigenous peoples' argument is that it is discriminatory to deny the right to self-determination to Indigenous peoples.

Also, Indigenous peoples fall within the natural meaning of the definition of peoples, as is mandated by the Vienna Convention on the Law of Treaties.[27]

Finally, there is an element of historical sovereignty in the Indigenous peoples' claim to self-determination – that Indigenous peoples were the sovereign

[27] 1155 UNTS 331, 8 ILM 679 (1980).

power over their territory prior to colonisation and dispossession, and lost that sovereignty through the illegal actions of others.

An Indigenous peoples' right to self-determination has been explicitly recognised by a number of UN institutions, not least the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples and the UN Human Rights Committee.[28]

But, as New Zealand posits, while being a firm legal principle in international law, espoused in the UN Charter and considered by some as a pre-emptory international legal norm, the content of the right to self-determination does remain confused to some extent. Nonetheless, scholars conclude that international law has settled on some fundamentals, namely that self-determination does not entitle a peoples to secession, or to undermine states' territorial integrity, except in limited circumstances, being:[29]

- where a colonial government governs a nation from outside the nation's territory;
- where a peoples is subject to "alien subjugation, domination, and exploitation", eg Palestinian Peoples; and
- "peoples separate from their parent state with its acquiescence or because the parent state disintegrates" (Former Yugoslavia and the Soviet Union).

There is also the implicit caveat in the 1970 UN Declaration on Friendly Relations, considered customary international law, that international law shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the *principle of equal rights and self-determination of peoples* and *possessing a government representing the whole people belonging to the territory without distinction as to race, creed or colour.*

Thus, article 3 of the Declaration, subject to existing international law, does not create an unlimited right for Indigenous peoples to secede from the states in which they currently reside.

Also, leading Indigenous peoples' in international law scholar, James Anaya, argues cogently that self-determination has substantive and remedial aspects. The remedy for a breach of a peoples' right to self-determination can include secession, but need not. He writes: [30]

> Accordingly, while the substantive elements of self-determination apply broadly to benefit all segments of humanity, that is, all peoples, self-

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28 For example, see *Apirana Mahuika et al v New Zealand* Communication No 547/1993 (27 October 2000) Report of the Human Rights Committee Vol II A/56/40, para 9.2 and Human Rights Committee "Concluding Observations of the Human Rights Committee: Canada" (7 April 1999) CCPR/C/79/add.105, paras 7 – 8.

29 Andrew Huff "Indigenous Land Rights and the New Self-Determination" (2005) 16 Colo J Int'l Envtl L & Pol'y 295

30 S James Anaya *Indigenous Peoples in International Law* (2ed, Oxford University Press, New York, 2004) 104.

determination applies more narrowly in its remedial aspect. Remedial prescriptions and mechanisms developed by the international community necessarily only benefit groups that have suffered violations of substantive self-determination. Indigenous peoples characteristically are within the more narrow category of self-determination beneficiaries, which includes groups entitled to remedial measures; but the remedial regime developing in the context of Indigenous peoples is not one that favours the formation of new states.

In summary, states concerns about secession generally are legitimate. However, any concerns about indigenous peoples' secession are addressed in the Declaration as has been recognised by the vast majority of states.

5 Lands, territories and resources

The lands and territories and resources articles have been watered down in the Chair's text such that there is no clear right for Indigenous peoples to lands that they have traditionally owned, occupied and used but have fallen out of Indigenous land ownership. In any event, these rights can be limited in the interests of protecting non-Indigenous land rights under article 45 of the Declaration and in international human rights treaties.

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