THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

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I Introduction

The United Nations *Declaration on the Rights of Indigenous Peoples*[1] ('*Declaration*') recognises putative international norms and evolving human rights standards pertaining to Indigenous peoples. While some of the rights elaborated in the text do not constitute accepted legal standards, the genesis of the *Declaration* was the need to arrest the protection gap that exists in international human rights law in relation to Indigenous peoples. Australia was one of four states that voted against the *Declaration* in the General Assembly on 13 September 2007.[2] This has no bearing on its application in Australia because the *Declaration* is a United Nations organ resolution, meaning it has no binding force in international law and therefore does not create any legal obligations under Australian law, irrespective of Australia's official position. The *Declaration* does, however, have significant moral force and may contribute to emerging customary international law on Indigenous rights. Despite being less than legally binding, the *Declaration* will be of great utility to Aboriginal and Torres Strait Islander communities because it is a comprehensive guide to human rights standards as they relate to Indigenous peoples, particularly given the centrality of the right to self-determination in the *Declaration*.

This article provides an overview of the *Declaration*'s passage through the United Nations and summarises aspects of the polemical debates that rendered the draft text controversial. The Working Group on Indigenous Peoples ('WGIP') was subject to such protracted debate that only two articles were passed between 1995 and 2005. As such, an overview of the central controversies of the 10 year impasse at the annual *Declaration* working groups in Geneva is provided. The primary focus is on the main arguments employed by states and Indigenous people regarding procedure, the right to self-determination and the concept of collective rights. In concluding, this paper considers the future of the *Declaration* internationally and domestically.

II Indigenous People and the UN Human Rights System: A Historical Overview

There are more than 300 million Indigenous people in over 70 different countries worldwide. The representatives of these groups have established a formidable presence at the United Nations, utilising international fora to increase global awareness of Indigenous peoples' issues.[3] It is within the United Nations human rights framework that Indigenous peoples have made the strongest impact upon international law. By mobilising the available human rights mechanisms, Indigenous people and their representatives have provided a critique of the Westphalian notion of sovereignty manifest in the narrative of dispossession that underpins the international legal and political system. It has also enabled reportage on the historical and contemporaneous violations of Indigenous peoples' human rights by member states.[4]

The first significant development in Indigenous advocacy was in 1971 when the United Nations Sub-Commission on the Prevention of Discrimination and Protection of Minorities ('Sub-Commission') commissioned Martinez Cobo to conduct a comprehensive study of discrimination against Indigenous peoples.[5] A consequence of that study was a definition of Indigenous peoples as

> those people having an 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.[6]

This definition has been a source of conflict for some member states, in particular Asian and African states, who have argued

that no Indigenous people exist in their regions and that these groups are actually 'minority groups'.[7] This tension contributed to the controversy regarding the draft text of the *Declaration*.

Since the period in which the Cobo study was conducted, Indigenous participation has increased dramatically at the United Nations. An indicator of this is the Indigenous non-governmental organisations ('NGO(s)') that have gained United Nations Economic and Social Council ('ECOSOC') consultative status. Consultative status is vital for Indigenous advocacy directed at the more restrictive UN bodies such as ECOSOC, the Human Rights Council and the Sub-Commission, as article 71 of the *Charter of the United Nations* states that, 'NGO's with concerns falling within the competence of the Economic and Social Council and its subsidiary bodies may be granted, if they so request, consultative status with this Council'.

The organised and intensive work undertaken at the United Nations by Indigenous representatives led to the most substantive development for Indigenous rights when the Sub-Commission, authorised by ECOSOC, established the WGIP to monitor developments relevant to Indigenous peoples.[8] The function of the now defunct WGIP was to gauge the major human rights concerns pertaining to Indigenous peoples. The ECOSOC resolution establishing the WGIP identified its mandate as having two key functions: review of 'developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations'; and 'to give special attention to the evolution of standards concerning the rights of such populations'.[9] It is the second element, the standard setting mandate, which empowered the WGIP to elaborate a draft in consultation with Indigenous participants of a United Nations declaration on the rights of Indigenous peoples. In 1985 the WGIP decided it should draft a declaration on Indigenous rights to fill the protection gap in international human rights law. It was envisioned that such a text would be produced in consultation with Indigenous representatives and adopted by the General Assembly.[10]

III Working Group Controversies

A The Procedure of the Working Group on the Draft Declaration

The Commission on Human Rights ('CHR') established an open-ended inter-sessional working group elaborating a draft declaration on the rights of Indigenous people ('the Working Group') in 1995.[11] As a CHR-affiliated body, the Working Group usually required ECOSOC NGO consultative status. However, special arrangements were made to enable broad Indigenous participation with observer status.[12] A specialist procedure was agreed upon and annexed to the resolution that established the Working Group, 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 meeting.[13] In determining authorisation, the Secretariat took into consideration the objectives and expertise of the Indigenous organisation and consulted the relevant member state.

The Working Group faced challenges from the outset in relation to the extent of Indigenous participation. While the first session was relatively uneventful, its engagement with the substantive text was minimal. The second session resulted in a walk-out by Indigenous representatives because of disagreement on the proposed work agenda for the meeting. At this meeting a statement by the Indigenous caucus called for the immediate adoption of the text 'without change, amendment or deletion' and expressed concerns about amendments to the text.[14] By the third meeting, the Indigenous position to reject any amendment to the text was entrenched, although two of the least controversial articles in the draft were adopted on first reading.[15] From 1998-2004 the impasse surrounding the text remained.

The consistent and universal position of the Indigenous caucus was to reject any amendment of the text suggested by states. This position was predicated on the belief that any amendment would corrupt the original text and therefore mean that all aspects of the (then) Draft Declaration were negotiable. Indigenous representatives argued that there was a significant risk of Indigenous rights being formally derogated at international law through a weaker and watered-down text. There were attempts to break the impasse, for example Mick Dodson's efforts to shift the Indigenous position.[16] Dodson proposed a framework of principles that established fundamental standards by which the text could be amended ('the Dodson principles'). The Dodson principles stated 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'. Dodson argued in his proposal that '[i]n order to rebut this presumption, any proposal must satisfy the following criteria: 1. It must be reasonable; 2. It

must be necessary; 3. It must improve and strengthen the existing text. In addition, any proposal must be consistent with the fundamental principles of: 1. Equality; 2. Non-discrimination; 3. The prohibition of racial discrimination'.[17] This proposal failed to shift the increasingly untenable position of the Indigenous caucus.

Indigenous representatives maintained that altering the text 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'.[18] In 2002 Working Groups convened in February and December (since the 2001 meeting had been postponed). These meetings reflected the growing frustration at the inertia of the Working Group. The major controversy for Indigenous participants during this period was that the drafting was conducted by states, in private sessions, during the two weeks allocated by the UN for meeting time to work in 'informal consultations'.[19] Transparency issues became the subject of heated debate.[20] While state consultations in private and informal meetings are not uncommon in the UN, it was expensive for Indigenous people to attend these meetings for two weeks. At the February 2002 Working Group Indigenous people were invited to attend the private government meetings, without speaking privileges but with a question time of 15 minutes at the end of each session. It wasn't until the Working Group met in 2004 that significant advances were made in breaking the impasse between states and Indigenous peoples. The abolition of the Indigenous caucus' 'no change' position resulted in Indigenous participation in amendments to the text.

B Self-determination

Self-determination was one of the key sticking points at the Working Groups sessions. The basis of Indigenous arguments in favour of the right to self-determination is its existence in international instruments, encompassed as it is in common article 1 of the *International Covenant on Civil and Political Rights*[21] ('*ICCPR*') and the *International Covenant on Economic, Social and Cultural Rights*[22] ('*ICESCR*') and articles 1 and 55 of the Charter of the United Nations. Indigenous peoples argued that the international legal right of self-determination applied to them and indeed constituted the cornerstone upon which the (then) Draft Declaration was predicated. Without acceptance of the right to self-determination the catalogue of rights protected in the body of the Draft Declaration cannot be effective: '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'.[23] It is therefore of great significance that article 3 of the *Declaration* reads: 'Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'.[24]

The official reports of debates at the Working Groups on the Draft Declaration clearly show that states were heavily influenced by traditional concepts of territorial integrity and non-interference (arguably a product of the financial implications of many economic, social and cultural rights) and were reluctant to extend the right of self-determination to Indigenous peoples at international law.[25] Secession remained a concern for some states when arguing against the concept of self-determination. This is despite consistent Indigenous efforts to continually deny such claims. As Benedict Kingsbury contends, it is unfortunate that the 'legal instantiation of self-determination upon which the claims of Indigenous peoples have drawn most in the formative period of the international Indigenous movement is the law established for decolonisation of extra-European colonies of European states'.[26]

Indigenous people have repeatedly countered secession arguments with one of the most quoted principles of international law: the so-called safeguard clause from the 1970 *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States*:[27]

> Nothing in the foregoing paragraphs shall 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 as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

While international law provides that the *Declaration* is subject to customary international law, to pacify those obstructive states, explicit reference was made in article 46 of the final text of the *Declaration* to the safeguard clause to confirm the territorial integrity of states. It is worth noting that Indigenous peoples regard secession arguments as implying that they, and their forebears, somehow relinquished or submitted

themselves to colonisation and therefore that the right to self-determination in fact constitutes a right to re-stablish sovereignty.[28] In fact, however, a common sentiment shared by Indigenous peoples at the Working Groups was that the right to self-determination, recognised in international covenants, applies to all peoples. Hence, for states to restrict its application solely to Indigenous peoples would actually be a violation of the international peremptory norm prohibiting racial discrimination.

Finally, of increasingly persuasive value during the years of the Working Group was the emerging international law right to democratic governance and the link being made between the right to self-determination and political participation within the liberal democratic context.[29] In 1999 the Australian Government argued that:

> Australia recognizes that the intention of Article 3 is to enunciate ... the legitimate aspirations of Indigenous peoples to enjoy more direct and meaningful participation in decision-making and political processes and greater autonomy over their own affairs.[30]

Because of this potential norm of democratic governance,[31] Indigenous people also argued that self-determination, in the context of liberal democratic political participation, is inextricably linked with democratic governance: 'the denial of self-determination is essentially incompatible with true democracy. Only if the peoples right to self-determination is respected can a democratic society flourish'.[32] At the Working Groups Thomas Franck's thesis on self-determination was frequently referred to:

> Self-determination is the oldest aspect of the democratic entitlement … self-determination is postulates the right of a people in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement.[33]

The idea is, of course, that self-determination works to enhance democracy, rather than fracturing it.

C Collective rights

Inherent in the *Declaration* is a challenge to the historically individual nature of Western human rights discourse, under which individual rights are considered paramount and group identity is constructed as the freedom of the individual to engage in group activity. To that extent rights discourse does not readily extend to the communal nature of Indigenous society. For some states collective rights were already part of the domestic legal system; other states, however, denied their very existence.[34] The Australian Government was consistent in its acceptance of collective rights; its main concern was the potential for conflict between individual rights and collective rights. The Government noted that collective rights are recognised in the Australian legal system.[35]

Indigenous people argued that collective rights are recognised in numerous international human rights law instruments,[36] for example the *International Convention on the Elimination of All Forms of Racial Discrimination*,[37] and the International Labour Organization's *Indigenous and Tribal Peoples Convention 1989, Convention 169* (which uses the term 'Indigenous peoples'). The *1986 African Charter on Human and Peoples Rights* recognises Indigenous peoples' claims to collective rights,[38] the *1978 UNESCO Declaration on Race and Racial Prejudice,* the *2001 UNESCO Declaration On Cultural Diversity* and the *Convention on Biological Diversity* also affirms collective rights.[39]

The polemic nature of the debate over the definition of 'peoples' and the enormous amount of time taken to resolve this debate necessitated that the Secretariat ensure that the official UN report on the progress of the Working Groups 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.[40]

IV Australia's Position

When the annual meetings of the Working Groups commenced the Australian Government supported the elaboration of a declaration and played a constructive role in supporting the right to self-determination for Indigenous peoples:

> 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

> internationally that a reference to self-determination in the Draft Declaration would not imply a right of secession.[41]

In 1996 a change of government led to Australia effectively withdrawing its support for the Declaration, the Howard Government insisting on changes to the text that would reflect Australian domestic law. In particular, the Government objected to the right to self-determination, expressing its concern about a secessionist movement arising out of any formal recognition of the right of self-determination. The Foreign Minister, Alexander Downer, suggested 'self-management' as an alternative nomenclature to 'self-determination', arguing that the latter gave 'an impression that we are prepared to have a separate indigenous state'.[42] It is important to note that the Foreign Minister's statement was issued in reply to the concerns raised by One Nation leader Pauline Hanson who queried the meaning of self-determination in Parliament:

> What exactly does self-determination mean? Does it mean self-government? Does it mean dedicated Aboriginal seats in parliament, as suggested recently by some prominent New South Wales state politicians? The fact is that native title is just a precursor to the establishment of a taxpayer funded Aboriginal state. Will other Australians have to seek permission or pay to enter?[43]

Since the Howard Government was elected in 1996, Australia has maintained an alliance with other Western democracies such as Canada, New Zealand and the United States in questioning the application of self-determination to Indigenous peoples. Australia's position eventually engendered a vote against the *Declaration* when it was adopted by the General Assembly on 13 September 2007.

V The Adoption of the *Declaration*

In 2004 significant progress was made on drafting the text after the Chair initiated conference room techniques to break the impasse. In 2005 the Chairperson sent a proposed text to the new Human Rights Council and in its first session in June 2006 it adopted the Chairperson's text.[44] The text then moved to the General Assembly where it was sent to the Third Committee to be considered. There was a paucity of consensus and it was scuttled by an African coalition who sought deferral of the *Declaration*. The concerns about the text were based upon the major controversies identified above: self-determination, collective rights and the identity of Indigenous peoples. The nature of diplomatic work at the United Nations renders it difficult for all states to attend all Working Groups. Few African countries had been involved in the process of drafting the *Declaration*. Confusion about the text was exploited by those Western liberal democracies most opposed to it: the United States, Canada, New Zealand and Australia. The text was deferred in 2006, however, after a process of lobbying with African (and other) states to explain the history of the text and how it in fact resolves the aforementioned controversies above, the General Assembly met and on 13 September 2007 adopted the *Declaration*.

VI A Summary of the *Declaration*

The text of the *Declaration* is extensive. Parts are over-elaborated and as a whole the *Declaration* goes further than 'well-accepted rights' in existing international law.[45] It is a catalogue of rights that seek to fill the protection gap in international human rights law. The text is aspirational and provides a framework that states should consider when drafting legislation and forming policies related to Indigenous peoples. However, it is important to note that there is no obligation on states to actually use the *Declaration* in this way. In this sense it is immediately apparent that the *Declaration* will not have a substantive impact on domestic legal systems because the rights contained therein are non-binding. However, as it is increasingly utilised and practised it may be that the *Declaration* will contribute to a growing body of customary international law.

A The *Declaration* and Customary International Law

Customary international law is not necessarily derived from written treaties or written documents (though it may have its genesis in an international document). It is law that is inferred from the custom or practice of states, meaning that it is established through the usual behaviour and perceived obligations of states. Customary international law is important because it is binding upon all states irrespective of formal acceptance, whereas treaty obligations that have not attained the status of custom are binding only upon those states that have formally ratified the instrument in question. For a rule to attain the status of customary international law two requirements must be met: state practice in relation to the norm in question must be uniform and consistent; it is also necessary that the state in question evinces a belief in the existence of the putuative obligation - the *opinio juris*.

The principle of *jus cogens* is also pertinent in customary international law. The *jus cogens* reflects peremptory norms or rules that are considered by the international community to be of such importance that they cannot be derogated from or limited in any way. The only way to modify the *jus cogens* is through the development of another general principle at international law of the same nature.[46] For Indigenous peoples important examples of *jus cogens* norms include the prohibition on slavery, genocide and racial discrimination. The question of whether a norm of customary international law has or has not crystallised is often controversial. It is notoriously difficult for norms to attain the status of customary international law. Anaya makes the point, however, that with increased communication technologies disseminating information about the utilisation and understanding of norms, a convergence of normative understanding will be enhanced.[47]

B Content of the *Declaration*

The *Declaration* is broadly divided into themes: self-determination and its exercise; threats to the survival of Indigenous peoples; cultural, religious, spiritual and linguistic identity; education and public information; participatory rights; and lands and resources.

Articles 1-6 recognise general principles and rights to nationality, self-determination, equality and freedom from adverse discrimination. Article 3 recognises the Indigenous right to self-determination, consistent with common article 1 of the *ICCPR* and the *ICESCR*: 'Indigenous peoples have the right to self-determination. By virtue of this right they freely determine their political status and freely pursue their economic, social and cultural development'.

Articles 7-10 deal with rights to life, integrity and security. Some states had difficulties in passing these articles in the context of emergencies and argued that they do not have to gain Indigenous consent prior to removal or relocation in circumstances of emergency.

Articles 11-13 codify rights pertaining to culture, spirituality and linguistic identity, including 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. This includes archaeological and historical sites, artefacts, performing arts or literature. These sections also highlight the right to maintain and protect and have access in privacy to religious and cultural sites and the right to repatriation of human remains.

Articles 14-17 deal with specific rights pertaining to education, information and labour rights, including the right of all children to all levels and forms of education, including the right of Indigenous people to establish and control their own educational systems and institutions. This body of rights 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 participatory rights elaborating development and other economic and social rights. This extends to Indigenous people participating fully at all levels of decision-making in relation to matters that affect their own lives. This section empowers Indigenous people with the right to special measures for immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security. Importantly, the *Declaration* also provides that states shall take measures, in conjunction with Indigenous peoples, to ensure that Indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Articles 24-30 deal with lands, territories and resources. This is the most controversial section of the *Declaration*. Article 26 states that Indigenous peoples have the right to own, develop, control and use lands and territories. This encompasses rights to the total environment of such lands, therefore comprising air, waters, coastal seas, sea-ice, flora and fauna and other resources which Indigenous people 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.

Articles 31-36 explain how the right to self-determination can be exercised, including matters relating to internal local affairs such as culture, education, information, media, housing, employment, social welfare, economic activities, land and resources, and the environment. This section also deals with matters of citizenship and the capacity to determine one's

own citizenship in accordance with customs and tradition. It enables Indigenous people to promote and maintain traditional judicial customs, procedures and practices.

Article 37 contains the right to conclude treaties, agreements or other constructive arrangements with states. Article 38 provides that the state, in cooperation with Indigenous peoples, shall take appropriate measures including legislative measures to achieve the ends of the *Declaration* and article 39 states that Indigenous people have the right of access to financial and technical assistance from states for the enjoyment of rights in the *Declaration*. Articles 40-46 are implementation rights expounding the role of the state and international organisations in recognising the rights provided in the *Declaration*.

VII Conclusion

Following the adoption of the *Declaration* the Supreme Court of Belize handed down a decision applying the *Declaration*, which related to Mayan rights to lands and resources. Chief Justice Conteh held that Belize was obliged by the *Constitution* and international law to recognise, respect and protect Mayan customary land rights. He found overwhelming evidence of Mayan customary land tenure and stated that Belize should 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, significance obligations for the State of Belize in so far as the indigenous Mayan rights to their lands and resources are concerned.[48]

After such an extensive process of drafting, negotiating and amendments, it is a triumph for both Indigenous peoples and the United Nations system that the *Declaration* was adopted by the General Assembly. Indigenous peoples' rights and claims strike at the heat of the statist system that dominates international law; the *Declaration* is a reminder of the impact of dispossession and the historical and contemporaneous human rights violations of Indigenous peoples. The next step is to consider who will in fact enforce and police the *Declaration* at the international level. It is important that there is a supranational institution that oversees its implementation by states. Currently the *Declaration* provides that the Permanent Forum on Indigenous Issues and specialised national and UN agencies should promote respect for, and full application of, the provisions of the *Declaration*, and that they should follow up the effectiveness of the *Declaration*.[49] There has been no definitive decision made as to a permanent monitoring body for the *Declaration*.

For Australia's Indigenous population, and indeed for the nation as a whole, Australia's negative vote against the *Declaration* does not affect or subvert the underlying importance and utility of the *Declaration*. However, with a new Government in power it is important, even at the purely symbolic level, to formally withdraw Australia's opposition. The *Declaration* constitutes an important document for Aboriginal and Torres Strait Islander peoples in their dealings with the Australian Government. This is particularly so in light of the trenchant criticism of Australia's contravention of its international human rights obligations in the Northern Territory 'intervention' and the associated suite of legislation. Of especial concern is the exclusion of the international *jus cogens* rule prohibiting discrimination on the basis of race, through the exclusion of the *Racial Discrimination Act 1975* (Cth).[50] In such a context the *Declaration*'s adoption is timely, in spite of Australia's vote against it in the General Assembly, because it reinforces the fundamentally unacceptable nature of the legislation underpinning the intervention.

The election of the Rudd Government in Australia represents a new opportunity for reconciliation. It is hoped that the Australian Labor Party's preference for multilateralism will herald a new approach to Indigenous affairs. From the outset this would require tempering the discriminatory excesses of the Northern Territory emergency response. Also required is a formal statement of Australia's commitment to the promotion of, and respect for, the full application of the *Declaration* in Australia. Following a decade of minimal consultation and a distinct paucity of engagement with Indigenous Australia, a commitment by the new Federal Government to the *Declaration* would reveal renewed political will and good faith - essential prerequisites to the reconciliation process in Australia.

Endnotes

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1 UN GAOR, 61st sess, GA Res 61/295, UN Doc A/RES/47/1 (2007).

2 The *Declaration* was adopted by the General Assembly by a vote of 143 in favour, with four votes against and 11 abstentions.

3 United Nations Office of the High Commissioner for Human Rights, *Fact Sheet No 9 (Rev 1) The Rights of Indigenous Peoples*, GA Res 50/157 annex (1995).

4 See generally Paul Keal, *European Conquest and the Rights of Indigenous Peoples: The Moral Backwardness of International Society* (2003) 84-112; S James Anaya, *Indigenous Peoples in International Law* (2004) 15-34.

5 *Study of the Problem against Indigenous Populations, vol 5, Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub2/1986/7 (1986-87).

6 Ibid, Add 4, 379, 381.

7 For an overview of the debate concerning the definition see Sarah Pritchard, 'Working Group on Indigenous Populations: mandate, standard-setting activities and future perspectives' in Sarah Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights* (1998) 42

8 *Establishment of the Working of Indigenous Peoples*, UN ESCOR, ECOSOC res 1982/34 (1982). See generally Anaya, above n 4, 221-22.

9 *Establishment of the Working of Indigenous Peoples*, UN ESCOR, ECOSOC res 1982/34 (1982).

10 UN ESCOR, UN Doc E/CN.4/Sub.2/1985/2.Ann. II (1982). See generally Julian Burger, 'The United Nations Draft Declaration on the rights of Indigenous peoples' (1996) 9 *St Thomas Law Review* 209.

11 UN ESCOR, ECOSOC Res 1995/32, UN Doc E/CN.4/1996/84 (1996).

12 Ibid. See also Pritchard, above n 7, 40, 50.

13 *Participation of organizations of indigenous people in the open-ended inter-sessional working group*, Annex to ECOSOC Res, above n 11.

14 Statement of Indigenous Peoples Caucus to the Chairman of the Intersessional open ended working group established to elaborate a Draft Declaration on the rights of Indigenous peoples, 21 October 1996 cited in Sarah Pritchard, *Setting International Standards: An Analysis of the United Nations Draft Declaration on the rights of Indigenous Peoples* (3rd ed, 2001).

15 Articles 5 and 43.

16 Commission on Human Rights Working Group 4, *Report of the working group on the draft United Nations declaration on the rights of indigenous peoples*, 54th sess, UN Doc E/CN.4/1998/106 (1997).

17 See Indigenous Peeoples' Centre for Documentation, Research and Information, 'Update 32/33' (1999-2000) <http://www.docip.org/download/english/upd3233e.rtf> at 8 December 2007.

18 'The response of Indigenous representatives at CHRWG 5 to the States' alternate texts': cited in Pritchard, above n 7.

19 For an explanation of informal consultations see Megan Davis, 'The United Nations Draft Declaration 2002' 5(16) *Indigenous Law Bulletin* 6.

20 Ibid.

21 Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

22 Opened for signature 16 December 1966, 999 UNTS 3 (entered into force 3 January 1976).

23 Pritchard, above n 14, 46.

24 Ibid.

25 See, eg, UN Docs E/CN.4/1996/84; E/CN.4/1998/106; E/CN.4/2000/84; and E/CN.4/RES/2001/58. 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.

26 Benedict Kingsbury, 'Reconciling Five Competing Conceptual Structures of Indigenous Peoples Claims in International and Comparative Law' (2001) 34 *New York University Journal of International Law and Politics* 189-250.

27 UN GAOR, GA Res 2625 (XXV), 25th sess, UN Doc A/8082 (1970).

28 Kingsbury, above n 26.

29 *Universal Declaration of Human Rights*, UN GAOR, GA Res 217A III, 10 December 1948, art 25; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

30 CHRWG 1999 Statement of Australia cited in Caroline Foster, 'Articulating self-determination in the draft declaration on the rights of Indigenous peoples' (2001) 12 *European Journal of International Law* 152.

31 See, eg, Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; Susan Marks, 'International Law, democracy and the end of history' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 532; Gregory H Fox and Brad R Roth, 'Introduction: the spread of liberal democracy and its implications for international law' in Gregory H Fox and Brad R Roth (eds), *Democratic Governance and International Law* (2000) 1.

32 Rudolpho Stavenhagen, 'Self-determination: Right or Demon?' in Donald Clark & Robert G Williamson (eds), *Self-Determination: International Perspectives* (1996).

33 Franck, above n 31, 52.

34 For example, France, Japan and the United States: *Report of the Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995*, UN Doc E/CN.4/1996/84 (1996).

35 *Native Title Act 1993* (Cth) s 223(1). See also *Gerhardy v Brown* (1985) 149 CLR 70, 104-105 (Mason J).

36 Committee on Human Rights, *Report of the Working Group on*

the Draft Declaration of Indigenous Peoples, 58th sess, UN Doc *E*/CN.4/2002/98 Annex 11 (2002).

37 Arts 1(a), 2, 4(a) and 14.

38 Arts 19, 20, 21, 22, 23 and 24.

39 Article 6(1).

40 For discussion on inclusion of paragraph to Annex of CHR reports qualifying the use of peoples, see generally, Sarah Pritchard, 'Commission on Human Rights Working Group (CHRWG) Third Session 27 October-7 November 1997' (1998) 5 *Indigenous Law Bulletin* 4; 'Working Group on Indigenous Populations - Working Paper by the Chairperson-Rapporteur, Mrs Erica-Irene Daes on the concept of "indigenous people"' 2 (1997) *Australian Indigenous Law Reporter* 167.

41 Statement by Mr Bill Barker on Behalf of the Australian Delegation, Geneva, 21 November 1995 cited in Pritchard, above n 14.

42 'Downer fears phrase will split Australia', *The Age* (Melbourne), 22 August 1998.

43 Second Reading Speech, Pauline Hanson Appropriation Bill (No 1) 1998-99 (Cth), House of Representatives, 2 June 1998 (Pauline Hanson).

44 See Human Rights Committee, *Consideration of Reports submitted by States Parties under Article 40 of the Covenant, Venezuela*, UN Doc CCPR/C/VEN/1998/3 (1999) [6]; Human Rights Committee, *Consideration of Reports submitted by States Parties under Article 40 of Covenant, Peru*, UN Doc CCPR/C/PER/1998/4 (1999) [6].

45 Alexandra Xanthaki, *Indigenous Rights and the United Nations Standards: Self-determination, Culture and Land* (2007) 116.

46 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

47 Anaya, above n 4, 62.

48 *Belize -- Aurelio Cal, et al v Attorney General of Belize, Supreme Court of Belize* (Claim 121/2007) (18 October 2007).

49 *United Nations Declaration on the Rights of Indigenous Peoples*, UN GAOR, 61st sess, GA Res 61/295, UN Doc A/RES/47/1 (2007).

50 *Northern Territory National Emergency Response Act 2007* (Cth), s 132.

COURT AND TRIBUNAL DECISIONS