

Analysis of Chairs text¹

Executive summary

We have considered the Chairs text (E/CN.4/2006/79) that was collated after the 11th session of the Working Group on the Draft Declaration on the Rights of Indigenous Peoples. We have compared the Chair's text to the original sub-commission text ("DRIP") testing whether the Chair's text improves or diminishes the sub-commission text.

Our analysis has shown that some amendments neither diminish nor strengthen the text whilst others change the original meaning of the text or diminish the text. Given the current discussion amongst Indigenous Peoples as to whether the Chair's text is the best text that we can expect, we have formed the view that the Chair's text as a *whole* must be rejected.

Preambular paragraphs

There are some changes to the preambular paragraphs that strengthen the original text such as PP1, PP10 and PP18. There are also some amendments that are not necessary for example PP15 and PP19 however; they do not change the original meaning of the text.

The major change is to PP13. Treaties, agreements and constructive arrangements are deemed to be domestic arrangements but some may be considered of international importance. Given the importance of Treaties, agreements and constructive arrangements to Indigenous Peoples, any attempt to limit the scope of these documents is concerning. The United Nations expert Martinez in his Treaty report clearly stated that such documents were international in nature. If the Chairs text was accepted, then the Declaration would be inconsistent with his findings.

Articles

There are some changes to the articles that strengthen the original text such as A1, A14 and A44. There are also some amendments that are not necessary for example A18 and A23 however these amendments do not change the original meaning of the text.

The major changes relate to self determination (A3 and A31), ethnocide and genocide (A7), rights to land (A26), ownership of intellectual and cultural property (A29) and inclusion of third party rights (A45). All these changes strike at the heart of the fundamental principles upon which the Declaration is based being collective rights, ownership of land and resources and full self determination over those resources. These principles cannot be diminished without having significant repercussions for Indigenous Peoples rights.

Procedural concerns

The DRIP has been discussed in the working group for the past 11 years. There is now a view that the Chairs text be adopted which seems to be based solely on a timing issue. This ignores the practice and process of the working group in that the Chairs text should also be discussed and its changes explained by their author. We must insist that the process that has existed for the past 11 years continues. Why would we adopt a text which has not been discussed?

¹ Analysis prepared by Estebancio Castro Diaz and Tracey Whare, 15 June 2006. This paper is the personal views of the writers and does not necessarily reflect the views of the International Indian Treaty Council or the Aotearoa Indigenous Rights Trust.

Consensus

The Chair has always maintained consensus as the method of decision making within the working group. This should be maintained. The question must be asked as to why the Chair is now changing this position given that every year he has stated that consensus is the only way that the DRIP will be presented to the Human Rights Council (formerly the Commission on Human Rights).

Further there is no consensus amongst the indigenous caucus or the indigenous regional groupings. This is another reason to maintain the DRIP which is the only text on which there has been consensus.

Other international standard setting

It is important to remember that other national and international standard setting is influenced by what is happening to the DRIP. To accept a weaker text is to limit the ability and scope of those Indigenous Peoples working in other standard setting areas. Again, it creates problems for those who rely on a strong and robust Declaration for their negotiations. For example in the access and benefit sharing negotiations, recognition of Sovereignty of Indigenous Peoples over their land and resources is required in order for a framework that acknowledges and accepts access and benefit sharing between Indigenous Peoples and states/corporations to be established. If there is no acknowledgement of Sovereignty, then states/corporations could argue that access and benefit sharing with Indigenous Peoples is neither required nor necessary.

Our analysis follows.

Clause	Comment
PP1	Deletion of phrase "in dignity and rights"; however the change still maintains the original meaning therefore it can be accepted.
PP2	Same as original text.
PP3	Same as original text.
PP4	Same as original text.
PP5	Change of phrase from "deprived of their human rights and fundamental freedoms" to "have suffered from historic injustices as a result of". The first phrase is preferable as it uses language that is already found in human rights instruments whilst the second phrase is more of a social comment on history. Given this is a preambular paragraph the change is not so important and could be accepted.
PP6	One phrase is amended from "inherent rights and characteristics" to "inherent rights". Secondly the wording has been moved around so that the reference to rights to land, territories and resources is now at the end of the first paragraph. The emphasis has changed slightly. There is a new second paragraph that refers to treaties, agreements and other constructive arrangements with States. Moved from PP13 but not exactly in the same terms.

PP7	Same as original text.
PP8	Same as original text.
PP9	Same as original text.
PP10	Slight change but Chairs text uses more direct language and could be accepted.
PP11	New phrase added at the end “consistent with the rights of the child”. This phrase refers to the Convention of the Rights of the Child (“CRC”). If the CRC is acceptable to Indigenous Peoples, then this amendment can be accepted.
PP12	Same as original text.
PP13	Major amendment which states that treaties, agreements and constructive arrangements (“treaties and agreements”) between states and Indigenous Peoples are in some situations matters of international concern. This implies that the norm is that treaties and agreements are matters of domestic interest. This is a significant change from the original article. It leaves open to interpretation as to whether treaties and agreements are considered of international importance. In limiting treaties and agreements to matters of domestic importance only, States do not need to consider international standards or international scrutiny. Decisions made in the national context are likely to be political as opposed to legal. For these reasons, the amended text is not acceptable.
PP14	Same as original text.
PP15	New phrase at the end of the paragraph “exercised in conformity with international law”. This phrase is superfluous because all human rights documents must be consistently interpreted with existing human rights law. Insertion of new paragraph (PP15bis) which refers to recognition of Indigenous Peoples human rights enhancing relations between states and Indigenous Peoples. Again superfluous however, whilst both amendments are not necessary, they could be accepted.
PP16	Wording has been rearranged and a new word inserted being “obligations”. Wording changed but the meaning remains the same.
PP17	Same as original text.
PP18	First paragraph is the same. Insertion of a new paragraph (PP18bis) which refers to collective Indigenous Peoples rights. Strengthens the original text and can be accepted.
PP19	Insertion of new phrase at the end “as a standard of achievement to be pursued in a spirit of partnership and mutual respect”. Again superfluous, adds nothing to the original. Whilst not necessary could be accepted.
A1	Right to all Human Rights

	<p>Deletion of the word “effective” and insertion of the phrase “as a collective or as individuals”. Doesn’t change the meaning of the article, but neither does it add anything. Deletion of the word effective whilst not good can be accepted.</p>
A2	<p>Equality with other Peoples</p> <p>Slightly different wording but doesn’t change the meaning so is acceptable.</p>
A3	<p>Self Determination</p> <p>First paragraph is the same as the original text. The second paragraph (A3bis) is the original article 31 but the phrase “as a specific form” has been deleted. This creates two potential interpretations. The first is that the meaning of the new A3bis limits self determination to local and internal matters only. There is no full right of self determination contained within this paragraph.</p> <p>Alternatively, it could also be interpreted that A3bis is only one form of self determination and does not rule out other forms of self determination however; it is unlikely that States would want to interpret self determination for Indigenous Peoples in the full sense. The meaning is therefore ambiguous. Further, it is discriminatory to expressly curtail self determination for Indigenous Peoples.</p>
A4	<p>Characteristics and Legal Systems</p> <p>Change of phrase by removing legal systems and replacing it with legal institutions. Also there is a change from political, economic, social and cultural <i>characteristics</i> to political, economic, social and cultural <i>institutions</i>. The term institutions could be considered stronger language.</p>
A5	<p>Nationality</p> <p>Same as original text.</p>
A6	<p>Genocide</p> <p>The two paragraphs have been changed around. The original first paragraph has been amended by deleting the phrase “full guarantees against genocide” to “shall not be subjected”.</p> <p>The removal of children has also been amended from reference to families and communities to groups.</p>
A7	<p>Ethnocide and Cultural Genocide</p> <p>First paragraph is amended. The terms ethnocide and genocide have been deleted and replaced with forced assimilation and destruction of their culture. Also there is a new second paragraph which was originally part of the first paragraph. The new paragraph changes the meaning which originally referred to prevention and redress compared to effective mechanisms for prevention and redress. The first is a legal obligation on the State; the second is a political decision and begs the question who will decide what an effective</p>

	<p>mechanism is.</p> <p>The insertion of the term “effective mechanisms” is a new term introduced by the Chair. It has the effect of removing States obligation to implement the right directly by focusing on the mechanisms to bring about change. This allows States to sidestep the real issue and focus on providing some sort of process which is likely to be political as opposed to legal. For example in Aotearoa, the State has established a Treaty settlement process by which the State and Maori negotiate a settlement package on the basis of Treaty breaches. However, Maori have criticized the State saying the process is not of their own making, there is no real negotiation and it does not provide justice for Maori. The States response is that they have provided an effective mechanism and this is the only mechanism available therefore they are meeting their obligations.</p> <p>Secondly the subparagraphs c, d, and e have new words added. The first two refer to forced population transfer and forced assimilation whilst the original did not refer to forced. Also, subparagraph e refers to propaganda that promotes or incites racial or ethnic discrimination not just propaganda per se.</p> <p>The amendments do not improve the original text rather they redefine and limit the right and are not acceptable.</p>
A8	<p>Identity</p> <p>This article has been deleted with no explanation. According to the Chairs summary there were numerous texts put forward. No one asked for it to be deleted. The article refers to the right of indigenous identity. Until an explanation is given as to why the article was deleted, its deletion is not acceptable.</p> <p>It should be noted that A32 also covers identity and membership.</p>
A9	<p>Community</p> <p>One amendment. “Disadvantage” amended to “discrimination”. Better wording, the change can be accepted.</p>
A10	<p>Forced Removal</p> <p>One amendment. The phrase “free and informed” is changed to “free, prior and informed consent”. This is an improvement and can be accepted.</p>
A11	<p>Armed Conflict</p> <p>This article has been deleted with no explanation. According to the Chairs summary there were numerous texts put forward. No one asked for it to be deleted. The article refers to the rights of Indigenous Peoples during armed conflict. The article refers to the Fourth Geneva Convention and the subparagraphs highlight particular areas of importance to Indigenous Peoples. The original should be maintained.</p> <p>A28 refers to military activities not taking place on Indigenous Peoples land. However, this article does not cover the personal protections set out in the original A11 which are important. For example in Columbia, young Indigenous Peoples are recruited by the State military,</p>

	<p>guerillas and private armies without any option to say no. The alternative is death. The original A11 is therefore important to protect Indigenous Peoples who find themselves in such situations.</p>
A12	<p>Cultural Traditions & Restitution</p> <p>The last part has been amended and made into a new paragraph. The new second paragraph changes the meaning which originally referred to redress compared to effective mechanisms which <i>may</i> include redress. The first is a legal obligation on the State; the second is a political decision and begs the question who will decide what an effective mechanism is. Similar amendment as was made to A7.</p>
A13	<p>Repatriation</p> <p>First paragraph remains unchanged. The second paragraph however, no longer refers to “effective measures” but rather “seek to enable”. This wording is weaker. Also the meaning has changed from reference to protection of indigenous sacred places to repatriation of ceremonial objects and human remains in the States possession. This limits the right as it no longer relates to private collections and museums only to those items held by States.</p>
A14	<p>Transmission of History</p> <p>First paragraph remains unchanged. Second paragraph deletion of phrase “whenever any rights of Indigenous Peoples maybe threatened”. The deletion does not change the meaning of the article and can be accepted.</p>
A15	<p>Education</p> <p>The Chair’s text includes major changes. The first two paragraphs have been rearranged but the meaning remains intact. However, the third paragraph which relates to Indigenous Peoples living outside their communities having the right to access education in their own culture and language has been changed and now refers to access when possible. There is also no reference to resources for implementing this right. These amendments weaken the text and are not acceptable.</p>
A16	<p>Public Information</p> <p>Slight changes but the meaning remains the same. The original text referred to eliminate prejudice whilst the Chairs text refers to combat prejudice and eliminate discrimination. Whilst the wording is weaker the original meaning remains intact. Also the Chairs text refers to consultation and cooperation as opposed to only consultation. This could be considered stronger language but doesn’t add anything to the original text. In summary, the amendments to the article can be accepted.</p>
A17	<p>Media</p> <p>Slight editing change to the first paragraph. The second remains unchanged with the inclusion of a reference to privately owned media. This potentially strengthens the text and the amendment can be accepted.</p>

A18	<p>Labour</p> <p>First paragraph refers to applicable labour law. The original did not contain the word applicable. The word individuals have also been included which is superfluous.</p> <p>There is a new second paragraph which relates to indigenous children and labour. Whilst not necessary it could be considered strengthening the text.</p> <p>Lastly there is a slight editing change to paragraph 3 which can be accepted. In summary the amendments are not accepted as labour law protections should not be limited to those that are applicable as it begs the question who will decide what laws are applicable.</p>
A19	<p>Participation in State Political Systems</p> <p>Some changes but the meaning remains the same. Can be accepted.</p>
A20	<p>Participation in Law Making</p> <p>The new text has a different meaning. The original text refers to a right to participate in national procedures that create laws that affect Indigenous Peoples. The Chairs text refers to a procedure that States should undertake to obtain Indigenous Peoples consent. There is no right contained within the amended text. The original text is therefore weakened and the amended text cannot be accepted.</p>
A21	<p>Subsistence and Development</p> <p>Slight change to first part with the inclusion of the phrase “institutions”. This inclusion is accepted. The second part of the article has become a new paragraph. There is a deletion of the term “compensation” to “redress”.</p> <p>This change is significant because compensation is a legal term which can be determined by Courts whilst redress is a political decision and is decided by the government in terms of what is acceptable politically. This is a weakening of the original text and is not accepted.</p>
A22	<p>Economic and Social Conditions</p> <p>Rewording of the original. Slight changes but acceptable.</p> <p>Two new paragraphs have been added. They strengthen the original text and can be accepted.</p>
A23	<p>Development</p> <p>Slight change. Insertion of a new phrase “right to be actively involved”. Not necessary but can be accepted.</p>
A24	<p>Health & Flora</p> <p>Amendment from right to the <i>protection</i> of medicinal plants, animals and protection to the <i>conservation</i> of medicinal plans, animal and minerals. The right of protection has been deleted and replaced with a reference to conservation. This weakens the text. Also reference to indigenous individuals as opposed to Indigenous Peoples. This changes the</p>

	<p>meaning from Indigenous Peoples being able to access health services to individuals only. It weakens the text as Indigenous Peoples who collectively suffer more than other sectors of society from certain health conditions cannot rely upon this right to be treated as a collective and access resources as a collective.</p> <p>There is a new second paragraph which refers to indigenous individuals attaining high health standards. This paragraph is acceptable but in light of the changes to the first paragraph, is not accepted.</p>
A25	<p>Spiritual and Material Relationship with the Land</p> <p>Deletion of the phrase “material relationship”. The Chairs text only refers to Indigenous Peoples spiritual relationship with the land. Whilst international jurisprudence recognizes Indigenous Peoples right to land as derived from their distinct spiritual relationship with the land, the deletion of the phrase ‘material relationship’ could be understood to limit the right especially in relation to the use and control of natural resources.</p> <p>The Chairs text therefore weakens the original text.</p>
A26	<p>Own, Develop and Control Lands</p> <p>The original text referred to the right of Indigenous Peoples to own, develop, control and use land and resources whilst the Chairs text separates this right into two parts. The first part refers to indigenous people's rights to land which they have traditionally owned, occupied or acquired.</p> <p>The second part of the article which refers to the full recognition of laws, traditions, customs, land tenure systems and institutions has been amended. There is now a reference not to full recognition but rather legal recognition and due respect. Also the reference to indigenous laws and institutions has been deleted.</p> <p>Lastly, the last sentence which refers to effective measures by States to protect these rights has been deleted entirely. All these amendments are not acceptable.</p> <p>The new A26bis refers to States, in conjunction with Indigenous Peoples creating a process that recognizes and adjudicates the rights of Indigenous Peoples in relation to their lands etc. The original text stated that States should recognize Indigenous Peoples institutions outright. The new text creates a process that may recognize Indigenous Peoples rights to land. This is not acceptable and weakens the original text.</p>
A27	<p>Restitution</p> <p>This article relates to compensation for lands no longer in the ownership of Indigenous Peoples. The right of restitution has been substituted to a right of redress which may include restitution or, just, fair and equitable compensation. The changes could allow States to offer the least costly option – compensation instead of restitution. However, this is coupled with the last part (which remains unchanged) that compensation must be equal in quality, size and legal status to those lands already lost. This is strong wording and could assist Indigenous Peoples to argue for equal resources not just resources that the State considers politically</p>

	<p>acceptable.</p> <p>The article can also be interpreted that if restitution and compensation are not possible, then something less could be ok. This article as drafted is not consistent with the CERD general recommendations on Indigenous Peoples.</p>
A28	<p>Conservation, Restoration and Protection of the Environment</p> <p>The first change is the deletion of the word “restoration”. This deletes the right to restoration entirely from this article. Also the sentence referring to military activities has been moved to a new paragraph.</p> <p>The second paragraph includes the phrase “free prior and informed consent” which could be considered an improvement.</p> <p>The new A28bis refers to land being used for military activities. Originally the consent of Indigenous Peoples was required. However, the new text allows military activity to take place with the consent of Indigenous Peoples or, if it is justified by a significant threat to relevant public interest. Whilst there is a reference to consultation with Indigenous Peoples, it is likely that this would be overridden by the public interest argument. However, the land can only be used on a temporary basis if taken for public interest sake.</p>
A29	<p>Cultural and Intellectual Property</p> <p>Deletion of the recognition of ownership of cultural and intellectual property. Cultural property has been more clearly defined as cultural heritage, traditional knowledge and traditional cultural expressions which could be considered an improvement. Also deletion of the phrase “special measures to control, develop and protect”.</p> <p>The meaning of this article has changed with the emphasis being placed on maintaining, controlling, protecting and developing cultural property as opposed to the recognition that Indigenous Peoples own their intellectual and cultural property. It is difficult to understand how Indigenous Peoples could maintain, control, protect and develop these resources without the issue of ownership being addressed. For these reasons these amendments are not acceptable.</p>
A30	<p>Development of Lands, Territories and Resources</p> <p>Slight changes to the first part of the article however the meaning is maintained. The second part has been amended so that compensation has been deleted and replaced with just and fair redress and effective mechanisms. Again the later are political decisions whilst the original text refers to a legal test and is stronger language. The amendments to the last part of the article cannot be accepted.</p>
A31	<p>Autonomy or Self-Government</p> <p>Deleted and moved to A3bis. See comments for A3 above.</p>
A32	<p>Citizenship</p> <p>Deletion of the collective right of Indigenous Peoples and citizenship. The former has not</p>

	<p>been replaced whilst the later has been replaced with identity or membership. Citizenship implies Sovereignty as the State determines the citizenship of its members. Identity and membership are something less such as belonging to a group. The amendment is important for those Indigenous Peoples who prefer to have the formal term of citizenship to define their members. We do not have a preference.</p>
A33	<p>Indigenous Institutional Structures, Juridical Customs, Traditions, Procedures and Practices</p> <p>Deletion of the right to maintain and develop juridical customs and insertion of a reference to developing and maintaining juridical systems or customs where they exist. This article could be interpreted in that only juridical systems or customs which are practiced can be maintain and developed. As such the wording is problematic and is not accepted.</p>
A34	<p>Responsibilities of members</p> <p>Deletion of the word “collective”. Intent remains the same. Change can be accepted.</p>
A35	<p>Indigenous Peoples and international borders</p> <p>Slight changes but intent remains the same. Changes are accepted.</p>
A36	<p>Treaties, Agreements and other Constructive Arrangements</p> <p>Deletion of the phrase “original spirit and intent” and reference to an international body to adjudicate on conflicts and disputes. The deletion of the first phrase could allow States to reinterpret the meaning of Treaties and could fail to address the fundamental reason as to why such documents were entered into by Indigenous Peoples.</p> <p>The deletion of reference to international bodies is not acceptable because it allows States to interpret Treaties on their own terms without reference to international standards. If conflict is not resolved nationally, then it will remain unresolved. It also implies that Treaties are not international documents and therefore are not subject to international scrutiny rather they are matters of domestic concern only. This is not how Indigenous Peoples view their Treaties. These changes cannot be accepted.</p>
A37	<p>Incorporation into national legislation</p> <p>A major change is the deletion of the second part of the paragraph which refers to the rights of the Declaration being written into national legislation. This weakens the text but there is an argument that because the Declaration is an aspirational document it does not need to refer to such specifics as incorporation of the rights into national legislation.</p>
A38	<p>Financial and technical assistance</p> <p>Slight changes but meaning remains the same. Change can be accepted.</p>
A39	<p>Resolution of conflicts</p> <p>Deletion of mutually accepted, replaced with just and fair procedures. Also inclusion of third parties and deletion of “shall take into account” replaced with “shall give due consideration”.</p>

	Strengthening of the text as the right is greater as it includes disputes with third parties also.
A40	United Nations to contribute to realization of the Declaration Same as original text.
A41	United Nations body The problem with this clause is that the UN body to give effect to the Declaration is not the Permanent Forum as the mandate of this body does not cover such matters. It was envisaged that the UN body would have powers to implement and promote the Declaration as well as hold States accountable for Treaty matters. This has not been the case. This amendment could be accepted if the Permanent Forum's mandate was amended to cover the matters set out in the original text. However, given this is unlikely to be the case, the changes cannot be accepted.
A42	Minimum standards Same as original text.
A43	Gender equality Same as original text.
A44	Future rights protected Slight change can be accepted.
A45	Not contrary to the Charter First paragraph has a new word inserted "people". A new second paragraph has been included which refers to Indigenous Peoples rights being limited by the rights of third parties. It also makes reference to requirements of a democratic society. The later part weakens the text as it makes the limitation of Indigenous Peoples rights possible by allowing States to weigh up Indigenous Peoples rights against other interests. For example the New Zealand government argued that the Foreshore and Seabed Act was justified by limitations. Also, it is not necessary to have a limitations clause given that the Declaration must be interpreted with existing international standards. This article cannot be accepted.