

# The rights of indigenous peoples

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discusses the Declaration and responds to New Zealand's objections

In late June, the UN Human Rights Council (UNHRC) adopted the UN Declaration on the Rights of Indigenous Peoples. New Zealand, although not a member and therefore without a vote on this body, opposed its adoption.

The Declaration is now headed to the UN General Assembly in New York. Many indigenous peoples the world over, and the majority of states, are lobbying for its adoption there before the year is out. UN bodies such as the Permanent Forum on Indigenous Issues also champion adoption. New Zealand has stated that it will not support adoption.

## HOW THE DECLARATION CAME TO BE

The Declaration is the product of more than 20 years negotiation between states, and between states and indigenous peoples. In the mid 1980s a body made up of five state-appointed experts on human rights, the UN Working Group on Indigenous Populations, began drafting the first incarnation of the Declaration (the Draft Declaration), involving states and indigenous peoples in that process. The then-titled UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities approved the Declaration in 1994. It had the support of indigenous peoples.

The Draft Declaration was moved to the Sub-Commission's parent body, the Commission on Human Rights in 1995, which established a further working group to "elaborate" a declaration "considering the Draft Declaration." Here, states, including New Zealand, and indigenous peoples' representatives from the world over, continued to negotiate the text. Most states did not accept the Draft Declaration, although some did, meaning indigenous peoples were forced to concede to amendments (this illustrates the clear state-bias in the UN — international law is, after all, mostly made by states and the UN is an organization of states).

By February 2006 the majority of the articles were agreed by consensus in the working group. However, some were not, including articles touching on indigenous peoples' self-determination and rights to lands, territories and resources.

The Chair concluded that consensus on the entire text was unlikely, and that it was doubtful whether further negotiation would appease the small minority of states and indigenous peoples holding up consensus. New Zealand fell into that small minority. Utilising amendments proposed by states and indigenous peoples in the working group, including those advanced by New Zealand, and the discussions in that forum over the previous eleven years, the Chair devised compromise text on the remaining articles. That text, along with the articles agreed by consensus, was adopted by the Human Rights Council. It has the support of the majority of states and indigenous peoples.

## THE SUBSTANCE OF THE DECLARATION

The Declaration has 46 substantive articles and 23 preambular paragraphs. The preamble sets the tone of the Declaration, elaborating a set of principles, including equality, concern with the impact of colonisation and dispossession on indigenous peoples, and recognition of indigenous peoples' inherent, treaty and cultural rights. The substantive provisions are broad in scope, and include:

- an indigenous peoples' right to self-determination;
- the right to equality and freedom from discrimination;
- state duties to respect treaties, agreements and other constructive agreements between indigenous peoples and states, which are also recognised as, "in some situations, a matter of international concern, interest, responsibility and character";
- indigenous peoples' control over developments affecting them;
- indigenous peoples' cultural rights in political, social and economic areas including education, the arts, literature, language and media;
- recognition of indigenous peoples' customary law;
- the right to redress for takings of indigenous cultural, intellectual, religious or spiritual property;
- rights to traditional knowledge;
- collective rights;
- the right to autonomy or self-government in matters relating to indigenous peoples' internal and local affairs;
- state duties to consult with indigenous peoples and seek their free, prior and informed consent before adopting measures that may affect them, including for development projects; and
- indigenous peoples' rights to lands, territories and resources, including to maintain and strengthen their spiritual ties to lands traditionally owned, occupied and used, recognition of indigenous land tenure systems, rights to own and control their lands, and redress for lands illegitimately taken.

## STATUS OF THE DECLARATION

The Declaration is not binding on states in international law, being "only" a declaration. Its force is moral rather than legal. Treaties are binding on states, which ratify them. The Declaration, while couched as "a standard of achievement to be pursued in the spirit of partnership and mutual respect", requires states to "take appropriate measures, including legislative measures, to achieve the ends of this Declaration." The Declaration remains significant.

First, although there is an international treaty focused on the rights of indigenous peoples, ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989, this is not widely ratified. This means the Declaration, as a “universal” instrument, is more widely applicable.

Second, the Declaration has a broader coverage of indigenous peoples’ rights, and provides for greater recognition of indigenous peoples’ specific concerns, than any other existing international instrument. While human rights treaties have been successfully utilised by indigenous peoples to require state recognition of their rights (eg the Committee on the Elimination of Racial Discrimination’s decision on the Foreshore and Seabed Act 2004) this has been the outcome of interpretation of individuals’ rights such as freedom from discrimination. In contrast, the Declaration goes directly to the heart of the matter by, for example, recognising indigenous peoples’ collective land rights.

Third, the Declaration provides evidence of crystallising customary international law on indigenous peoples’ rights (customary international law consisting of state practice “carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the rule of law requiring it”. (*North Sea Continental Shelf (FRG/Den; FRG/Neth)* [1969] 169 ICJ Rep 3, 44)) It is difficult to get a clearer indication from states as to their understanding of the content of legal norms. In New Zealand, customary international law is part of the common law.

Fourth, the Declaration can be of some persuasive legal value, as we have seen: *Ngai Tahu Maori Trust Board v Director-General of Conservation* [1995] 3 NZLR 553 (CA) and the Waitangi Tribunal both referred positively to the Draft Declaration. Lawyers can use it as a point of reference in submissions. Other international institutions, such as the Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples (the Special Rapporteur), the UN human rights treaty bodies and the UN Permanent Forum on Indigenous Issues can use it as a benchmark against which to assess states’ behaviour.

Fifth, the Declaration will be an important tool to add legitimacy to indigenous peoples’ political claims in relation to, for example, negotiations on Treaty of Waitangi settlements and opposition to the deletion of references to the principles of the Treaty of Waitangi in legislation.

Finally, the Declaration complements other international instruments and international institutional jurisprudence. Given that the majority of states support it, the Declaration sanctions existing international law consistent with it, such as that coming from the CERD Committee, the Human Rights Committee and the Special Rapporteur.

## NEW ZEALAND’S OBJECTIONS

Over the years, New Zealand has expressed a whole raft of objections to the Declaration, and made numerous attempts to amend it when it was in draft. The focus here is on those recently expressed in a statement, made together with the US and Australia, to the United Nations Permanent Forum on Indigenous Peoples in May 2006.

New Zealand’s first and most consistent objection is to an indigenous peoples’ right to self-determination, which it fears could give indigenous peoples an unqualified right to secede. It has sought to alter self-determination to mean self-management. Of course, secession, together with threats

to the political unity and territorial integrity, are legitimate state concerns (arguably, even where states’ sovereignty has been wrested illegitimately from indigenous peoples).

However, the Declaration’s right to self-determination is not a unilateral right to secede. This is the reason why most other states, which do not have any lesser interest in territorial integrity, can accept the Declaration.

Looking at the Declaration itself, art 4 states that indigenous peoples “have the right to autonomy and self-government in matters relating to their internal and local affairs” in exercising their right to self-determination. While only one possible interpretation of self-determination, it expresses the thrust of the Declaration on self-determination. Further, under art 46(1) “nothing in this Declaration may be interpreted as implying for any state, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations”. The Charter guarantees states’ territorial integrity and political unity.

Turning to international law more generally, the right to self-determination only permits peoples to secede in specific circumstances, namely where: a colonial government governs a nation from outside the nation’s territory; a people is subject to “alien subjugation, domination, and exploitation”; and where “peoples separate from their parent state with its acquiescence or because the parent state disintegrates”. (See Huff “Indigenous Land Rights and the New Self-Determination” (2005) 16 *Colo J Int’l Envtl L & Poly* 295) The Declaration does not modify this. Only indigenous peoples who fall within these categories have the right to secede as an exercise of the right to self-determination.

There is also the principle, considered by some to be customary international law, that peoples within states cannot secede where the state is conducting itself in “compliance with the principle of equal rights and self-determination of peoples” and has a government that represents the whole people belonging to the territory “without distinction as to race, creed or colour” (see the 1970 UN Declaration on Friendly Relations).

Consistent with all of this is the logical argument that secession is not the only interpretation of self-determination, and does not exhaust its meaning. If self-determination only meant secession, the right would be expressed as such ie, as a right to secede. (see S James Anaya *Indigenous Peoples in International Law* (2ed, OUP, 2004))

International bodies, such as the Human Rights Committee, have already accepted that indigenous peoples have the right to self-determination. New Zealand’s objections go against existing international jurisprudence, and are too late.

New Zealand also protests that the Declaration did not achieve consensus in the working group. However, as illustrated above, consensus was not forthcoming, in part because of New Zealand’s objections; it cannot now complain without acquiring a “poor loser” quality to its argument.

Further, it is unlikely that consensus could have been achieved. If over 20 years of negotiations did not lead to consensus, it is unlikely more time could have changed that. The choice faced by the Chair and the working group was to pass the Declaration by majority or to be beholden to the few, at great expense and knowing that almost all indigenous peoples would have rejected the Declaration if New Zealand et al’s amendments were accepted.

New Zealand similarly objects to provisions that it claims will allow indigenous peoples a power of veto over the laws of a democratic legislature, and suggests that it is “important

to be mindful of the Convention on the Elimination of Racial Discrimination (CERD Convention)".

Again, this is a legitimate state concern *per se*, but is misstated and misplaced in relation to the Declaration. Article 19 requires consultation and cooperation with indigenous peoples "in order to obtain" consent, rather than a veto. It is also confined to matters that "may affect" indigenous peoples — its coverage is not universal as is implied by New Zealand.

There is an unhappy irony in New Zealand, Australia and the US referencing the CERD Convention in the context of indigenous peoples' rights, given all 3 are subject to adverse decisions from the CERD Committee for failing to respect indigenous peoples' rights.

New Zealand's stated objections to the lands, resources and territories provisions are equally overstated. They do not, as New Zealand claims, appear "to require the recognition of indigenous rights to lands now lawfully owned by other citizens" in the sense of ownership and control. Instead, indigenous peoples have the right to "own, use, develop and control" the lands which they currently possess. In relation to traditionally owned, occupied and used lands that are not currently possessed by indigenous peoples (often as a result of injustice), indigenous peoples only have the explicit right to maintain and strengthen their "spiritual relationship".

In any event, all of this must be read in the light of the art 28 redress provision, which recognises that some indigenous peoples' traditional territories are no longer in indigenous peoples' ownership.

Finally, as with the other rights in the Declaration, the lands, territories and resources rights can be limited under art 46(2) "for the purpose of securing due recognition and respect for the rights and freedoms of others", which could clearly cover property rights.

Another objection is that collective rights prevail over individual rights in the Declaration. That is not true across the board, as, for example, art 34 subjects indigenous peoples' rights to maintain indigenous institutions and practice customs to human rights standards. More generally, the Declaration must be read subject to the individual's rights protected in the human rights treaties, which are legally binding, and, again, to the Declaration's art 46(2) limitations provision. The Declaration's focus on collectives simply enables a fairer balancing between indigenous peoples' collective rights and individuals' rights.

## THE POLITICS

As the above illustrates, New Zealand's stated objections to the Declaration appear mostly legalistic in tone. However, there is cause to question New Zealand's broader political motivation; perhaps it is offering its legal critique to buffer what are really political concerns.

In short, New Zealand appears to be undermining international law on indigenous peoples' rights in a self-interested attempt to make it consistent with New Zealand domestic law. The CERD Committee and the Special Rapporteur found that same law to breach international law. How can this benefit the indigenous peoples of the world? New Zealand might also be suffering from a "once bitten, twice shy" mentality, hurting from that recent international censure, and seeking to limit the potential for further negative international attention.

The difficulty with a domestic law driven approach is that New Zealand's constitutional protection of Maori

rights is comparatively poor. Maori rights do not have constitutional protection, as do indigenous peoples' rights in Canada, and in a number of Central American, South American and Asian states. Nor does New Zealand recognise Maori retention of their inherent pre-colonial sovereignty, as the US does.

Instead, Maori rights ultimately exist at the whim of democratically driven political processes in New Zealand. In a country where Maori are a minority, it is not surprising that the law has taken away at least as many rights as it has recognised.

In addition, New Zealand's policy on the Declaration may also be explained as the product of a state that has recently moved backwards on indigenous peoples' rights, especially post the foreshore and seabed and the disclosure of a political intolerance for Maori rights, best encapsulated in Brash's infamous Orewa speech. It is noteworthy that New Zealand's position on the Declaration's self-determination article has become more conservative over the past two years.

To the extent that New Zealand's concerns are politically driven, they must be balanced against other, equally political, factors.

New Zealand's opposition to the Declaration puts New Zealand out of step with other countries on indigenous peoples' rights. However, New Zealand is a small country that cannot afford to be as ideologically isolated as it is geographically. Its objections also jeopardise New Zealand's international reputation, undercutting New Zealand's right to comment on other states' human rights compliance. This is a big, not to mention hypocritical, call for a nation that makes much of human rights rhetorically.

The political legitimacy of New Zealand's position is also undermined by its failure to exhibit good faith and its lack of engagement with Maori on the Declaration, especially in the past five years, even though it has changed the substance of its proposed amendments during that time. Consultation has been non-existent, notwithstanding invitations from Maori organizations and representatives for it to do so.

Of late New Zealand delegates have exhibited a similar disdain for other indigenous peoples at the UN; indigenous peoples (not only Maori) have related objectionable New Zealand delegation behaviour. In contrast, Australia and the US delegations, although they share New Zealand's position on the Declaration, have interacted positively with indigenous peoples. Likewise, the UK benefited from working closely with the indigenous caucus to negotiate language acceptable to it, and could then vote for the Declaration in the Human Rights Council.

Finally, New Zealand has cast aspersions on other states' ability to protect their indigenous peoples' rights, and cited that in the context of expressing its objections to the Declaration. This is illogical, given that the majority of states exhibit the political will to sign up to a document that has the objective of advancing indigenous peoples' rights, and New Zealand does not. Even putting that aside, New Zealand is not in the position to call others to task when it is currently breaching international law on indigenous peoples' rights.

The upshot is this: New Zealand would do well to support the will shown by the majority of states to raise the bar on international legal recognition of indigenous peoples' rights, change its position, and support the Declaration in the General Assembly later this year. □