The UN Declaration on the Rights of Indigenous Peoples

By Megan Davis

There are currently more than 300 million indigenous people worldwide in over 70 different countries. Over the past three decades, their representatives have successfully used the United Nations to increase the international community's awareness of the issues they face.

It is within the UN human rights bodies that indigenous peoples have made the greatest international impact. They have used these bodies to report violations of human rights by states and disseminate information to the world media and each other about the domestic developments and best practice in indigenous issues. The UN Declaration on the Rights of Indigenous Peoples[1] (the Declaration) is the result of a co-ordinated approach to the development of international human rights standards pertaining to indigenous peoples. It is unique because it was written by indigenous peoples, promotes recognition of collective rights, and promotes the right of indigenous peoples to self-determination. The Declaration has been controversial because of this, as well as industry concerns about its provisions on land and territories. Even though as an aspirational declaration it is non-binding, it will eventually attain the status of a Convention within international law.

Adopted by the UN Human Rights Council on 29 June 2006 and finally adopted by the General Assembly on 13 September 2007, the Declaration was drafted in consultation with indigenous peoples, in a process that began in 1985. The predecessor to the Human Rights Council, the Commission on Human Rights, established an open-ended, intersessional working group in 1995 to elaborate on the Draft Declaration on the Rights of Indigenous People (the Working Group). The Draft Declaration was originally created by the Working Group on Indigenous Populations (WGIP), with the expert members drafting the text in consultation with indigenous peoples who had participated in the process since 1985.[2]

The Declaration therefore represents the culmination of many years of advocacy by indigenous peoples at the UN. The first major success for indigenous people in raising awareness of indigenous issues came in 1971, when the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities hired Cuban diplomat, Martinez Cobo, to conduct a comprehensive study of discrimination against indigenous peoples.[3] As a result of this study, the UN defined 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.'[4]

The definition of indigenous peoples remains contentious for some member states – in particular, Asian and African countries – which argue that all people in their regions are indigenous and that those peoples claiming indigenous status are, in fact, 'minority groups'.[5] This explains why virtually no African countries, and very few Asian states, participated in the decade-long process of negotiation on the text of the Declaration.

Through most of the process, there was an impasse in the Working Group. Indigenous observers consistently rejected any amendment of the Declaration on the basis that any amendment would corrupt the original text. The logic of >>

their position was that, if you allowed states to amend one article, then all aspects of the Declaration were negotiable. This position was untenable because of the nature of negotiation and compromise in UN working groups, and it forced states to negotiate about the text in informal sessions. Eventually, the indigenous strategy had to change, to ensure that the text (which was being amended without their input) would not be watered down. Many states obstructed the smooth passage of the Declaration, frequently misinterpreting international law and unfairly using domestic law to hamper the progress of negotiations. This behaviour disregarded states' obligations to enter into the development of human rights standards in good faith.

The unique yet equally controversial features of the Declaration include the right of self-determination for indigenous peoples as a collective right, rather than simply an individual right. The Declaration is viewed by some as a challenge to the historically individualist and Western nature of rights discourse that promotes the individual as paramount. In contrast, collective rights are the rights of the group or community. Despite the objection of some states, such as the United States, Australia and New Zealand, to the recognition of collective rights in the Declaration, such rights have previously been recognised in numerous international human rights law instruments.[6]

SUMMARY OF THE DECLARATION

The text of the Declaration is divided into six sections. The first section – Articles 1 to 5 – deals with general principles such as self-determination, equality and freedom from adverse discrimination. Articles 6 to 11 deal with rights to life, integrity and security including genocide, rights to maintain distinct identities, the right not to be forced or relocated from lands, and the right to special protection in armed conflict. Articles 12 to 14 deal with culture, spirituality and linguistic identity, including the right to practise 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 and literature. Articles 15 to 18 deal with specific issues pertaining to education, information and labour rights; for example, the right of all children to all levels and forms of state education, including the right to establish and control their own educational systems and institutions. The next section – Articles 19 to 24 – cover participatory rights, and deal with development and other economic and social rights, including the right to participate 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. The most controversial section, from a state's perspective – Articles 25 to 30 – deals with land and resources.

SELF-DETERMINATION

The indigenous right to self-determination has been the major sticking point for the working groups that have spent years elaborating the Declaration. Article 3 of the Declaration is consistent with common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights:

> '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.'

Indigenous peoples view self-determination as the cornerstone of the Declaration: '[t]he 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.'[7] Without accepting the right to self-determination, the catalogue of rights protected in the body of the Declaration cannot be effective. The official reports of debates at the working groups on the Draft Declaration clearly show that some states are heavily influenced by traditional concepts of territorial integrity and non-interference, the financial implications of many social-economic protections, and are reluctant to extend the right of self-determination to indigenous peoples at international law.[8] As Caroline Foster argues, '[s]elf-determination as understood in the particular context of decolonisation accounts for governments' concerns that recognizing a group's right to self-determination may legitimise secession'.[9]

Therefore, independence and secession remain the central arguments that states employ when arguing against the concept of self-determination. This is despite consistent indigenous efforts to argue against 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'.[10] To counter secession arguments, one of the most quoted principles of international law by indigenous people in conjunction with Article 3 of the Declaration is the safeguard clause from the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States:

> '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.'

Safeguards such as the clause cited above broke the stalemate at the working groups and eventually enabled the Declaration to be passed by the Human Rights Council for consideration by the General Assembly.

Self-determination at its most fundamental means participating in any decision-making processes that

impact upon one's life. Similarly, for indigenous peoples, self-determination is about being consulted on decisions that affect them, as well as participating at an appropriate level in the formulation of the broader ideas and policies that will affect their lives. The degree of consultation and participation will depend on the circumstances; however, consultation is absolutely fundamental to the indigenous worldview. Moreover, in international law, there is a putative norm of democratic governance – that is to say, the only way human beings can truly experience self-determination is through democratic participation: 'the denial of self-determination is essentially incompatible with true democracy. Only if the people's right to self-determination is respected can a democratic society flourish.'[11] The idea is that, for indigenous peoples to thrive in a democracy, there must be provision for decision-making processes in an indigenous community such as an extra-parliamentary representative body or designated electoral seat. Indeed, for Indigenous peoples in Australia, the minimalist, utilitarian nature of democratic participation (know as 'ballot box' democracy) means that Indigenous interests are rendered nugatory by a political culture that focuses on the needs and aspirations of the majority. The growing link between self-determination and democracy in international law argues in favour of greater control by Indigenous Australians over the decision-making and management of our own affairs and greater participation in Australian democracy.

CONCLUSION

When the Declaration was first considered by the General Assembly, African countries convinced the Third Committee to delay voting on it. These African states, almost none of which was present for the decade-long drafting process, raised issues about collective rights and self-determination. That is to say, they objected to all of the issues that had been raised during the 11 sessions of the Working Group since 1995.

This action by the African states illustrates the sensitivity of the issue of indigenous people's rights, particularly the fact that much of the world's wealth has been gained through the dispossession of indigenous lands. In this respect, the contribution of indigenous peoples to the global economy has gone unrecognised.

The final adoption by the General Assembly was a momentous occasion for indigenous peoples, who have invested enormous faith in the standard-setting structures of the UN. The success of the Declaration despite the votes against its adoption by Canada, Australia, New Zealand and the US confirms that the UN, as a body of states, is capable of elaborating substantive rights for indigenous people. While the Declaration is no panacea to our problems in Australia, the legal recognition of the inherent rights of indigenous peoples – including the High Court Decision in *Mabo* – has historically been influenced by developments in international law. The UN system is imperfect, but its genesis lies in the international consensus that states cannot always be trusted to do the right thing by their citizens; if anyone understands this, it is Indigenous Australians. So the Declaration on the Rights of Indigenous Peoples is a major development towards the broader acceptance of a normative framework of indigenous rights. ■

Notes: **1** E/CN.4/Sub.2/1994/2/Add.1 (1994). **2** For a comprehensive history see: Burger, J, 'The United Nations Draft Declaration on the rights of indigenous peoples' (1996) 9 *St Thomas Law Review* 209. **3** *Study of the Problem against Indigenous Populations, vol 5, Conclusions, Proposals and Recommendations*, UN Doc E/CN.4/Sub2/1986/7. **4** *Ibid*, Add 4, 379, 381. **5** See overview of the debate about definition in Pritchard, S, 'Working Group on Indigenous Populations: Mandate, Standard-setting Activities and Future Perspectives' in Sarah Pritchard (ed), *Indigenous Peoples, United Nations and Human Rights* (1998) p42. **6** For example, the International Convention on the Elimination of All Forms of Racial Discrimination (1969) Articles 1(a), 2, 4(a), 14; the International Labour Organization Indigenous and Tribal Peoples Convention (1989); the African Charter on Human and Peoples Rights, Articles 19–24; the UNESCO Declaration on Race and Racial Prejudice (1978). **7** Pritchard at p46. **8** See, for example, E/CN.4/1996/84; E/CN.4/1998/106; E/CN.4/2000/84 E/CN.4/RES/2001/58; and the excellent discussion of this in Iorns, C, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty' (1996) 24 *Case Western Reserve Journal of International Law* p199. **9** Foster, C, 'Articulating Self-determination in the Draft Declaration on the rights of indigenous peoples' (2001) 12 *European Journal of International Law* p145. **10** Kingsbury, B, '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* pp189–250 **11** Stavenhagen, R, 'Self-determination: Right or Demon?' in Clark, D, and Williamson, R (eds), *Self-Determination: International Perspectives* (New York: St Martin's Press, 1996) p8.

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