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Abstract

Indigenous peoples have for many years struggled for recognition of their land and cultural rights at the domestic and international levels. The adoption of the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) represents a significant shift in the way indigenous peoples are regarded internationally, outlining a range of individual and collective rights of indigenous peoples that are essential for their political, economic, social and cultural development. The Declaration, in particular, recognises indigenous rights to self-determination, land, territory and resource rights, and free, prior and informed consent. It was these key provisions that saw Canada, Australia, New Zealand and the United States oppose the Declaration, notwithstanding the sizeable indigenous populations within their borders. This paper will assess these key provisions in relation to the objections of the opposing States, and will argue that their concerns in relation to these rights are unreasonable, exaggerated and dated. It will argue that consensus on the Declaration is achievable through processes of negotiation, dialogue and cooperation, and that giving recognition to the rights contained in the Declaration will not impact on these States to the extent that they claim, and that there is already evidence of State practice and opinio juris in relation to these rights.

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Indigenous Peoples-United Nations-International Law
INTRODUCTION

After nearly 25 years of intense lobbying and negotiations over the rights of the world's indigenous peoples, the United Nations General Assembly (GA) finally adopted the United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) on 13 September 2007. The Declaration is the most comprehensive and progressive of the international instruments dealing exclusively with the rights of indigenous peoples', providing protection for their traditional lands and resources, and to maintain their unique cultures and traditions. It represents the increased recognition by the United Nations (UN) of the world's estimated 370 million indigenous peoples as legitimate subjects of international law.

Support for the Declaration has been overwhelming, with 143 countries voting in favour of the Declaration, 4 against and 11 abstentions. The four countries that voted against the Declaration are Canada, Australia, New Zealand and the United States (CANZUS). Each of these countries, built as they are on the colonisation and subjugation of the indigenous peoples who lived there, as well as the dispossession of their lands and resources, has sizeable indigenous populations within their borders who continue to press their claims for proper recognition of their land and cultural rights. The Declaration, therefore, with its ground-breaking provisions on self-determination, land and resource rights, redress for past injustices and consultation rights, has potentially wide-ranging implications for these and other countries with indigenous peoples within their borders.

Prior to the adoption of the Declaration, the indigenous struggle for equality and rights recognition had achieved only moderate success at the domestic level. While indigenous peoples have been effective in influencing change in domestic policies, legislation and redress for historical grievances, such developments often fall well short of the standards that indigenous peoples seek. As a result, indigenous groups and organisations throughout the world have increasingly appealed to the

1 UNGA "The United Nations Declaration on the Rights of Indigenous Peoples" (13 September 2007) UN Doc A/61/L.67 [hereinafter "UN Declaration on the Rights of Indigenous Peoples"].
2 Claire Charters "The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples" (2007) 4 New Zealand Yearbook of International Law 121, 123.
3 UNGA "General Assembly Adopts Declaration on the Rights of Indigenous Peoples" (13 September 2007) GA-10612 [hereinafter "UNGA Plenary Meeting (13 September 2007)"].
international community as a means of expressing their concerns, and have unified to form a strong worldwide indigenous rights movement. The international community over recent years has responded positively to indigenous demands, which has seen the increased recognition of indigenous peoples as legitimate subjects at international law as well as the development of international norms and international institutions. There are now a number of international human rights bodies with the specific mandate of protecting and developing the rights of indigenous peoples.

The international focus on indigenous rights has also seen the development of a growing body of international human rights instruments, culminating most recently with the adoption of the Declaration. The increased recognition of indigenous rights internationally reflects the seriousness with which the international community views indigenous issues and the extent to which they are prepared to recognise evolving international norms.

The adoption of the Declaration is a significant triumph for indigenous peoples as they continue their quest for recognition and acceptance of rights that are vital to their cultural development and survival. This paper will assess the impact of the Declaration on indigenous peoples, particularly in relation to the CANZUS States. The Declaration contains key indigenous rights to self-determination, land, territory and resource rights, and free, prior and informed consent. It was these key provisions that saw the CANZUS States oppose the Declaration, notwithstanding the sizeable indigenous populations within their borders. This paper will assess these key provisions in relation to the objections of the opposing States. It will argue that their concerns in relation to these rights are unreasonable, exaggerated and dated on the basis that recognising indigenous peoples' rights as outlined in the Declaration will not impact on the CANZUS States to the extent that they claim, and that there is already evidence of State practice and opinio juris in relation to these rights. It will also argue that consensus on the Declaration is achievable through processes of negotiation, dialogue and cooperation.

Part II of this paper will look at how the recognition of indigenous rights at international law has evolved over time, from their historical denial under State-centred approaches to international, to recognition under an international human
Part II will look at the rights-centred regime. Part III will look at how the UN has responded to indigenous peoples' demands by recognising indigenous rights within a number of international instruments and forums, reflected most recently with the adoption of the Declaration.

Part IV will look at the background to the Declaration and the process by which it was developed. Part V will then provide an overview of the Declaration, and will consider the impact of the Declaration for indigenous peoples, particularly in relation to the CANZUS States. It will also consider the application of international customary law in relation to individual provisions within the Declaration. It will argue that the application of customary international law may apply where there is evidence of State practice and opinio juris.

Part VI will assess the key provisions on self-determination, land territory and resource rights, and free, prior and informed consent and the CANZUS States' objections to these rights. Part VI will argue that State concerns over these rights are exaggerated, unreasonable and dated. It will assert that a closer analysis of these provisions will show that State's concerns and fears over the application of these rights are unfounded, on the basis that they do not impact on States to the extent that they claim and that there is already evidence of State practice and opinio juris. Part VI will also consider the extent to which these rights are already accepted as indigenous rights and practiced within each of these States, thus providing evidence of international customary law.

As a non-binding instrument, the Declaration should be seen as standard of achievement to be pursued in a spirit of partnership and mutual respect, not dissected as if it were legally binding. Part VII will look at how States can give effect to the Declaration. It will argue that States and indigenous peoples can reach mutually satisfactory outcomes through processes of dialogue, negotiation and cooperation. Part VII will also consider recent developments in Australia in relation to its indigenous peoples and their reversal towards the Declaration. It will consider what impact this may have for the remaining CANZUS States.
II  INDIGENOUS PEOPLES AT INTERNATIONAL LAW

The adoption of the Declaration represents the interpretation of fundamental rights in favour of indigenous peoples. It establishes positive standards of obligation for state and non-state actors in the international arena and represents that we are in a "time when international law speaks concretely to the issues of indigenous peoples around the world".\(^4\) It also represents progress in the attitudes of the international community towards indigenous peoples, which can be seen as an achievement for the persistence, patience and determination showed by indigenous groups and representatives in their continued appeals to the international arena.

For many years indigenous peoples have struggled not only for the proper recognition and protection of their rights at the domestic and international levels, but they have also struggled to overcome the effects of colonisation, which caused significant loss of indigenous ancestral lands and resources, and serious damage to indigenous social, cultural and political systems, and way of life. Indigenous peoples have also suffered a significant loss of tribal autonomy as a result of the imposition of colonial control, which has often resulted in significant social, economic and cultural disparities between indigenous and non-indigenous peoples. Indigenous peoples are widely regarded as being among the most disadvantaged and vulnerable throughout the world.\(^5\)

A  State-Centred Approaches to International Law

Indigenous rights are currently at the forefront of the international human rights agenda, as evidenced by the adoption of the Declaration, which represents a significant shift in the way indigenous peoples were represented and regarded historically at an international and domestic level.\(^6\)

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\(^5\) UNGA Plenary Meeting (13 September 2007), above n 3.

The status of indigenous peoples at international law in contemporary times, particularly over the last quarter of the twentieth century, is vastly different to the way they were regarded during the colonial period of discovery, conquest and subsequent colonisation. During this period of European expansion into the 'new world', international law was instrumental in providing the legal mechanisms for the dispossession of indigenous peoples' lands and resources, and the denial of their rights. Rules such as "discovery", "conquest" and "terra nullius" made up the "doctrines of dispossession", which provided the initial legal justification for the colonisation and domination of indigenous peoples and their lands and resources.

After being denied justice and protection at home, indigenous peoples appealed to the international community for protection of their rights, which they believed stood for fair treatment and human rights. The first formal approach by indigenous peoples to the international community occurred in the early 1900s, when tribal representatives from Canada and New Zealand each made separate appeals to the international community for recognition of their collective rights, and to protest their treatment at home. The international response, however, was limited by the prevailing view that international law was concerned solely with the rights and duties of states. The human rights of individuals and groups were not of international concern.

Under the classic, state-centred approach, international law could only be created by nation-states; international law was primarily concerned with the regulation of affairs between and not above states; only nation-states could hold rights and obligations in the international arena; and states were protected from outside interference in the conduct of domestic affairs, including the treatment of indigenous peoples within states. This positivist approach had a number of implications for indigenous peoples, including their status at international law. To enjoy rights as a

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9 Ibid.
group, indigenous peoples would have to be regarded as nations or States. Indigenous societies, however, struggled to satisfy the orthodox requirements of statehood because they did not fit within the European conception of nation-States. Indigenous societies were typically characterised by tribal or kinship ties, shared or overlapping spheres of territorial control and decentralised political structures. As a result of their non-recognition as distinct sovereign groups, indigenous peoples were not able to participate in the shaping of international law, nor could they rely on international law to protect their interests.

Having been denied possession and ownership of their ancestral lands and territories by international law, and the right to control their own lives, indigenous peoples were subsequently denied their rights of sovereignty and self-government. International law simply could not provide or cater to the notion of self-governing aboriginal societies within nation-States, whose social and political systems were vastly different from the orthodoxy of European civilisations. Furthermore, any treaties concluded between indigenous peoples and colonising states, which purported to uphold indigenous rights, including self-government, could simply be disregarded internationally as matters for domestic concern or invalid at international law since treaties could only be concluded between sovereign states. Indigenous peoples were clearly not considered as possessing, or capable of possessing, sovereign authority at international law. The common view of colonising states and of the international community was that indigenous peoples were to be civilised, assimilated and integrated into mainstream society. Indigenous peoples were seen as incapable of controlling their own lands and destinies, which had previously ensured their cultural survival and way of life for centuries. The loss of indigenous sovereignty and the dispossession of their lands and resources brought with it the near extinction of their languages and culture. The international legal system, focussed as it was on the rights


12 See for example, the Island of Palmas Case (United States v Netherlands), 2 R.I.A.A. 829 (1928) 831 at 858, which concluded that treaties entered into by the indigenous peoples and the Dutch East India Company were not “in the international law sense, treaties or conventions capable of creating rights and obligations such as may, in international law, arise out of treaties”. See also, Iorns Magallanes, above n 10, 236.
and obligations of states, remained inherently opposed to many of the demands of indigenous peoples.  

B Early Recognition of Indigenous Rights at International Law

From the mid-1950s, international institutions such as the International Labour Organisation (ILO) attempted to address the situation of the world's indigenous peoples. ILO Convention No. 107 (Convention No. 107),\(^\text{14}\) for example, represented a shift in focus towards the situation of the world's indigenous peoples, but it also reflected the paternalistic attitudes of States and of the international community in the mid-1900s towards indigenous peoples. It was the first international instrument dealing explicitly with the rights of indigenous peoples, although no indigenous group was involved in the drafting of this convention. This was reflected, as its title suggests, in its aim to further integrate and assimilate indigenous peoples with other citizens of the State. Convention No. 107 recognised that indigenous peoples had rights and interests that were distinct from those of other minorities, but contained no rights for indigenous peoples to exist as culturally distinct groups.\(^\text{15}\) The paternalistic approach of Convention No. 107 failed to include indigenous peoples in the decision-making processes and institutions that affected their lives and resources. The attitudinal approach of the 1950s and 1960s towards indigenous peoples reflected "a vision of equality that signified sameness, rather than diversity, and certainly had no room for the kind of diversity that would uphold indigenous peoples as robust, self-governing communities".\(^\text{16}\)

C A Human-Rights Centred Approach to International Law

Despite their failure to gain proper recognition of their rights, indigenous peoples continued to press their claims for recognition at the domestic and international levels. While their protests at home had generated some change in domestic policy and legislation in the late 1900s, with bi-cultural and devolution

\(^\text{14}\) Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (No 107) (26 June 1957) International Labour Organisation 40\(^\text{th}\) Session (entry into force 2 June 1959).  
\(^\text{15}\) Iorns, above n 10, 237.  
\(^\text{16}\) Anaya, above n 4, 259.
policies, as well as provisions for the redress of historical grievances, such changes often fell well short of indigenous aspirations to be self-determining. Their persistence in the international arena coincided with the international human rights and civil rights movements of the post-World War II era, which saw a shift away from the traditional state-centred role of international law to a human rights-centred approach, which included the greater protection of individuals and groups. The atrocities of the 2nd World War prompted a rethink of the virtually unlimited discretion of State power over its citizens, which saw the prioritisation of the human rights and self-determination of peoples by the UN.17

This shift opened the door to greater legal protections for non-state actors, including indigenous peoples.18 Indigenous peoples throughout the world formed strong alliances, presenting a united international voice on indigenous issues. While there may not be consensus from the world's indigenous peoples on the range of issues that affect them, they have agreed on a minimum set of rights for the international community to recognise.19 As Alexandra Xanthaki identifies, although indigenous peoples may have been excluded from the process of creating international laws, "they have refused to stand on its periphery and have been determined to become equal partners in its evolution".20

The content of modern-day international law has been greatly influenced by the principles of equality, self-determination, non-discrimination and respect for the human rights and fundamental freedoms for all. Human rights laws protecting the rights of individuals and minority groups, including indigenous peoples, developed further with the adoption of the 1948 Universal Declaration of Human Rights (Universal Declaration),21 the International Covenant on Economic, Social and Cultural Rights (ICESCR),22 and the International Covenant on Civil and Political Rights (ICCPR).23 Indigenous peoples seized upon the institutional and normative

18 Charters, above n 13, 24.
19 Xanthaki, above n 6, 6.
20 Ibid, 2.
21 UNGA Resolution 217 A (III) (10 December 1948).
23 International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171.
regime of human rights that was brought within the fold of the international legal system in the post-World War II era, grounding their demands on existing human rights principles. Article 27 of the ICCPR, for example, provides for, inter alia, the collective rights of ethnic minorities to enjoy their own culture, to profess and practice their own religion, or to use their own language. Indigenous peoples have used this provision to seek greater recognition and protection of their right to enjoy their culture, which the UN Human Rights Committee (UNHRC) has interpreted to also include economic and social relations, including relations with land.

From the 1970s onwards, international law has increasingly recognised indigenous peoples as distinct peoples with a set of well defined rights, reflecting a new generation of international consensus on indigenous peoples' rights. The ILO, for example, recognised the change in international standards and perceptions towards indigenous peoples since its adoption of Convention No. 107, and the inadequacy of its earlier standards. A committee of experts convened by the ILO recognised that the integrationist and assimilationist policies that were characteristic of the 1957 Convention "no longer reflected current thinking". The committee also identified that indigenous peoples should be allowed "as much control as possible over their own economic, social and cultural development", and to maintain their own lifestyles. The ILO's revised standards towards indigenous peoples were incorporated into ILO Convention No. 169, which recognises a range of collective rights of indigenous "peoples", including rights to equality, non-discrimination, culture, and land and resource rights. It is the only international treaty dealing exclusively with the rights of indigenous peoples, although it has only been ratified by 17 States, which impacts on the influence that this Convention can have on States.

24 Anaya, above n 11, 7.
26 Jorns, above n 10, 239.
28 Ibid.
30 Ibid, Article 1(3).
31 Ibid, Article 2(2)(a).
32 Ibid, Article 3(1).
33 Ibid, Article 2(2)(b).
34 Ibid, Articles 13-19.
The increased focus on indigenous peoples and human rights since the 1950s has brought with it a "sustained level of international institutional activity focused upon indigenous peoples' concerns and a corresponding body of norms that build upon long-standing human rights precepts". 35 An impressive and growing body of international treaties, conventions, declarations and customary law reflects a new generation of international law that recognises and protects the rights and interests of indigenous peoples, representing a dramatic reversal in the way they were regarded traditionally at international law. 36 Indigenous peoples are now considered legitimate subjects of international law who, through a range of international bodies and forums, are able to play a greater role in the creation and development of international law as it pertains to them.

D Other Challenges for Indigenous Peoples at International Law

1 Identification

In seeking protections at international law, the identification of indigenous peoples is a key issue. This can be a controversial issue, particularly where States may attempt to avoid fulfilling any obligations towards its indigenous peoples by denying or challenging the indigeneity of some groups. 37 In most cases, however, identifying the world’s indigenous peoples will not be an issue. They are invariably comprised of descendants of the pre-invasion inhabitants of lands now dominated by others, and are characterised by the social and economic disadvantage they experience relative to the rest of society as a result of historical forces that stripped them of their lands, resources, cultures and livelihood. 38

To adopt a formal definition of 'indigenous peoples' would be complex, since "international law refrains from sharp and tight definitions that may limit the flexibility of applying instruments to different circumstances". 39 Moreover, it is the

35 Anaya, above n 11, 7.
37 Xanthaki, above n 6, 9.
38 Anaya, above n 11, 3.
39 Xanthaki, above n 6, 9.
characteristic right of peoples with aspirations of being self-determining to be able to define themselves, rather than be defined by others.\textsuperscript{40}

For practical reasons, however, the UN has adopted a working definition as put forward by the Martinez Cobo report,\textsuperscript{41} which provides that:\textsuperscript{42}

Indigenous communities, peoples and nations are those which, having a historical continuity with the pre-invasion and pre-colonial societies that developed on their territories, 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 the 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.

The Declaration provides no formal definition or identification of indigenous peoples. While identification may be an issue in some regions of the world, the focus of this paper is concerned primarily with an analysis of the application of the Declaration to the CANZUS States. It will proceed on the basis that identification of indigenous groups within these States is not contested or denied.

2 \hspace{1em} \textit{Collective rights of peoples}

The recognition of collective rights at international law is also a highly contested issue. International law has traditionally been concerned with the human rights of individuals. While indigenous peoples claim the protection of individual rights, they also seek recognition of their collective rights. For indigenous peoples, the protection of individual rights will often be achieved through the protection of collective rights. The recognition of collective rights is closely linked with the recognition of indigenous peoples as distinct cultures. As Kymlicka identifies:\textsuperscript{43}

\textsuperscript{40} Ibid.
\textsuperscript{41} See discussion below, Part III, at n 43.
\textsuperscript{43} Will Kymlicka \textit{Liberalism, Community and Culture} (Oxford University, Oxford, 1991) 124.
If we respect Indians as Indians, that is to say, as members of a distinct cultural community, then we must recognise the importance to them of their cultural heritage, and we must recognise the legitimacy of claims made by them for the protection of their culture.

One of the main features of the Declaration is the recognition of collective rights. Indigenous rights to, inter alia, self-determination, culture, land, language and tribal membership are collective by nature. A denial of collective rights would essentially amount to a denial of culture and indigeneity.
Indigenous peoples throughout the world have successfully used the UN system as the main international forum for voicing their concerns and pressing their claims. The first significant step by the UN towards indigenous issues came in 1971 with the appointment of Special Rapporteur Jose Martinez Cobo, who was commissioned to conduct a comprehensive study into the situation of the world's indigenous peoples. Martinez Cobo produced a number of reports to the Sub-Commission of the UN Commission on Human Rights (Sub-Commission), which concluded, inter alia, that indigenous peoples are separate peoples who have been denied their rights, and encouraged the opening of the UN to indigenous peoples.

In response, the Sub-Commission established the Working Group on Indigenous Peoples (WGIP) in 1982, which was the first body in the international arena with the specific mandate to promote and protect the human rights and fundamental freedoms of indigenous peoples and to draft standards for their protection. Other key developments within the UN include the establishment of the UN Permanent Forum on Indigenous Issues (PFII) and the appointment of the Special Rapporteur on the situation of the human rights and fundamental freedoms of indigenous peoples. The establishment of the PFII is significant in that it provides an important meeting ground between governments and indigenous peoples, as well as between indigenous peoples themselves. The appointment of the Special Rapporteur was made in response to the growing international concern regarding the marginalisation and discrimination against indigenous people worldwide. The Rapporteur's mandate is to strengthen the mechanisms of protection of the human rights of indigenous peoples.

Better recognition of indigenous rights within the UN has also seen the increased use of the Committee on the Elimination of Racial Discrimination
(CERD)\textsuperscript{52} and the UNHRC\textsuperscript{53} by indigenous peoples. The growing number of bodies on indigenous issues demonstrates the increasing importance that the UN, and ultimately the international community, currently places on the recognition and protection of indigenous peoples.\textsuperscript{54} It also demonstrates the faith that indigenous peoples have placed in the UN to recognise and protect their rights. This is reflected most recently with the adoption of the Declaration. The Declaration is significant, not just in terms of what it represents for indigenous peoples, but also in terms of its implications for States and the international community. The process by which the Declaration was developed also indicates the inclusive nature of the UN process, which allowed the interaction of indigenous and other non-state actors. It signifies the acceptance of emerging international norms concerning indigenous peoples by the international community, and reflects how far international law has come in recognising and protecting the rights of indigenous peoples.

\textsuperscript{52} See for example, UN Committee on the Elimination of Racial Discrimination "Decision 1(66): New Zealand" (27 April 2005) CERD/C/DEC/NZL/1; UN Committee on the Elimination of Racial Discrimination "Concluding Observations: New Zealand" (15 August 2007) CERD/C/NZL/CO/17.


\textsuperscript{54} Xanthaki, above n 6, 5.
IV HOW THE DECLARATION CAME TO BE

The lengthy process of the Declaration began in 1982 with the establishment of the WGIP. For nearly a decade, from 1984 to 1993, the WGIP worked towards a draft Declaration on the Rights of Indigenous Peoples. The chairperson, Erica-Irene Daes, found that it would be unethical for the UN to develop the Declaration without the active role of indigenous peoples. The GA also encouraged the participation of indigenous representatives in the drafting process, which coincided with the first International Decade of the World's Indigenous People – further evidence of the UN's concern for the situation of indigenous peoples throughout the world. In dedicating an International Decade to indigenous peoples the UN hoped to strengthen international cooperation to improve the economic, social and cultural situation of the world's indigenous peoples.

Opening the drafting process of the Declaration to indigenous peoples allowed them to negotiate with States and make interventions and recommendations on the text of the Declaration. As a result of the relaxed rules of participation and enthusiasm among participants, the WGIP attracted up to 700 individuals and grew to be one of the largest regular human rights meetings organised by the UN.

The draft Declaration was completed by the WGIP in 1993, and was adopted by the Sub-Commission in 1994, who then reported it back to their parent body, the UN Commission on Human Rights (UNCHR). A Working Group on the draft Declaration (WGDD) was formed by the UNCHR to further elaborate the Draft. It was here that the text of the Declaration was fiercely negotiated between States and indigenous peoples. The draft Declaration was finally adopted by the WGDD at the

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57 Ibid.
58 Xanthaki, above n 6, 102.
61 Claire Charters "The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples" (2007) 4 NZYBIL 121, 122.
beginning of 2006. The UNCHR was replaced in 2006 by the UNHRC. This signalled a significant change for indigenous peoples because the UNHRC sits alongside the UN Economic and Social Council (ECOSOC) rather than under it, and reports directly to the GA, and is thus higher up in the UN hierarchy. In its first substantive decision, the UNHRC adopted the revised version of the Declaration later that year, and referred it to the GA for adoption in 2006. The GA, however, voted to defer the adoption of the Declaration at the request of Namibia, on behalf of a group of African governments, who proposed that consideration of the Declaration be deferred to allow time for further consultations. These delegations had expressed concerns about the self-determination provisions and its potential effects on national sovereignty, territorial integrity and land rights. Supporters of the Declaration expressed concerns that this deferral was an attempt to delay and even jettison the adoption of the Declaration by the GA, which left the status of the Declaration at the end of 2006 on uncertain ground. The Declaration, however, went before the GA again on 13 September 2007 where it was finally adopted, nearly 25 years after its commencement.

The Declaration consists of 29 preambular paragraphs and 46 operative paragraphs. It recognizes the rights of indigenous peoples and sets out a framework for protecting and promoting the rights of indigenous peoples. The Declaration recognizes the right of indigenous peoples to self-determination, autonomy, and self-government. It recognizes the right of indigenous peoples to preserve and develop their languages, cultures, and traditions, as well as to maintain and strengthen their own institutions, legal systems, social and cultural traditions. Indigenous peoples also have the right to be consulted on matters affecting their communities.

64 Charters, above n 13, 36.
66 Ibid, para 2.
67 UNGA "Concluding Considerations of the Third Committee's Reports, General Assembly" (20 December 2006) GA/10563.
THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The adoption of the Declaration as an international human rights instrument is a significant achievement, reflecting the increased attention of indigenous peoples at international law and the improved interaction between state and non-state actors. It also represents a step forward in the promotion and protection of human rights and fundamental freedoms for all. The Declaration is an authoritative statement of emerging international norms concerning indigenous peoples on the basis of generally applicable human rights principles. The lengthy process by which the Declaration was developed demonstrates the durability and fundamental nature of the rights and principles contained therein. Extensive deliberations and intense debates between states, indigenous representatives and UN authorities enhance its authoritativeness and legitimacy.

The Declaration consists of 24 preambular paragraphs and 46 operative provisions, which deal with a range of individual and collective rights of indigenous peoples, including rights to self-determination, autonomy and self-governance, equality, land and resource rights, redress, traditional knowledge and intellectual property rights, culture, education, language, the transmission of education and media in their own languages, consultation, as well as recognition of indigenous peoples' distinct political, legal, economic, social and cultural institutions.

Indigenous peoples also have the right not to be subjected to forced assimilation or

69 Anaya, above n 11, 65.
70 Ibid.
72 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 3.
73 Ibid, Article 4.
74 Ibid, Article 46(3).
75 Ibid, Articles 25 and 26.
76 Ibid, Article 8(2).
77 Ibid, Article 31.
78 Ibid, Article 11.
79 Ibid, Articles 14, 15, 17 and 21.
80 Ibid, Article 13.
81 Ibid, Articles 14 and 16.
82 Ibid, Articles 15, 17, 29, 36 and 38.
83 Ibid, Article 5
destruction of their culture, or to be forcibly removed from their lands or territories. The stated rights are guaranteed to indigenous peoples as individual and collective rights, not just as individual rights.

The Declaration covers the gaps in existing international law on indigenous rights, unifying international norms on indigenous peoples' rights under a single, comprehensive UN instrument, which is widely accepted by the world's States as a standard to attain. Its provisions largely reflect the views of indigenous peoples, as well as a degree of States' opinio juris, thus providing "evidence of crystallising customary international law on indigenous peoples' rights."

Regarding the nature of the Declaration, States repeatedly emphasised that the Declaration is an aspirational instrument with political and moral value, but is not a legally binding document. As an aspirational document, it recognises indigenous peoples' rights and establishes an appropriately high standard for States and indigenous peoples to work towards, which could well form the further development of international law on indigenous peoples' rights in the future. The onus is on States to take responsibility for the particular issues that affect their indigenous communities and to reflect the needs and circumstances of that particular region in addressing those issues. The Declaration is framed as a "standard of achievement to be pursued in a spirit of partnership and mutual respect," which requires States to take "appropriate measures, including legislative measures, to achieve the ends of this Declaration."

In addressing the historical grievances and present needs of indigenous peoples, States (representing the needs of all of its citizens) and indigenous communities need to work towards effective and pragmatic solutions. For

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See for example, ibid, Article 1. The importance of collective indigenous rights is reinforced throughout the Declaration, with its reference to the collective rights of indigenous peoples being indispensable to their existence, well-being and integral development as peoples; see ibid, Preamble.


Preambular paragraph 23 of the Declaration recognises that the situation of indigenous peoples "varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration".

UN Declaration on the Rights of Indigenous Peoples, above n 1, Preamble.

Ibid, Article 38.
such arrangements to be durable and effective it is important that the Declaration not be too prescriptive in the actions that States should take. The Declaration sets the standard to attain while remaining sufficiently broad for each country to adapt to their particular circumstances. It is intended that the Declaration take its place with the other international instruments – some in the form of treaties and some in declaratory form – which together set international standards for the observance of human rights.\footnote{Alison Quentin-Baxter "Introduction" in Alison Quentin-Baxter (ed) Recognising the Rights of Indigenous Peoples (Victoria University of Wellington, Wellington, 1998) ix, ix.}

Discussions between States and indigenous communities should therefore occur within a framework of dialogue, negotiation and cooperation, and with a broader focus of relationship-building rather than focussing strictly on the legal rights of each party. That way, reconciling the interests of each party is not so much about resolving the past but of working out how to live together.\footnote{Matthew S R Palmer "The International Practice" in Alison Quentin-Baxter (ed) Recognising the Rights of Indigenous Peoples (Victoria University of Wellington, Wellington, 1998) 87, 89.}

Unfortunately, some States have dissected and opposed the Declaration as if it were a legally binding treaty.\footnote{Allmand, above n 8, 39.} The Declaration contains key provisions on self-determination, lands, territory and resource rights, and free, prior and informed consent. The content of these provisions is what ultimately saw the CANZUS States oppose the adoption of the Declaration. Part VI of this paper will discuss these key provisions, and the objections of the opposing States. It will argue that the concerns of the opposing States over these particular provisions were exaggerated and unreasonable, and that it was possible for States and indigenous peoples to reach satisfactory outcomes on the rights contained in the Declaration.

In explanation of their vote against the Declaration, it was noted that the CANZUS States purported to express their positive commitment to indigenous rights domestically and internationally and to their hopes of agreeing on a meaningful Declaration, before proceeding to oppose the Declaration in its entirety. In explanation of their vote, the United States (US) did not make any express objections to any specific provisions of the Declaration. The US was more concerned with the
overall process and language of the Declaration, which they found to be confusing, unclear and unacceptable. As a result, the US felt that the Declaration could not enjoy universal support and become a true standard of achievement.

A The Application of Customary International Law

Although the Declaration is not binding, its status as a declaration, however, attributes to it a level of importance comparable with the Universal Declaration. While these instruments are not binding per se, they are nevertheless influential in the development of international norms, and are reflective of international consensus on the basic rights of people. Moreover, individual provisions may be binding if they can be categorised as customary international law.

In assessing the objections of the CANZUS States to each of the key provisions of the Declaration, this paper will consider the extent to which these rights are already accepted by the CANZUS States and exercised by indigenous peoples, thus providing evidence of customary international law. Australia argued that the Declaration does not constitute "evidence of the evolution of customary international law", but as Anaya and Wiessner identify, the distinct body of customary international law concerning indigenous peoples, as contained in the Declaration, had formed long before it was adopted, and that voting against the Declaration does not necessarily invalidate claims to the customary international law character of individual components of the Declaration, or of the principles contained within it. Part VI of this paper, therefore, will also consider whether indigenous rights of self-determination, land rights, and consultation and consent rights are already regarded as norms of international customary law.

1 Establishing customary international law norms

In order to establish a norm of customary international law the ICJ held that State practice must be "carried out in such a way as to be evidence of a belief that this

95 UNGA Plenary Meeting (13 September 2007), above n 3.
practice is rendered obligatory by the rule of law requiring it. In order to establish international customary law, there must be widespread and representative State practice in support of a particular norm, as well as a degree of States' opinio juris.

In claiming rights under the Declaration indigenous peoples may be able to point to certain provisions of the Declaration as customary international law. As a non-binding instrument it may be necessary for indigenous peoples to look at whether the right in question might be enforceable as an international customary law norm, regardless of whether the State signed the Declaration or not. Although 143 countries signed the Declaration there may be some countries who have little intention of actually giving effect to it. Other countries may have the political will to support the Declaration, but their may be greater legal or logistical hurdles to overcome in giving effect to it. There could, however, be a stronger case of opinio juris for those States that signed the Declaration. Finding ways of upholding the rights and principles within the Declaration will be an important step for all States and indigenous groups.

VI KEY PROVISIONS OF THE DECLARATION

A Self-Determination

Perhaps the most central (and contentious) issue in relation to indigenous rights, not just in terms of the Declaration, but throughout the entire indigenous rights movement, is the right of indigenous self-determination. Indigenous peoples have consistently pressed for recognition of their right to self-determination, which they have understood to be a right to freely determine their own political status and freely pursue their economic, social and cultural development. Indigenous groups assert that as 'peoples' they have an inherent right to self-determination, in that they have an inherent right to control their own destinies. Self-determination, as an expression of sovereignty, emanates from the unique identity and culture of peoples and is therefore an inherent and inalienable right of peoples. As an inherent right, its existence does not rely on a grant, transfer or other similar act of recognition by the State. Rather, it is sourced in the collective lives, laws and traditions of indigenous communities, and in the fact of their prior occupation and sovereignty. It does, however, rely on the State to acknowledge the original sovereignty of indigenous peoples and relinquish some of its control over indigenous communities. States and non-indigenous peoples, however, have struggled to understand or accept the basis of indigenous sovereignty and how it might apply within modern social and political structures.

Support for recognising indigenous self-determination is based on a number of grounds. Firstly, indigenous peoples existed as distinct communities who exercised sovereign authority and control over their lands and people before the Europeans arrived. In the post-settler phase, indigenous peoples usually did not fully consent to

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outside governance, nor was there a legitimate transferral of power from indigenous peoples to the State. With the onset of colonisation, some indigenous communities attempted to preserve their sovereignty by entering into treaties with the colonising State, while the sovereignty of other indigenous communities was simply regarded as "non-existent". Secondly, in attempting to reduce inequities between indigenous and non-indigenous peoples as a result of colonisation, indigenous peoples want to be able to control their own affairs according to their traditional cultural practices. Providing for indigenous self-determination is based on the pragmatic recognition that indigenous systems could hardly fail to be more productive than existing Western systems. The third ground is based on the quest for cultural survival, which is at the heart of indigenous claims to self-determination. Indigenous peoples claim to be distinct cultural entities with distinct cultures who demand the right to preserve and maintain their own cultural survival; in other words, cultural self-determination. Indigenous peoples can ensure their cultural survival and development where they are free to exist as distinct entities. Indigenous representatives have repeatedly stressed that the recognition of their right to self-determination is essential for their cultural survival and development. Cultural integrity and cultural survival, therefore, hinges on the right of indigenous peoples to exercise self-determination within the framework of existing state structures.

In providing for indigenous self-determination within contemporary societies, the question then becomes one of how indigenous peoples, who were previously fully self-determining and who still claim and have memory of self-determination, can be restored to being fully self-determining in the present.

102 Charters, above n 88, 159.
103 Aboriginal political and social structures were regarded as being "so low on the scale of social organisation" at the time of European colonisation that it is as if their sovereign rights were non-existent; see, Mabo v Queensland (1992) 107 ALR 1, 28 (HCA).
105 Iorns Magallanes, above n 98, 132.
108 Bennett, above n 101, 79.
States are increasingly acknowledging historical wrongs committed against indigenous peoples during and subsequent to the colonial seizure of indigenous lands, and are exploring ways of addressing their past. The growing body of international law and academic literature on indigenous self-determination provides evidence that self-determination is increasingly recognised as a 'right' that belongs to indigenous peoples, and is the main priority for indigenous claims. The content and scope of indigenous self-determination, however, remains unclear and highly contested, with both indigenous peoples and States presenting opposing claims. Indigenous peoples want greater control over their own political, social, cultural and economic futures. For indigenous peoples, self-determination includes rights such as autonomy over lands and resources, tribal self-government, political representation at a national level, and independence. On the other hand, States and non-indigenous peoples want to ensure that their territorial integrity and political unity remains unaffected. Reconciling the two competing positions has been a significant challenge for all concerned. The issue is further complicated by varying conceptions of sovereignty, citizenship, autonomy, nationhood and culture.

1 Self-determination as a general human right

The self-determination of peoples as a general right is widely acknowledged as a principle of customary international law and even jus cogens, a peremptory norm. Its basis as an international norm is sourced in the framework of fundamental human rights, and has been accepted as an international law right pertaining to all peoples. Article 1 of the Charter of the United Nations (the UN Charter), for example, provides that one of the purposes of the UN is "to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". This purpose is further elaborated under Articles 55 and 56 of the Charter, which affirms the fundamental importance and respect for the principles of equal rights and self-determination of peoples. The self-determination of peoples is also affirmed under Common Article 1 of the ICESCR and the ICCPR, which provides that "all 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." Its standing as a 'principle' under the UN Charter has developed to being recognised as a 'right' under the International Covenants. Its inclusion within the International Covenants recognises that self-determination is not a right created by treaty, but one that already exists as an international human rights norm.\(^{112}\)

2 Self-determination as an indigenous right

The UN has recognised the particular situation of colonised peoples, including that of indigenous peoples, and their need for self-determination, and regards self-determination not only as a fundamental right for colonised peoples but also as a necessary step in the decolonisation process. Under the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples (the 1960 Declaration),\(^{113}\) the UN proclaimed that recognising self-determination as a right of peoples is a necessary step in bringing a "speedy and unconditional end [to] colonialism in all its forms and manifestations".\(^{114}\) Article 1 of the 1960 Declaration provides that "the subjection of peoples to alien subjugation, domination and exploitation" is contrary to the UN Charter and is regarded as a "denial of fundamental human rights", while Article 2 affirms that "all 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". In the Western Sahara (Advisory Opinion), the International Court of Justice (ICJ) recognises self-determination as a general rule of international law on the basis of its inclusion in the international human rights instruments, and acknowledges the role that self-determination plays in the decolonisation process.\(^{115}\)

The 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States (the 1970 Declaration) also recognises the principles of equal rights and self-determination of peoples, and provides that States

\(^{112}\) Elena Cirkovic "Self-Determination and Indigenous Peoples in International Law" (2006-2007) 31 Am Indian L Rev 375, 386.

\(^{113}\) GA Resolution 1514 (XV) (14 December 1960).

\(^{114}\) Ibid, Preamble.

\(^{115}\) Western Sahara (Advisory Opinion) [1975] ICJ Rep 12, 31 paras 54-59 Judgment of the majority.
have a duty to promote this principle.\textsuperscript{116} It upholds the principles of equal rights, self-determination and decolonisation in the same language as the Charter and the other international instruments, under the proviso that:\textsuperscript{117}

\begin{quote}
Nothing in the foregoing paragraphs shall be construed as authorising 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.
\end{quote}

The 1970 Declaration upholds the territorial integrity and political unity of States on the condition that States recognise the equal rights and self-determination of peoples, without distinction as to race, creed or colour. Indigenous peoples would clearly fall within this category. A State that recognises the equal rights and self-determination of indigenous peoples, along with the rights of other citizens, will be reflected in a representative government that accommodates the needs and interests of indigenous peoples. Where States fail to recognise or apply these rights, the limitations of territorial integrity and political unity may no longer apply, which may justify wider claims of self-determination, including secession.\textsuperscript{118} The 1970 Declaration is particularly instructive in the discourse on self-determination in that it sheds some light on the content of the right of self-determination, in particular the need for indigenous interests to be represented within government. Bröllmann and Zieck identify, however, that indigenous participation in democratic government "seems predominantly geared to preserving the indigenous autonomy".\textsuperscript{119} Alison Quentin-Baxter also asserts that majority rule within non-homogenous States is "an inadequate way of protecting the interests of minority and most other non-dominant groups".\textsuperscript{120} Protecting the rights and interests of indigenous peoples, and recognising their

\begin{footnotes}
\item[118] Bröllmann and Zieck, above n 109, 107.
\item[119] Ibid, 106.
\end{footnotes}
inherent right to control their own lives can only really be achieved by empowering indigenous communities. This means self-determination.

3 Self-determination under the Declaration

Self-determination was the source of extensive discussions and intense debate throughout the drafting process. Indigenous representatives ensured that the right of self-determination remained central to the Declaration, arguing that the right to self-determination was a prerequisite for the enjoyment of all other human rights and fundamental freedoms. Indigenous peoples repeatedly stressed that they could not accept the Declaration without recognising this right, asserting that without agreement on self-determination it would be difficult to reach consensus on the other provisions. Self-determination is perceived as the right on which all other rights depend.

Indigenous representatives successfully argued for the inclusion of a right to self-determination in the Declaration. Under Article 3 of the Declaration, "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." The guarantee of self-determination under the Declaration mirrors the language of Common Article 1 of the International Covenants, indicating the parity at international law between the indigenous right of self-determination and the general right of self-determination of peoples. It also acknowledges its collective application to peoples as well as individuals.

Article 4 of the Declaration elaborates on the content of this right, providing that "indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs,

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122 Ibid, para 44.
123 Xanthaki, above n 6, 109.
124 Report of the 1999 session of the Commission Working Group, above n 121, para 44.
125 Quentin-Baxter, above n 120, 28.
as well as ways and means for financing their autonomous functions". This provision provides the first reference in an international instrument to a 'right to autonomy', and clearly limits the exercise of indigenous self-determination to matters relating to their internal and local affairs.

(a) Internal self-determination

Internal self-determination is limited to the collective rights of indigenous peoples to autonomous self-government within the state, whereas external self-determination can include a right of secession. States consistently argued that any exercise of indigenous self-determination should be limited to the internal aspects of the right, as opposed to an external expression of self-determination in order to protect and maintain their territorial integrity and political unity. Under the Declaration, the scope of indigenous self-determination is therefore limited to autonomous acts of self-government in relation to their tribal affairs, and does not include the option of secession. Preambular paragraph seventeen of the Declaration provides that any right to self-determination must be exercised in conformity with international law. This is confirmed under Article 46(1) of the Declaration, which prevents groups from doing anything that would be contrary to the UN Charter or that would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States. An act of secession would be contrary to Article 2 of the UN Charter, which upholds the territorial integrity and political unity of States. Moreover, under Article 46(2) of the Declaration, the exercise of any rights under the Declaration must respect the rights and freedoms of others and not be harmful to democratic society. Any act of secession will likely have a significant impact on democratic society and on the rights and freedoms of others, particularly where non-indigenous or non-tribal citizens live within or possess lands in contested territories. In recognising indigenous self-determination, States will also want to guard against the demands of minority or separatist movements and other special groups who may make similar demands for rights recognition.

126 Xanthaki, above n 6, 111.
127 Iorns Magallanes, above n 98, 135.
Self-determination is paramount among the rights of indigenous peoples, but most indigenous groups do not interpret this as a right to statehood, nor are they interested in seceding.\textsuperscript{128} Throughout the drafting process, indigenous delegations confirmed that they were not interested in seceding, and were prepared to offer assurances to that effect.\textsuperscript{129} Indigenous peoples see self-determination as meaning the ability to control their own cultural and economic destinies within existing state structures.\textsuperscript{130} For indigenous peoples, self-determination really means "entitlement of indigenous groups to make decisions about their economic, social and cultural development without unwarranted interference by the state".\textsuperscript{131} They want to be in control of their own lives and destinies.

In explanation of their vote against the Declaration, Australia was the only opposing country to express concerns over self-determination, with fears that a right to self-determination could amount to a right to secession. The Australian government noted that they could not encourage action that might "impair, even in part, the territorial and political integrity of a State with a system of democratic representative Government."\textsuperscript{132} Australia’s lone voice on this issue was surprising given the ongoing debate over this issue. New Zealand, for example, has consistently objected to an indigenous peoples’ right to self-determination, which it also feared could give indigenous peoples an unqualified right to secede.\textsuperscript{133} Canada, on the other hand stated in 1999 that they "accepted a right of self-determination for indigenous peoples that respected the political, constitutional and territorial integrity of democratic States".\textsuperscript{134} Given their earlier support of the Declaration, it was surprising that Canada would subsequently vote against the adoption of the Declaration.

The notion of indigenous secession has been a common concern among States. It appears, however, that States’ fears of self-determination under the Declaration,

\textsuperscript{129} Report of the 1999 session of the Commission Working Group, above n 121, para 85.
\textsuperscript{130} Paul Keal "Indigenous Self-Determination and the Legitimacy of Sovereign States" (2007) 44 International Politics 287, 288.
\textsuperscript{131} Frank Brennan One Land One Nation: Mabo – Towards 2001 (University of Queensland Press, St Lucia, 1995) 148-149.
\textsuperscript{132} UNGA Plenary Meeting (13 September 2007), above n 3.
\textsuperscript{133} Charters, above n 87, 336.
\textsuperscript{134} Report of the Commission Working Group, above n 121, para 50.
which might include a right of secession, are exaggerated and unreasonable. Indigenous delegations emphasised throughout the drafting process that they were not interested in seceding, and the Declaration clearly does not allow for secession. Moreover, there seems to be a double standard in this debate when States are able to freely re-define their own constitutional arrangements while blocking indigenous aspirations of being self-determining, fearing that indigenous peoples will break away from the State. Australia and New Zealand, for example, have both entertained the notion of becoming a republic and thus breaking away from the Commonwealth, with Australia holding a national referendum in 1999.\(^{135}\) As independent nation-States, moves towards Australian or New Zealand independence from the Commonwealth are not to be equated necessarily with indigenous secession. A republicanism movement would nevertheless have a significant impact on indigenous peoples. Māori, for example, would be greatly affected by moves towards New Zealand becoming a republic, especially since their Treaty of Waitangi agreement is with the British Crown. What protections will remain for Māori under the Treaty within a newly formed republic? Will the Treaty still be applicable?

It seems that States are able to re-define their own constitutional arrangements free of the paternalistic constraints that they have displayed towards indigenous peoples, who simply want greater control over their own affairs and live according to their own customs. States are able to fully determine their own status while indigenous peoples, who were previously fully self-determining, are not. States continue to adhere to the absolutist notion of parliamentary sovereignty while remaining "unaccountably anxious" about how indigenous peoples see themselves within the constitutional framework.\(^{136}\) The Rt Hon Dame Sian Elias suggests that a fixation on parliamentary sovereignty to the exclusion of wider perspectives is "impoverishing our constitutional thinking",\(^{137}\) and that it is time we considered our constitutional arrangements "without distorting them through the lens of command".\(^{138}\) Indigenous peoples have legitimate claims for self-determination. They should be able to negotiate their claims without being trumped by monolithic

\(^{135}\) See for example, The 1999 Australian Referendum, 6 November 1999; (8 March 1994) 539 NZPD 121.

\(^{136}\) Rt Hon Dame Sian Elias GNZM "Sovereignty in the 21st Century: Another Spin on the Merry-Go-Round" (Speech to the Institute for Comparative and International Law, Melbourne, 19 March 2003) 2.

\(^{137}\) Ibid., 3.

\(^{138}\) Ibid.
notions of parliamentary sovereignty. The presence of indigenous peoples within countries points to the State as a container of not one but several communities. Resolving the issue of indigenous self-determination within States has been problematic. States have predictably adopted the inflexible and somewhat unimaginative stance that their sovereign authority is absolute and indivisible. How long this stance will remain is uncertain, but the standoff need not be so categorical. Indigenous peoples generally acknowledge the State’s authority to govern, while reserving to them the right to control their own affairs.

(i) When is secession authorised?

There are a limited number of circumstances whereby peoples are entitled to secede from the State. These are 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”.

International law appears to recognise a remedial right to secede, particularly in response to serious injustices, but not a general right of self-determination that includes a right to secede. Only indigenous groups who fall within these categories, or who qualify for this remedial right, are able to secede. The Declaration does not modify this rule, nor do indigenous peoples claim any such authorisation under the Declaration. Unless indigenous groups qualify for a right to secede, it is clear that a right to self-determination under the Declaration does not include secession, and that States' fears of secession, therefore, are unreasonable and unwarranted. This is consistent with the argument that secession is not the only interpretation of self-determination, and does not exhaust its meaning. If self-determination only meant secession, it would be expressed as a right to secede.

139 Keal, above n 130, 301.
140 Charters, above n 87, 336.
142 Ibid.
143 Charters, above n 87, 336.
The key task for States and indigenous peoples is to settle on what an internal right of self-determination means. Indigenous representatives have argued that self-determination is not a static concept, but that it is continually evolving. They have expressed concerns that States have considered the implementation of that right as a pre-defined outcome rather than an ongoing process. States have immediately assumed that self-determination means secession, whereas indigenous peoples have been more pragmatic in its application.

The parameters for any self-determination arrangement needs to be individually determined through a process of dialogue and consultation between indigenous communities and the State, based on principles of "justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith". Attempting to define self-determination is a somewhat abstract and speculative exercise without knowing the relevant circumstances and conditions of its exercise. It is something that will develop as the right is increasingly recognised and negotiated within States. Internal self-determination arrangements will likely vary between indigenous groups, but they should include the development of power-sharing models between indigenous peoples and the State, and the empowerment of tribal authorities to be able to distribute necessary services, such as welfare and other social services to its members. The extent of autonomous control sought by indigenous communities will depend on the needs of each group. Smaller, under-resourced tribes or sub-tribes will likely seek to maintain ongoing relationships with larger tribes or with the State, whereas larger, well-resourced indigenous groups will likely seek greater independence from the State, short of secession. Empowering tribal authorities should include the provision of financial resources, enacting national or local government legislation, and where necessary, adjusting constitutional arrangements to accommodate indigenous needs.

144 Report of the 1999 session of the Commission Working Group, above n 121, para 47.
145 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 46(3).
The right to self-determination has four key aspects; political, economic, social and cultural. In exercising this right, indigenous peoples may freely determine their political status, as well as their economic, social and cultural development. These four aspects are said to be interdependent, and can only be fully realised through the recognition and implementation of each. The political right of self-determination enables indigenous peoples to create their own governing institutions, which may take the form of tribally elected councils or forums. The exercise of this right will vary from region to region, ranging from autonomous or self-governing institutions, quasi-federal relationships with the State, self-management, national government representation and full integration with the State. While some indigenous groups may contemplate full independence as an expression of their right to political self-determination, it is clear that the content of indigenous self-determination under the Declaration does not include a right to secede. As discussed above, it will only apply under a limited number of circumstances, which falls outside the ambit of the Declaration.

(i) "Constitutive" self-determination

Determining a people’s political status has been described as the "constitutive aspect" of self-determination, which Anaya explains as "the creation of processes guided by the will of the people governed". This occurs when a group makes a fundamental decision about their political status, such as independence, autonomy, self-government, self-management, integration and so forth. The important aspect of exercising self-determination is the process by which a group is able to determine their own political status, instead of that decision being determined for them. Allowing for groups to determine their own status is an essential part of the constitutive process, and is an expression of the autonomous will of the group.

147 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 3.
149 Anaya, above n 11, 104.
150 Ibid.
"Ongoing" self-determination

The economic, social and cultural aspects of the right fall under what Anaya defines as the "ongoing aspect" of self-determination. After their political status has been determined through the constitutive process, the ongoing aspect allows the tribal authority to make decisions that reflect the will of its tribal members in the economic, social and cultural aspects of their lives. It is important for a self-governing group to be able to exercise and retain real political authority rather than delegated authority, which can be overridden or revoked at a later point. Ongoing self-determination will include matters such as the establishment of tribal councils and authorities, tribal constitutions, tribal rules and regulations, including membership registration and participatory rights. It will also include the development and control of tribal assets and resources for the benefit of tribal members, including the establishment of corporate governance structures, programmes for education, health, other social services, and enforcement agencies and tribunals within tribal jurisdictions. Tribal authorities will be able to conduct their affairs according to the customs and traditions of the group, which will ensure the cultural development and survival of that group.

Acknowledging and accommodating self-governing groups is not expected to have a dramatic impact on the way society currently conducts itself, or on their relationship with the State. They will still be required, individually and as a collective, to uphold domestic and international law. It may be necessary to establish mutually agreeable standards for the provision of social services, such as national educational standards for example. It is expected that self-governing peoples will maintain their interaction with and contribute to modern society as they are now. They will likely continue to live as they are now, but as a collective they will have greater control over the economic, social and cultural aspects of their lives, even from outside traditional tribal areas. For example, tribal child-welfare agencies may be better equipped to address the needs of their own members within existing communities rather than centralised governmental agencies. Tribal social welfare agencies will be able to provide social development courses in a more culturally

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151 Ibid.
152 Buchanan, above n 141, 333.
instructive and receptive manner. Tribes will be able to provide financial assistance to its members through training incentives, scholarship programmes and other educational schemes.

Commercial development and success within the tribe is essential for the provision of such services. The settlement process for historical grievances will play an important role in the allocation of assets and settlement funds to tribal groups, which will contribute significantly to economic self-reliance and development. Tribal peoples will also be able to maintain and preserve their lands and natural resources using proven cultural methods of resource management, rather than relying on resource management legislation. All of these practices will contribute significantly to the cultural identity, preservation and development of the group.

5 Self-determination in practice

Indigenous peoples have been able to exercise limited forms of self-determination with the devolution of government services to tribal authorities, which have taken a limited form of self-government within state structures. They have also benefited financially from the allocation of settlement assets and other resources, which have provided opportunities for economic development. The emergence of modern tribal authorities has enabled indigenous peoples to be more collective in their negotiations with the State, more assertive in their demands and better organised in the management of tribal assets, resources and services. Devolution policies have provided an avenue for the empowerment and self-management of indigenous groups, but they have failed to adequately address the negative effects of colonisation, while the state is prepared to allow only those activities that do not present a serious challenge to its legitimacy. True relationships of equality and partnership between indigenous peoples and the State will see the development of real and effective power-sharing arrangements between indigenous groups and the State, rather than indigenous groups and State departments. It would see the real transfer of power rather than the allocation of funds and the setting of external expectations. Indigenous

153 Keal, above n 130, 297.
peoples seek recognition of their traditional right to exercise their inherent sovereign authority over land, people and resources. As noted above, indigenous self-determination is an inherent right that is not granted, but rather acknowledged. While the State can not transfer or grant self-determination, it is something that a colonising power can disregard through command and control. For self-determination to be effective and operative the State must be prepared to recognise it and allow it to operate. For the State this means a relinquishing of their control over aspects of tribal life as well as an acknowledgment that some aspects of indigenous life are better controlled by indigenous peoples. States should move towards the "effective sharing of power and decision-making at all levels". Services should not simply be devolved or hastily transferred to tribal groups. There needs to be adequate planning and resources in order to strengthen tribal authorities and develop partnership relationships with all levels of government.

Recognising indigenous self-determination should, as a starting point, allow for tribal authorities to take greater control of the social, cultural and economic development of its members. This will enable tribal authorities to address the various challenges that they face according to their own customs. This will include matters such as employment, education and development, health care, child-welfare and other social services, as well as other areas where the State has so far failed to provide for indigenous needs. Tribal settlements will play an important role in providing the necessary resources for tribal groups to operate independently. The State, however, can greatly assist in this process by acknowledging the authority of traditional tribal structures over its members, affirming indigenous customs and ideologies, and by ensuring that tribal authorities are adequately resourced. This process will empower indigenous groups and provide opportunities for tribal authorities to take greater control of their own destinies. It will allow indigenous peoples to make a greater contribution to themselves and to the country. The strengthening of tribal authorities will help to establish a system of legal and political structures that are representative of tribal members and capable of administering social and economic

156 Iorns Magallanes, above n 98, 163.
programmes for the development of its members. Tribal authorities will also carry the necessary legal and political mandate of its members, enabling it to represent the will and needs of its people in negotiations with the State. This is an important building process in that it will help to identify and re-establish partnerships between indigenous peoples and the State.

More importantly, it should be seen that recognising indigenous self-determination need not come at the expense of State sovereignty, territorial integrity or political unity. Multiple or overlapping sovereignties should not be seen as a diminishing of State powers, especially in contemporary and increasingly global times. Paul Keal identifies a diffusion of state sovereignty so that increasingly full state sovereignty can only be exercised through the cooperation of different institutions and groups. Societies need to be sufficiently flexible to accommodate the needs of the various groups within its borders, particularly indigenous groups. For States with indigenous populations, this could mean a re-assessment of governmental functions and responsibilities, and where necessary a re-allocation of powers and authority to ensure that tribal authorities are able to freely exercise authority over tribal matters without unwanted outside interference.

6 Evidence of international customary law

Tribal autonomy and self-government arrangements, as manifestations of self-determination, are already widely recognised within the CANZUS States. In the US, the Indian Self-Determination Act 1975 provides an early example of the policy to strengthen tribal entities through the devolution of federal services and the establishment of federal-tribal relations. The US Supreme Court in *Santa Clara Pueblo v Martinez* also upheld the importance of protecting tribal self-government, particularly in relation to tribal membership and the role of tribal courts. Tribal self-government was also affirmed by the US in explanation of their vote against the Declaration, which said that under domestic law:

\[158\] Keal, above n 130, 302.
\[159\] *Santa Clara Pueblo v Martinez* 436 US 49 (1978), 72.
\[160\] UNGA Plenary Meeting (13 September 2007), above n 3.
The Government recognised Indian tribes as political entities with inherent powers of self-government as first peoples. In its legal system, the federal Government had a government-to-government relationship with Indian tribes. In that domestic context, that meant promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, economic activities, and land and resources management.

In response to the Canadian Supreme Court decision in *Calder v British Columbia*,\(^1\) the Canadian federal government accepted the principle of aboriginal self-determination, which recognised the existence of aboriginal title at common law. This was affirmed under section 35 of the Constitution Act 1982, which upheld tribal self-government via the recognition of existing aboriginal and treaty rights of the aboriginal peoples. In recognition of this right, Canada also helped to draft the self-determination provisions throughout the drafting process of the Declaration.

Common law aboriginal title was also recognised by the Australian High Court decision in *Mabo v Queensland*,\(^2\) which rejected the terra nullius fiction. The court also identified that recognising aboriginal title brought Australia into line with their international obligations, in particular the right of non-discrimination under the Optional Protocol to the ICCPR.\(^3\) Mechanisms recognising aboriginal control over lands and tribal affairs included the Aboriginal Council and Associations Act 1976, the Aboriginal and Torres Strait Islanders Commission Act 1989 and the Native Title Act 1993. There is a close connection between the recognition of land rights and the realisation of self-determination. The recognition of aboriginal title provides the basis for indigenous groups to exercise tribal authority or self-determination over a defined area and to control their own affairs. The recognition of aboriginal title is therefore an essential step towards the self-determination of indigenous peoples.

In New Zealand, self-government arrangements were first provided under section 71 of the New Zealand Constitution Act 1852, which provided for the "native inhabitants" to govern themselves according to their own "laws, customs and usages". More recently, the government has provided for the establishment of Māori

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2. *Mabo v Queensland (1992) 107 ALR 1, 28 (HCA).*
3. Ibid, para 42.
councils,\textsuperscript{164} tribal rūnanga,\textsuperscript{165} and Treaty settlements,\textsuperscript{166} while the strengthening of tribal autonomy has been proposed under a new system of tribal governance entities by the Law Commission.\textsuperscript{167}

It is arguable whether these self-government mechanisms have actually assisted indigenous development, but their purpose of strengthening tribal autonomy and internal indigenous self-determination is clear. It is argued, therefore, that State provisions for indigenous self-determination across the CANZUS States, albeit to varying degrees, provides evidence of State practice and opinio juris in relation to indigenous self-determination. This arguably provides strong evidence of emerging, if not existing, international customary law on indigenous self-determination.

\textbf{B Lands, Territories and Resources}

The second key provision that the CANZUS States had difficulty with was in relation to land, territory and resource rights. The Declaration makes a number of references to land rights, reflecting comments made by UN treaty bodies on prevailing discrimination on indigenous land rights.\textsuperscript{168} The issue of land rights is central to the question of survival of indigenous peoples and their cultures. As Warren Allmand identifies:\textsuperscript{169}

\begin{quote}

The indigenous concept of land as collective property was alien to the new settlers in much of the world; their relationship to the land was deeply spiritual and the destruction of that link was often equally damaging to their identity.
\end{quote}

Consequently, the provisions on lands, territories and resources are critical to any international instrument dealing with the rights of indigenous peoples,

\textsuperscript{164} Māori Community Development Act 1962.

\textsuperscript{165} Iwi Rūnanga Act 1990.

\textsuperscript{166} See for example, the Māori Fisheries Act 2004, which provides the allocation model for the distribution of fisheries settlement assets under the Māori Fisheries Act 1989 and the Treaty of Waitangi (Fisheries Claims) Settlement Act 1992. The 2004 Act establishes a number of requirements before assets can be distributed to tribal groups, including the mandating of iwi (tribal) organisations; see, Māori Fisheries Act 2004, ss 13-14.


\textsuperscript{168} Xanthaki, above n 6, 117.

\textsuperscript{169} Allmand, above n 8, 38.
highlighting the importance of these rights for indigenous peoples, and the connection between land rights and the enjoyment of other indigenous rights.

Article 26(1) of the Declaration provides that indigenous peoples have the right to the lands, territories and resources that they have traditionally owned, occupied or otherwise used or acquired. Article 26(2) provides that indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those that they have otherwise acquired. Article 26(3) provides that States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect for the customs, traditions and land tenure systems of the indigenous peoples concerned.

The main concern of the opposing States is the impact that indigenous land rights might have on lands now lawfully owned and occupied by other citizens, both indigenous and non-indigenous. Australia pointed out that the land and resource provisions could be read to require recognition of indigenous rights to lands without regard to other legal rights existing in land. Canada found the provisions to be overly broad, unclear and capable of a wide variety of interpretations, discounting the need to recognise a range of rights over land and possibly putting into question matters that had been settled by treaty. New Zealand asserted that the provision on lands and resources could not be implemented in New Zealand. They argued that in terms of ownership and control the lands, territories and resources provisions could be read to "require recognition of rights to lands now lawfully owned by other citizens". They continued that if New Zealand were to recognise indigenous people's rights to own, use, develop or control lands and territories that they had traditionally owned, occupied or used, the entire country could potentially be caught within the scope of this provision, which appeared to require recognition of rights to lands now lawfully owned by other citizens.

Once again, the CANZUS objections appear to be exaggerated. It is submitted that the lands, territories and resources provisions under the Declaration do not support the concerns of the CANZUS States.
Article 26(1) provides that "indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired". This provision establishes as a starting point the rights that indigenous peoples have to the lands, territories and resources that they traditionally owned according to their customary land tenure systems. It recognises the validity of these customary land tenure systems and the failure of colonial legal systems to recognise indigenous customary or treaty rights to lands. As a result, indigenous peoples were often unlawfully dispossessed of their lands, territories and resources. Article 26(1) establishes that indigenous peoples have legitimate claims to these lands, and that States should acknowledge the validity of customary ownership of traditional indigenous lands and, where possible, facilitate the return of unlawfully confiscated lands, territories and resources to indigenous communities.

States will rightly be concerned at the impact that land rights under Article 26(1) could potentially have on lands now lawfully owned by other citizens. Article 26(1), however, must be read in the context of Article 28, which provides for the redress of traditionally owned and occupied lands and territories that have been confiscated, taken or used without the free, prior and informed consent of the indigenous group. Redress can include restitution, but when this is not possible States should provide just, fair and equitable compensation. Indigenous peoples may have rights to traditionally held lands, but pragmatism recognises that the return of confiscated lands to indigenous peoples may not always be possible.

Article 26(1) must also be read in the context of Article 46(2), which provides for the "due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society." This will clearly cover the property rights of other citizens, which means that the rights of indigenous communities to traditionally held lands must be balanced against the existing rights of others, and the need to maintain societal order.

As with most rights under the Declaration, the land, territory and resource rights are not absolute, nor are they binding. They are to be negotiated and reconciled
between indigenous peoples and the State in a spirit of partnership and mutual respect in order to reach the best possible outcome. This may include the return of indigenous lands or compensation for confiscated lands, but it should not be taken as only meaning the restitution of lands.

2 Article 26(2)

Article 26(2) on the other hand elaborates on the property rights that indigenous peoples have over the traditional lands, territories and resources that they currently possess. Under Article 26(2) indigenous peoples are entitled to "own, use, develop and control" the lands, territories and resources that they possess by reason of their traditional ownership or occupation. It holds that indigenous peoples have the same property rights to own, use, develop or control lands that they currently possess according to their traditional customs as other citizens have to own, use, develop or control their lands. It does not provide rights of ownership, development or control over the traditional lands, territories and resources that indigenous groups no longer possess and it provides no additional property rights to traditional lands they possess that other citizens do not already enjoy.

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 under Article 25 to maintain and strengthen their "distinctive spiritual relationship". This provision appears to make allowance for custodial or guardianship-type arrangements over traditional lands, territories or resources, which will allow indigenous communities to manage resources consistent with their own customs and "to uphold their responsibilities to future generations", while also guaranteeing public use or access to that land, territory or resource. This provision does not allow for indigenous property rights of ownership, development or exclusive control.

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170 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 26(2) (emphasis added).
171 Ibid, Article 25. See also, Charters, above n 87, 337.
172 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 25.
The existing rights of other citizens to lands are therefore not threatened under these provisions as the CANZUS States assert.

3 Summary

The content of Article 26(1) and Article 26(2) demonstrates a differentiation of rights between the provisions. There is an important distinction between the Article 26(1) rights of indigenous peoples to their traditionally held lands, which they clearly no longer posses, and the use-rights under Article 26(2) to lands they currently possess. Indigenous peoples may argue for the return of confiscated lands under Article 26(1), but these rights are to be balanced against Articles 28 and 46(2). Article 26(1) rights are not absolute, but are to be balanced against the existing rights of other citizens and the exigencies of the State to govern for the good of all of its citizens and the maintenance of societal order. Article 26(1) may, in effect, be limited to moral or aspirational rights with little prospect for realisation, but they should not be trivialised or disregarded.

Article 26(2) on the other hand establishes indigenous property rights to lands they currently possess; rights that are no different to the property rights of other citizens.

The lands, territory and resource provisions, therefore, do not recognise indigenous rights to lands to the extent that the CANZUS States claim. To argue that the land, territories and resource provisions will impact on the existing land rights of other citizens is therefore exaggerated because the Declaration does not guarantee to indigenous peoples what the CANZUS States claims that it does. It does not give priority to indigenous peoples land rights over the existing land rights of others and it does not create additional rights for indigenous peoples that other citizens do not already enjoy. Providing redress for confiscated lands under Article 28 strengthens the argument that Article 26 only provides rights to lands, territories and resources that indigenous communities currently possess, because it clearly accommodates for lands and resources that are no longer in indigenous peoples' ownership.\(^{173}\) In fact,

\(^{173}\) Charters, above n 87, 337.
Article 26 protects the interests of the State and its citizens while upholding the rights of indigenous peoples, by balancing indigenous land rights against the need to recognise and respect the rights and freedoms of others and the preservation of democratic society. Moreover, Article 26 seems to be more focussed on the recognition of customary indigenous land tenure systems rather than exclusive property rights to land. Whether the lands in question were, are, or will be possessed by indigenous communities, the emphasis of Article 26 seems to be on the recognition of traditional methods of land ownership, which take account of the collective nature of land rights in indigenous societies.

4 Evidence of international customary law

The recognition of aboriginal title across the CANZUS States is firmly established, as well as the recognition of treaty rights and redress over traditional lands. Settlement packages have included the return of lands as well as compensation. In addition, Article 25 custodial arrangements over lands, short of full property rights, which allow for the indigenous management and spiritual connection of traditional lands, have also been recognised. The existing recognition of aboriginal title within each of the CANZUS States is firmly grounded in applicable legislation, common law, constitutions and treaty agreements. State practice and opinio juris in relation to the lands, territories and resources provisions under the Declaration provide the strongest evidence of international customary law in relation to indigenous land rights.

174 See also, Delgamuukw v British Columbia [1997] 3 SCR 1010 (Canada); The Wik Peoples v The State of Queensland (1996) 134 ALR 637 (HCA) (Australia); Ngāti Apa v Attorney-General [2003] 3 NZLR 643 (CA) para 87 per Elias CJ (New Zealand); Cherokee Nation v Georgia, 5 Pet. 1 (1831); Worcester v State of Georgia, 6 Pet. 515 (1832); Mitchel v United States, 9 Pet. 711 (1835) (United States).

175 See for example, Part 2 of the Foreshore and Seabed act 2004, which provides for territorial customary orders or the establishment of reserves over the foreshore and seabed. See also, Crown negotiations with Ngāti Porou and Te Whānau-a-Apanui over the foreshore and seabed. The outcome of these negotiations could range from guardianship rights over the foreshore and seabed through to rights of veto over resource consent and management activities for these tribal groups; see for example, Hon Dr Michael Cullen "Foreshore and seabed Heads of Agreement with Ngāti Porou" (5 February 2008) www.beehive.govt.nz/release (accessed 27 February 2008).
C Free, Prior and Informed Consent

Under Article 19 of the Declaration, States are required to consult and cooperate in good faith with indigenous peoples in order to obtain their free, prior and informed consent in relation to legislative or administrative measures that may affect them, while Article 32 requires consultation and cooperation in good faith on any projects affecting indigenous people’s lands, territories or resources. The rationale for these provisions is that consultation and cooperation, based on the principles of equality, non-discrimination, protection, self-determination, autonomy, partnership and mutual respect, will enhance the harmonious relations between indigenous peoples and the State.176

In opposition to these provisions, the CANZUS States were concerned that this would imply a right of veto over democratic and legislative action, and would apply a standard for indigenous peoples that did not apply to others in the population. It was argued that indigenous peoples would have a right of veto that other groups or individuals did not have.

The CANZUS States’ concerns are once again exaggerated. Article 19 is limited to matters that "may affect" indigenous peoples, and in order to obtain "consent", rather than a right of veto. This right is consistent with States recognising indigenous groups as distinct peoples with certain rights, and not as minorities. It is hoped that such recognition would encourage and promote consultation and cooperation in good faith, and in a spirit of partnership. Its coverage is therefore not as universal as the CANZUS states infer.

States were also concerned that consent rights for indigenous peoples that would create different classes of citizenship are discriminatory and would amount to apartheid. This is also exaggerated. The international law instruments that forbid racial discrimination look at the consequences of the different treatment of particular groups, not the mere fact that groups are treated differently.177 Apartheid had the effect of denying fundamental human rights and freedoms, including political rights,

176 UN Declaration on the Rights of Indigenous Peoples, above n 1, Preamble.
177 Quentin-Baxter, above n 120, 29.
to sections of a national community. Because apartheid had that kind of exclusionary effect, it involved racial discrimination. The Declaration prescribes different treatment for indigenous peoples with the object of enhancing, rather than impairing their political and other rights. In doing so it does not nullify or impair the enjoyment or exercise of human rights and fundamental freedoms of non-indigenous peoples. Self-determination should not be equated with apartheid.

If the exercise of indigenous self-determination and rights over land, territories and resources is to be meaningful and respected, indigenous peoples must have real control over matters that may affect them. This means consulting and cooperating with indigenous groups in good faith in order to obtain their free, prior and informed consent and for effective tribal governance. Unfortunately, some States do not have a good record in this area. In doing so, States miss out on opportunities to develop partnerships, improve relations and build trust.

1 Evidence of international customary law

In its dealings with indigenous peoples, New Zealand claims to have some of the most extensive consultation mechanisms in the world. Consultation is recognised as an important principle of the Treaty of Waitangi, particularly where legislation would affect Māori rights and interests under the Treaty. The government has also directed that "departments should consult with appropriate Māori people or institutions including representatives from any iwi or hapū particularly affected; Consultation may in the first instance have to extend to identifying the Treaty issues and rights and interests involved and to the matters raised in Part 2 and Part 3 below; Consultation should as far as possible be in a form that those consulted regard as appropriate and should have clear results that are communicated by way of feedback to them and their communities.

178 Ibid.
179 David Williams "Self-Determination is Not Apartheid" (1 November 2007) www.herald.co.nz (accessed 1 December 2007).
180 UNGA Plenary meeting (13 September 2007), above n 3.
181 See for example, New Zealand Māori Council v Attorney-General [1987] 1 NZLR 641, 683 per Richardson J
182 See for example, Royal Commission on Social Policy The April Report, Volume II: Future Directions (Royal Commission on Social Policy, Wellington, 1988) at 73, which sets out the following guidelines for consultation: It will be necessary to identify at an early stage the Treaty issues involved, that is, the significant matters "affecting the application of the Treaty" and Māori rights and interests, that will be the subject of the proposed legislation and necessitate consultation; Consultation must be with appropriate Māori people or institutions including representatives from any iwi or hapū particularly affected; Consultation may in the first instance have to extend to identifying the Treaty issues and rights and interests involved and to the matters raised in Part 2 and Part 3 below; Consultation should as far as possible be in a form that those consulted regard as appropriate and should have clear results that are communicated by way of feedback to them and their communities.
people on significant matters affecting the application of the Treaty". This provides evidence that within New Zealand, consultation is regarded as important.

Consultation does not necessarily mean veto rights, but if the State is serious about indigenous rights it will accept that indigenous groups may exercise that option. More recently, the New Zealand government has commenced negotiations with tribal groups from the East Coast region of the North Island over customary rights in the foreshore and seabed. Where territorial customary rights are recognised over the foreshore and seabed, tribal groups will be granted "permission rights", which will give them the right to approve or withhold approval for any resource consent applications over that area. It provides evidence of opinio juris and State practice in relation indigenous consultation and consent rights. Their opposition to Article 19 is puzzling given their acceptance of indigenous consultation and consent rights domestically. Moreover, it indicates that consultation between indigenous peoples and the State can work, that tribal input and control are essential to the exercise of their rights, and that a veto right is not necessarily something to be feared.

183 Ibid, 72.
185 Ibid.
VI  MAKING THE DECLARATION WORK

A  The Legal Effect of the Declaration

It was the clear intention of the States involved with the drafting of the Declaration that it be regarded as an aspirational document with political and moral, rather than legal force, and as a "standard of achievement to be pursued in a spirit of partnership and mutual respect". From a formal standpoint, the Declaration is not legally binding on States. If it were intended to be legally binding, it would have been couched in an appropriately worded instrument. As it was, it still took nearly 25 years for States and indigenous representatives to develop a non-binding, aspirational document. Compare this with the passage of the Convention on the Rights of Persons with Disabilities and its Optional Protocol, the only other human rights instrument to be negotiated thus far in the 21st century. This Convention was negotiated during eight sessions of an Ad Hoc Committee of the GA from 2002 to 2006, making it the fastest negotiated human rights treaty. It was signed by 81 States on 30 March 2007, the highest number of signatures of any human rights convention on its opening day. Although the Declaration contains equally fundamental human rights guarantees, its potentially far-reaching implications make it a highly contested document.

The process for reconciling indigenous interests will be similar for most countries, whether governments voted in favour of the Declaration or not. Providing for indigenous interests will likely require concessions from both indigenous peoples and the State. States and indigenous groups will need to develop mechanisms that will accommodate processes of dialogue, negotiations and cooperation in good faith. Indigenous groups will be able to draw on the principles of the Declaration, which represent international consensus on indigenous peoples' rights, in order to exert moral pressure on their governments, even if they are channelled through international

186 UNGA Plenary Meeting (13 September 2007), above n 3.
187 UN Declaration on the Rights of Indigenous Peoples, above n 1, Preamble.
189 Ibid.
forums to effect domestic change.\textsuperscript{190} Even prior to its adoption, the persuasiveness of the Declaration was demonstrated in New Zealand within the court system,\textsuperscript{191} and in negotiations on Treaty settlements and Waitangi Tribunal Claims.\textsuperscript{192}

In terms of giving effect to the Declaration, Bolivia has taken the lead by incorporating the Declaration into domestic legislation under National Law 3760 shortly after it was adopted by the GA. This legislation is an exact copy of the Declaration. In incorporating the Declaration into domestic law the Bolivian President asserted that adopting the Declaration is not about indigenous peoples taking vengeance on anything, but about having their rights respected.\textsuperscript{193} While the world’s States may have different priorities for the application of the Declaration domestically, States can still give effect to the Declaration in ways that suit their own circumstances.

\textbf{1 A relational approach}

The Declaration recognises that the situation of indigenous peoples varies from region to region and from country to country, which would require the history, background and particularities of each situation to be taken into consideration.\textsuperscript{194} For this reason it was intended for each State to develop their own unique mechanisms to address the particular rights and concerns of its indigenous populations, not in a formalistic or legalistic way, but in a spirit of partnership and mutual respect. By not supporting the Declaration, the CANZUS States have turned down the opportunity to declare to the rest of the world their intentions of better recognising the rights of its indigenous peoples by adopting the Declaration, notwithstanding any objections they may have had with specific provisions within the Declaration. They could have invoked the persistent objector doctrine on contested provisions, while supporting the overall purpose of the Declaration. It is arguable, however, whether States can invoke the persistent objector doctrine where there is evidence of State practice, opinio juris or international customary law.

\textsuperscript{190} Iorns Magallanes, above n 10, 265.
\textsuperscript{191} Ngai Tahu Māori Trust Board v Director-General of Conservation [1995] 3 NZLR 553 (CA).
\textsuperscript{192} Charters, above n 13, 34.
\textsuperscript{194} UN Declaration on the Rights of Indigenous Peoples, Preamble.
By not supporting the Declaration, the CANZUS States have demonstrated to the world that they are unwilling to move forward with international developments, but are willing to maintain the status quo. In this regard, they also miss the point that in both international and domestic law, negotiating in good faith, in an endeavour to reach agreement, is accepted as the best, and indeed only way of reconciling competing rights and resolving conflicting interests that are characteristic of a complex modern society. Quentin-Baxter adds that "negotiations to give effect to the rights set out in the Declaration would not be at large. Both parties would have the protection of negotiating within the framework of mutually accepted, overarching principles." 

Opportunities are also missed for relationship building. As Matthew Palmer identifies, the process of settling indigenous claims illustrates the futility of focussing primarily on legal rights, instead of taking a broader approach that acknowledges the cultural nature of the relationship. A relational approach to interactions between the State and indigenous groups recognises that governments and indigenous groups are in an ongoing relationship managed through mechanisms satisfactory to both, with an emphasis on dialogue, negotiation and cooperation. It was never intended for the Declaration to provide or stipulate the framework for this to happen. The onus is on States and indigenous peoples to establish a suitable framework, using the internationally accepted standards of the Declaration to guide the discussion. The focus should be one of reconciliation, relationship-building and finding better ways to accommodate 'difference' within that relationship, rather than competing visions of who should have the last word. In dealing with calls to devolve or transfer important aspects of national sovereignty, Paul Kennedy identifies that: 

The key autonomous actor in political and international affairs for the past few centuries appears not just to be losing its control and integrity, but to be the wrong sort of unit to handle the newer circumstances. For some problems, it is too large to operate effectively; for others, it is too small. In consequence, there are pressures for a
"relocation of authority" both upward and downward, creating structures that might respond better to today's and tomorrow's forces for change.

Some of those "newer circumstances" include the need to improve the economic, social and cultural conditions of indigenous communities, as well as better recognise the place of indigenous peoples within constitutions. Indigenous peoples insist on having more control over their own affairs in order to truly realise their political, economic, social and cultural development. International standards for indigenous autonomy have been affirmed under the Declaration. It is incumbent on States to respond to contemporary international norms and to work out with its indigenous communities how this should unfold, rather than remain "frozen in the international law of 200 years ago".201

2 The Declaration and the CANZUS States

Since voting against the Declaration in September 2007, Australia has had a change in elected government that has demonstrated an attitude and approach towards its indigenous aboriginal peoples that is far more consistent with contemporary views, compared with the previous government. The first motion for the incoming government at the 42nd Parliament was the issuing of a formal apology for policies and legislation that saw the forced removal of aboriginal children from their communities between 1910 and 1970.202 This was a hugely significant step in the reconciliation of historical injustices against indigenous peoples in Australia, especially with the previous government's unwillingness to address the situation of its indigenous peoples by issuing a formal apology.

The significance of a formal apology was identified in the 1997 Bringing them home report, which recommended that the government make reparations to the indigenous peoples affected by their forced removal.203 Reparations included an

201 Anaya, above n 4, 271.
203 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families Bringing them home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families (Human Rights and Equal Opportunity Commission, Sydney, 1997).
acknowledgement of responsibility, the issuing of a formal apology, guarantees against repetition and monetary compensation. One of the key objectives of the Declaration is the recognition of historic injustices that resulted from colonisation, and taking appropriate steps of redress. In particular, the Declaration condemns any act of violence or genocide against indigenous peoples, including the forced removal of children of one group to another group. In this regard, the current Australian government is responding to the needs of its indigenous peoples by addressing historic injustices committed against its indigenous communities. In doing so, Australia has opted to step out from the shadow of the CANZUS alliance, recognising instead the importance of moving forward in a spirit of partnership, mutual respect and conciliation with its indigenous peoples, and is upholding contemporary international consensus on indigenous issues.

With the willingness of the Australian government to apologise for its past treatment of its indigenous peoples, and take positive steps to address indigenous issues, it is worthwhile considering whether Australia would have voted in support of the Declaration under the new government? Building on their historic formal apology, recent statements from the Australian Foreign Minister confirm that not only is the government "positively disposed to the Declaration", but that they are actually in the process of reversing their earlier decision on the Declaration. This demonstrates the positive influence that a change of government can have, and is a significant statement to the other CANZUS States that adopting the Declaration is part of their future for advancing the interests of indigenous peoples.

Will Australia’s support of the Declaration influence Canada, New Zealand or the US to change their stance towards the Declaration? While it is difficult to speculate, it is this writer’s assertion that although Canada, New Zealand and the US may still remain opposed to the Declaration it will be less tenable for these countries to maintain their position without the support of the Australian government, especially when Australia formally adopts the Declaration. This step will provide additional

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204 Ibid., pp 282, 287 and 292.
205 UN Declaration on the Rights of Indigenous Peoples, above n 1, Preamble.
206 UN Declaration on the Rights of Indigenous Peoples, above n 1, Article 7(2).
strength to the body of internationally accepted norms on indigenous rights, and will weaken the opposition of the remaining CANZUS States to the Declaration. These countries will be very concerned about damage to their international reputation, especially after Australia’s defection in support of the Declaration has left them somewhat exposed. Indigenous groups within Canada, New Zealand and the US will also be looking to the Australian situation, and will likely pressure their governments to follow Australia’s lead by also adopting the Declaration.

In terms of formalising their position, because the Declaration is not a formal treaty per se, it will be a matter for the Australian government to simply communicate their support in favour of the Declaration. As the Australian Foreign Minister points out, once they have concluded their consultation process with stakeholders – the Australian States and Territories – they simply let their view be known at the appropriate time. This will be yet another significant step towards the international recognition of indigenous rights.

Australia’s new attitude towards indigenous issues and particularly the Declaration provides an interesting example of the influence that a change of government can have on indigenous policies, with other nations already looking to Australia’s lead to adopt the Declaration. Canada’s vote against the Declaration also provides an example of the influence that a change of government had on their position on the Declaration, only in reverse. Canada previously had a strong record of supporting indigenous people’s rights both domestically and internationally, and was a staunch proponent of the Declaration until the election of a new government in February 2006.209 Canada went on to strongly oppose the Declaration, which included a media campaign against the Declaration, lobbying other States to oppose the Declaration and seeking amendments to provisions it had previously helped to draft.210 Their subsequent opposition to the Declaration surprised many, including all opposition parties in Canada, who have urged the federal government to change its position and support the Declaration.211

208 Ibid.
209 Anaya and Wiessner, above n 96.
211 Ibid.
Australia has already signalled its intention to adopt the Declaration. Where to then for the indigenous peoples of the remaining CANZUS States, whose governments voted against a non-binding Declaration? While it is disappointing that these States, each with significant issues concerning their indigenous populations, could not support an international indigenous rights instrument, each of these countries has nevertheless signalled their continued support for indigenous issues at a domestic level. By voting against the Declaration, States have perhaps signalled their intention to guard against the elaboration or codification of indigenous rights. The process of the evolution of rights, from non-binding principles to codified rights, can be seen with the development of the human rights instruments. The UN Charter affirmed the principles of fundamental human rights and freedoms of the human person following the 2nd World War, including equality, non-discrimination and self-determination. These principles were further elaborated in the Universal Declaration and later codified as rights in the 1966 International Covenants, and other legally binding instruments protecting against, inter alia, racial discrimination, genocide and torture. The governments that opposed the Declaration will want to guard against the passage of indigenous peoples' rights eventually being codified into legally binding instruments. Indigenous groups need to ensure, however, that the rights discourse reflects the interests and perspectives of indigenous peoples. Indigenous peoples will also be able to argue for the application of international customary law. By participating in the process of the Declaration, the opposing States have demonstrated an opinio juris, a willingness to be bound if the provisions as finally formulated were in line with their policy preferences. As Anaya and Wiessner assert, the internal practice of the opposing States, as well as their consent to accord a special status and rights to indigenous peoples in principle, makes them part of the world consensus on international customary law.

212 Anaya and Wiessner, above n 96.
213 Ibid.
VII CONCLUSION

Will Kymlicka has asserted that "indigenous peoples may get moral victories from international law, but the real power remains vested in the hands of sovereign States, who can and do ignore international norms".214 The experience with the CANZUS opposition to the Declaration confirms this. While the majority of States supported the rights of indigenous peoples, a minority of States can and do ignore evolving international norms on indigenous rights. By letting the opposing States set the discourse on the application of the Declaration, its value and influence is therefore diminished. This paper has argued that the CANZUS objections to the Declaration are exaggerated, unreasonable and dated. It has also argued that closer analysis of the key provisions has demonstrated that their concerns over the Declaration are unfounded. Voting in support of the Declaration presented an opportunity for States like New Zealand to take the lead on indigenous issues internationally, and to demonstrate that commitment at home. It is unfortunate that the CANZUS States, perhaps now with the exception of Australia, have opted to remain frozen in the international law of earlier years.

In terms of the future for the Declaration, it is hoped that recognition of indigenous rights will continue to evolve and be accepted domestically and internationally. This may occur either through the development of State practice, as evidence of international customary law, through international pressure on States to recognise internationally accepted standards or when States decide to accept the rights of indigenous peoples within their borders, as has been demonstrated recently in Australia. For the future development of indigenous rights it is essential that the Declaration be seen and developed from indigenous perspectives, with the assistance of key states, to ensure that the fundamental nature and integrity of indigenous rights are upheld and protected.

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The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006, by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

Annex

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,
Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,
Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights\(^1\) and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action,\(^2\) affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

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\(^1\) See resolution 2200 A (XXI), annex.
\(^2\) A/CONF.157/24 (Part I), chap. III.
Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Indigenous peoples have the right to maintain and strengthen their distinct political,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:
Article 1

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights\(^3\) and international human rights law.

Article 2

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

Article 3

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.

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

\(^3\) Resolution 217 A (III).
Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:
   (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
   (b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
   (c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;
   (d) Any form of forced assimilation or integration;
   (e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.
Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to transmit to future generations their histories, languages, oral traditions, philosophies, writing systems
and literatures, and to designate and retain their own names for communities, places
and persons.
2. States shall take effective measures to ensure that this right is protected and also to
ensure that indigenous peoples can understand and be understood in political, legal
and administrative proceedings, where necessary through the provision of
interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems
and institutions providing education in their own languages, in a manner appropriate
to their cultural methods of teaching and learning.
2. Indigenous individuals, particularly children, have the right to all levels and forms
of education of the State without discrimination.
3. States shall, in conjunction with indigenous peoples, take effective measures, in
order for indigenous individuals, particularly children, including those living outside
their communities, to have access, when possible, to an education in their own culture
and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures,
traditions, histories and aspirations which shall be appropriately reflected in education
and public information.
2. States shall take effective measures, in consultation and cooperation with the
indigenous peoples concerned, to combat prejudice and eliminate discrimination and
to promote tolerance, understanding and good relations among indigenous peoples
and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own
languages and to have access to all forms of non-indigenous media without
discrimination.
2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
Article 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. 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.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other
economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.
Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

**Article 33**

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

**Article 34**

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

**Article 35**

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

**Article 36**

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.
Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

Article 38

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.
Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 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 or 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.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.