



Human Research Ethics Committee
Approval Form

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Ethics approval has been granted for the following project:

BIG GUBBA BUSINESS The United Nations, Australia and the Aboriginal Renaissance: The Evolution of the United Nations Agenda and the Rights and Aspirations of Indigenous Australians

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This is to certify that the above application has been reviewed by the Australian Catholic University Human Research Ethics Committee (ACU HREC). The application has been approved for the period given above.

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Kind regards

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BIG GUBBA BUSINESS

THE MAKING OF THE UNITED NATIONS
DECLARATION
ON THE RIGHTS OF INDIGENOUS PEOPLES,
FIRST NATIONS RESURGENCE AND THE
AUSTRALIAN CONNECTION

by

Graeme Lyle La Macchia

This Thesis contains no material that has been extracted in whole or in part from a thesis that I have submitted towards the award of any other degree or diploma in any other tertiary institution.

No other person's work has been used without due acknowledgment in the main text of the thesis.

All research procedures reported in the thesis received the approval of the relevant Ethics/Safety Committees at Australian Catholic University.

Brisbane, Friday 8th June 2018

BIG GUBBA BUSINESS - DEDICATION

This Thesis is dedicated to the Indigenous Peoples of the world and especially the Aboriginal Australian activists who contributed to the creation of a First Nations international presence and made the *United Nations Declaration on the Rights of Indigenous Peoples (2007)* a contemporary international political reality.

I also pledge this work to my forebears, especially the Gumbaynggirr and Yuin peoples of coastal New South Wales.

I dedicate this document to my Father, Fred (Ian Maurice) La Macchia and also my Grandfather, Robert Walker, who shared a global Indigenous vision and a commitment to Aboriginal empowerment.

BIG GUBBA BUSINESS - ABSTRACT

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Incorporating a significant component of *Yarning*-based oral history, Big Gubba Business investigates the making of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) from an Aboriginal Australian standpoint. This study examines the dynamics of the global Indigenous resurgence and interrogates the evolution of the Indigenous/UN relationship. First Nations engagement with the UN system and participation at the 1993 UN World Conference on Human Rights are explored in detail. Big Gubba Business also unravels the ongoing self-determination debate and the rise of the CANZUS bloc of resistant States. Having established the political context and surveyed the cultural landscape, this study identifies and analyses the actions and achievements of Indigenous Australian representatives in the drafting, elaboration and eventual adoption of the UN Declaration on the Rights of Indigenous Peoples. Big Gubba Business finds that the principal value of the *Declaration* derives from its role as a rallying point and *common cause* for First Nations activists and theorists. The legacy of the *Declaration* project includes the building and embedding of a worldwide network of Indigenous organizations and an enhanced First Peoples political and intellectual presence on the world stage. It is hoped that Big Gubba Business will serve to direct academic attention to this neglected domain of political activity and inform a wider public of the nature and importance of the Indigenous/UN relationship.

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CHAPTER 1- INTRODUCTION

BACKGROUND

In 1991 I was working at Tranby Aboriginal College in Glebe, an inner suburb of Sydney. One morning a student from far western New South Wales spoke about visits to her community by United Nations (UN) personnel during the 1960s and 1970s:

“The United Nations people would arrive with lots of Land Rovers and equipment. Sometimes they had whitefellas with them – ‘gubbas’ from Australian governments who come around asking questions and taking notes. The UN people were also gubbas, but they were different gubbas. We called them ‘Big Gubbas’ because they came from the ‘Big Government’ of overseas that is the United Nations. They told us the UN wanted to understand how Aboriginal people were being treated by the whitefellas. People don’t know about UN business and why those people came to Australia. Someone should do a book about that Big Gubba Business. People would be interested in that story”.

The memory of that conversation has not faded. The idea of researching the relationship between Aboriginal Australia and the UN remained intact and alive into the early twenty-first century. Then 2014 saw the beginning of a PhD research project at Australian Catholic University (ACU) on the topic *Big Gubba Business*.

Today the United Nations engagement with Indigenous Australia remains a largely untold story. Yet the connection between Australia’s First Peoples and the UN is not new. Intermittent UN engagement commenced in the 1950s, rising to a high level of intensity with the Year of Indigenous People (1993) and the Decade of Indigenous Peoples (1993–2002) that followed. For many Aboriginal Australians, the focus became the long-nurtured plan of establishing a permanent Indigenous presence at the United Nations. The drafting of the *Declaration on the Rights of Indigenous Peoples* represented the practical expression of the compelling idea of global

Indigenous resurgence – a notion that has attracted the support of a diverse range of Indigenous activists that predates the inception of the United Nations.

By the late 1980s the *Declaration* concept had captured the imaginations of a large percentage of informed Indigenous Australians. Many hoped that a UN Indigenous Declaration would encourage greater restraint on the part of States and would also afford Indigenous peoples a degree of recognition and profile enhancement. In leadership circles it was hoped that such a document would assist First Nations peoples to withstand the ongoing predations of government. The following decades constituted a ‘rollercoaster ride’ in the world of international Indigenous politics. The heady optimism of the early 1990s was followed by stalemate. In the late ‘90s Indigenous representatives endured sustained counterattack as the ‘settler States’ moved to defend their interests against the perceived threat of First Nations activism. With effective information sharing and co-ordination, resistant States and their supporters became increasingly influential. Over time the settler States counterattack made some gains. The document eventually adopted in September 2007 is a weaker statement of First Nations rights than many had expected. Nevertheless, the Declaration remains the focus of Indigenous Australians in their thinking and activity in relation to the United Nations. The Declaration is also a product and expression of First Nations peoples’ substantial but fragmented presence on the world stage. While enthusiasts and supporters continue to laud its virtues, the Declaration is perceived by many Indigenous as a profound and bitter disappointment. The political significance of the Declaration is not limited to Australia and Aboriginal Australians. Throughout the Americas, in Aotearoa/New Zealand and across the wider Indigenous world, the UN Declaration or ‘UNDRIP’ remains a controversial and divisive issue.

CONTESTED CONSTRUCTION

This thesis is a study of the gradual and often contested construction of the Declaration, and of the contributions and responses of First Nations participants, States’ representatives and members of Non-Government Organisations (NGOs) during the three decades that witnessed the inception, evolution, transformation and eventual adoption of UNDRIP. More than the story of any other document, the UNDRIP saga demonstrates the nature of the underlying relationship between

Indigenous peoples and their long-term colonisers, five hundred years after Columbus made landfall and more than two centuries after James Cook and Arthur Phillip created a British outpost in New South Wales. In the early twenty-first century, Indigenous peoples are a continuing presence. First Nations peoples remain custodians of the lands and seas and significant contributors to the cultural, political and intellectual life of their regions. Yet meaningful change has occurred. Indigenous peoples are no longer separated by insurmountable geography. An internet and email-based Indigenous global platform has become a reality. First Nations are no longer isolated and alone.

Indigenous peoples have become each other's most resolute and engaged supporters and interpreters. The making of the Indigenous Declaration brought Indigenous peoples together in new and exciting ways that encouraged teamwork, solidarity and diplomatic engagement. The Declaration project henceforth had many dimensions. As well as creating a document of significance, the UNDRIP project enabled Indigenous communities to discover other First Nations and to rediscover themselves. The Declaration initiative bound many thousands of Indigenous peoples together in a common cause. In the mid-twenty-first century, other major Indigenous projects may build on the foundations that constitute the centrepiece of the UNDRIP legacy. The *United Nations Declaration on the Rights of Indigenous Peoples* was an ambitious initiative that demonstrated that change is achievable. Above all, the Declaration saga indicates that at the level of global Indigenous engagement, the shared experience and collective memory of First Nations representatives working successfully together may well be the most valuable and enduring dimension of the UNDRIP legacy.

INDIGENOUS RIGHTS AND HUMAN RIGHTS

Native American literature scholar Lee Schweninger contended that human rights and Indigenous rights are culturally dissimilar or even incompatible, especially in terms of their origins and orientations:

In the context of Indigenous rights and human rights in general, one must ask if it is possible to reconcile a massively generalized western ontology – as represented by the 20th century emergence and evolution of human rights – with the

particularity of the cultural, intellectual, religious and spiritual requirements of Indigenous Peoples worldwide (Schweninger in Pulitano 2012, pp. 251-252).

Few Indigenes are pre-occupied with the relationship between Indigenous and human rights. In the minds of First Nations members, Indigenous rights have existed since the beginning of the earliest Indigenous peoples. In Western academic terms, the situation remains unresolved. In the domain of international law, Indigenous rights represent a new and problematic sub-discipline. First Nations lawyers, activists and political leaders have come to apprehend Indigenous rights as a zone within the larger domain of human rights. While the relationship between Indigenous and human rights has been imprecise and problematic, many First Nations representatives have embraced human rights as an 'armoury' capable of resisting and subverting the agendas of States. Robert Williams has argued that the creation of UN-sanctioned and internationally recognized standards has provided a powerful framework for the extension and consolidation of human rights (Williams in *Encounters*, p. 670 as discussed in Keal 2003, p. 137). In addition to furnishing First Nations with new opportunities for cultural and political advancement, the international human rights framework has eroded the legitimacy of repressive State practices and policies. With the demise of formal empire, assertive sovereign States have become the central problem for First Nations. Reactionary and frequently nationalistic behaviour, on the part of States, has served to deny human rights and simultaneously marginalize and undermine Indigenous rights.

COLONIZATION

In the early 1970s, across North America, Australia and elsewhere, First Nations peoples began to create a more emphatic public profile, displaying elements of their traditional dress, protocols and ceremonies at gatherings and conferences that showcased the Indigenous resurgence. Participants discovered that invasion and colonization had delivered similar results throughout the Indigenous world. First Nations cultural traditions and ways of life differed greatly, yet the impacts of colonization remained strikingly consistent. During colonial times, generations of First Nations peoples were forced to accept Western religion, education and ways of doing. For many Indigenes, acceptance of colonization was a necessary but temporary

expedient. Colonization was an everyday reality, but less enduring than it appeared. It was also long-running, haphazard and morally indefensible. While Indigenous Peoples felt the full force of colonialism, they retained their commitment to the value systems and moral codes of earlier times. Despite its economic and political achievements, colonization was never a fully developed or all-encompassing system. Across Australia, Aboriginal activists learned not to resist at every turn, but to be agile and elusive, ‘bending like the grass’ or ‘melting away into the scrub’. Above all, Indigenous peoples learned the value of patience.

For many Indigenous Australians in the twentieth century, colonization was ‘unfinished business’ that could never be fully realized. Members of Aboriginal communities were often transported to other localities against their will. Most clung to culture and upheld the old hierarchies of family, community and Spirit Business, while simultaneously adopting Western dress and diet. Families were heavily politicized by their social and political circumstances and strove to instil an *indigenized* political consciousness in their children. Some embraced the new religion and ‘whitefella’ language, while others made different choices. In many parts of the Indigenous world, traditional ceremonial and religious practices were maintained in secret. Instead of missions, schools and government agencies replacing community-based relationships, annual ceremonies and law, the two systems frequently co-existed. By the late twentieth century, First Nations peoples had gained a wealth of painful experience in the process of dealing with government and engaging with almost every manifestation of Western colonial society. Many had also performed the roles of recipients and adherents of Indigenous culture. As survivors of the colonial onslaught, First Nations leaders were in most cases psychologically robust, politically astute and articulate individuals. Importantly, leaders represented and embodied *culture*, ensuring Indigenous worldviews and values were reflected in the priorities and plans of First Nations organizations.

The Aboriginal *culture* that leaders embodied was characterized by longstanding and embedded local and regional concepts of *rights* that were profoundly different from Western notions of *human rights* based on the rights of the individual citizen. Within non-Indigenous and especially Western ideational frameworks, rights are possessed

by individuals who are assumed to be rational, reasonable and capable of exercising free will. In Indigenous societies, the long-term needs of the community, including animal, physical and spiritual elements of the environment, take precedence over the interests of the individual. Rather than aligning with notions of reason and free will, First Nations concepts of moral and appropriate behaviour locate the individual within larger ongoing systems in which the role of every individual is to fulfil the demands of his/her life situation. The defining Indigenous moral focus entails acceptance of the primacy of *societal obligation*. In this First Nations moral construct, the *human rights* of the individual are only relevant or useful to the extent that they may consolidate or enhance the interests of the community or *people*.

The concept of *societal obligation* entails the notion of a shared framework of values and attitudes within a specific group or *People*. *Societal obligation* sits at the core of an Indigenous person's community orientation, underpins *Indigenous difference* and is central to Indigeneity. *Indigenous difference* and the demand for provisions that reflect such realities is a 'grey area' in international law. Still, within this *grey area* adjustments have been attempted. Isabelle Schulte-Tenckhoff has suggested that the elaboration of standards applicable to Indigenous peoples has 'stretched the envelope' regarding 'special rights' as an alternative to rights of non-discrimination (Schulte-Tenckhoff in Pulitano 2012, p. 73). Schulte-Tenckhoff concluded that First Nations representatives are unlikely to find their needs and aspirations readily accommodated in international law:

While the principle of non-discrimination is firmly anchored and monitored in positive international law, this is not the case regarding special measures to be taken in favour of Indigenous Peoples as collective entities. . . Still, although international law is informed by Eurocentric conceptions of statehood and law, First Nations meet the key criteria for acceptance as Peoples: a permanent population, a defined territory, an effective government, and the capacity to enter into foreign relations (p. 75).

While Indigenous peoples enjoy some standing in international law, their presence on the world stage has provoked considerable anxiety and antipathy. In some quarters, Indigenes have been perceived as a potential threat to the stability of the world

system and an ongoing challenge to the integrity of the global economy. At a deeper and more revealing level, Schulte-Tenckhoff has affirmed:

The debate over Indigenous rights has brought many States face to face with their colonial past. States have been forced to re-visit their morally and legally questionable acquisition of sovereignty over vast territories and diverse resources. In most cases, they have demonstrated a determination to maintain the status quo. States have also displayed a consistent unwillingness to grant group rights to Indigenous Peoples (p. 73).

Given the neo-colonialist character of the responses of most settler States to the Indigenous resurgence, it is not surprising that early versions of the Draft Declaration were explicitly *anti-colonial* documents consistent with the orientations of Indigenous participants. A consensus view emerged that while cultural heritage and revitalization were important, it was the 'big picture' that had the potential to inspire young and old alike. For many First Nations activists, the Draft Declaration was the 'tip of the iceberg'. Indigenous leaders had been entrusted with a larger and more demanding mission – creation of a global Indigenous presence and the re-imagining of First Nations self-determination. At the heart of the Indigenous notion of self-determination was the concept of Indigenous control over First Nations peoples, places and cultural heritage. Indigenous peoples were determined to regain control over Indigenous matters. Discussions concerning political control often led to conversations regarding the theoretical domain or *theoretical context* surrounding political action. Such discussions frequently created divisions and misunderstandings. While few Indigenous Australian activists agreed on the 'best way forward', many believed theorizing was better left to *blackfellas* and representatives of other First Nations, with non-Indigenous bureaucrats and academics sidelined.

THEORETICAL CONTEXT

In the 1970s a collection of theoretical frameworks crafted by a diverse collection of First Nations scholars emerged in response to the overwhelmingly oppressive and dehumanizing influence of Western colonialism. In the process of creating a new and sustainable *space* for First Nations scholarship and academic discourse, Indigenous

researchers constructed alternative approaches that privileged, embedded and connected First Nations perspectives. While almost every field of research in the humanities and social sciences has a theoretical underpinning, there are normally numerous competing and occasionally controversial theoretical approaches within and across disciplines. Disagreements regarding *theory* are particularly common in disciplines that engage closely with Indigenous peoples. This is a contested and fragmented research domain in which the practical/theoretical divide represents a challenging cultural separation. Many researchers see themselves as enthusiastic and proficient practitioners within one of the major Western disciplines. In the health sciences and education, for example, 'empirical' researchers often proceed along narrowly practical lines. In the 'softer sciences' and in the humanities theory-building has been the major focus. This thesis argues that both practical and theory-based approaches are necessary to sustain a meaningful First Nations intellectual and academic presence. Western academic frameworks are not the only intellectual paradigms of consequence. First Nations cultures tend to make their own teleological and political demands distinct from those of the Academy.

In Indigenous Australia, any research framework that is entirely *practical* or exclusively *theoretical* will most likely be out of alignment with the orientations of 'the Mob'. A balance of practice and theory is demanded, but insufficient of itself. For the Indigenous researcher – and the growing First Nations audience – the most valuable and powerful dimension is the authentic and embedded *Indigenous* dimension, protected from the imposed Western dichotomy between *practical* and *theoretical* approaches. The underlying challenge for Indigenous researchers is to incorporate relevant First Nations elements in ways that give voice to the cultural and intellectual traditions and aspirations of community.

EMBRACING ABORIGINAL ORAL TRADITION

Indigenous individuals have played leading roles in this research project. Direct engagement – most often in the form of *Yarning* sessions – has enabled respondents to provide their own interpretations and insights derived from lived experience and personal reflection. The full benefit of oral engagement exceeds the well-known advantages of direct eyewitness testimony. In addition to its significant intrinsic value,

such testimony informs a wide range of documentary evidence and interrogates the content, orientations, roles, achievements and shortcomings of written and especially official sources. This methodology is consistent with the approach developed by South Australian Narungga/Kaurna/ Ngarrindjeri man Professor Lester Irabinna Rigney in 1997 under the title 'Internationalisation of an Indigenous anti-colonial cultural critique of research methodologies: A guide to Indigenist research methodology and its principles' (Lowitja Institute Researcher's Guide, Flinders University 2016, Ch. 3, p. 45). Striving to reinforce a new wave of research by Aboriginal Australians and expressing ongoing frustration with the non-Indigenous academic establishment, Rigney declared with characteristic passion:

The interests, experiences and knowledges of Indigenous Peoples must sit at the centre of research methodologies and the construction of knowledge about Aboriginal peoples. Incorporating these aspects in research, we can change the construction of knowledge, creating one which does not compromise our identity or the principles of freedom from racism, independence and unity (1997, p. 637).

More recently, Rigney has broadened his focus, responding positively to further expansion and consolidation of Indigenous Australian scholarship, endorsing the broad acceptance of multiple methodologies and the emergence of a range of Indigenous voices and perspectives. Rigney suggested that:

Today's Indigenous scholars can re-think research methodologies, employing a variety of approaches that match contemporary realities and advance the interests and aspirations of researchers and their collaborators (2006 in Lowitja Institute Researcher's Guide, 2016, p. 47).

INDIGENOUS STANDPOINT THEORY AND 'INDIGENIST' THEORY'

Other Indigenous Australian academics have supported Indigenous Standpoint Theory, many using Rigney's work as a 'springboard'. In 2003 Dennis Foley suggested that Rigney's work closely aligns with that of the late Professor Japanangka Errol West. In Foley's view, *Epistemology* (the branch of Philosophy that explores the origin, nature, methods and limits of human knowledge) represents a key area of difference between the theoretical frameworks of Indigenous Australians and those of Western

(and Australian) theorists (Foley 2003, p. 47). Foley contends that Indigenous Australians have accepted the underlying foundations of Aboriginal knowledge systems. By contrast, those operating within the Western tradition have been taught to question not only the products, but also the foundations of knowledge systems, and to formulate and propose alternatives (Foley 2003, p. 47). Foley has emphasized the Indigenist or political dimension of Rigney's contribution, suggesting that the continuing relevance of his work is bound up with Rigney's focus on 'resistance' to generally accepted and dominant Western scientific paradigms. Foley notes the powerful 'emancipatory imperative' in Rigney's concept of Indigenist research, locating it within the larger global context of First Nations resurgence:

In Rigney's analysis Indigenist research is fundamental to the aspirations of Indigenous Australian peoples. Such research is central to the ongoing struggle to uncover and resist continuing forms of oppression within this country. For Rigney, the primary goal of Indigenist research is resistance to racism and support for self-determination (Foley 2003, p. 48).

Rigney's proactive orientation rejects the idea of Indigenous 'victimhood', insisting that only Indigenous academics should research Indigenous issues. Rigney identified the 'social link' between research projects and community needs, arguing that only Aboriginal investigators had the capacity to 'serve and inform the political struggle', making themselves *intellectual instruments* of community (Foley 2003, p. 48). This concept is intertwined with the idea of *privileging* Indigenous voices – a notion strongly supported by Maori Professor Linda Tuhiwai Smith (1999) and a diverse collection of North American First Nations scholars.

Rigney's demand for Indigenous control of the histories and cultural and intellectual heritage of First Nations peoples remains current across the Indigenous world. Indigenist research empowers those being researched, by providing opportunities for them to clarify and project their own perspectives as individuals and as members of a community. This is a significantly different concept of research, which acts to strengthen and affirm the position of the broader Indigenous community in relation to those of non-Indigenist academic and scientific establishments. In short:

Indigenist research focusses on the lived historical experiences, ideas, traditions, dreams, interests, aspirations and struggles of Indigenous Peoples who are the main subjects of Indigenist research (Rigney 1997, p. 118).

By Rigney's definition, this study of the making of the UN Declaration on the Rights of Indigenous Peoples and of the role of Indigenous Australians in that project, written by an Aboriginal Australian researcher and incorporating a significant Indigenous oral history component, sits squarely within the category of *Indigenist research*.

MARTIN NAKATA AND 'DECOLONIAL GOALS'

Unlike Lester Rigney, Torres Strait Islander Professor Martin Nakata has sounded a note of caution regarding the location and nature of 'battlelines' in the evolving Indigenous/ Western contest. Nakata's perspective focusses on the problem of uncertain boundaries.

The complex grounds of the Indigenous-western contest make it a difficult task to resolve what is 'Indigenous' and what is 'colonial', or what ultimately serves Indigenous interests and what does not . . . (Nakata et al. 2012, p. 121).

At a deeper level, Nakata's analysis is incisive, particularly in relation to the simple but problematic dichotomies that often characterize discussion of Indigenous scholarship in recent and contemporary settings:

The practice of representing what is 'western' in singular terms and as antithetical to that which is 'Indigenous', reflects the struggle for freedom, recognition and self-determination on the part of Indigenous peoples . . . Though a justifiable response, this approach entails the risk of reinforcing colonial binaries. Moreover, political resistance that demands the dismissal of almost everything Western as 'colonial' . . . inhibits more measured examination of what it means to be 'Indigenous' and how Indigenous social circumstances and political concerns can be best understood and represented (Nakata et al. 2012, p. 127).

The underlying approach adopted throughout this thesis includes acceptance of *complexity* and rejection of simplistic binaries. *Yarning*-based research has confirmed that a distinction must be made between 'Western' and 'colonial' in terms of the

evolution and reception of the UN Indigenous Declaration. In addition, multiple complexities must be accepted as a constant in the realm of politics, in the theoretical domain, within Indigenous communities and organisations, within government and throughout the UN system. On another level, global Indigenous resurgence is an overwhelmingly complex phenomenon, and the responses of government and other organisations to the challenges posed by First Nations activism and international diplomacy have also been complex, largely hidden and often inconsistent. In grappling with overwhelming scale and complexity, it is useful to seek and explore the insights of participants. One of the most effective means of engagement with participants and activists is traditional Aboriginal Australian *Yarning*.

YARNING AND DADIRRI

Rigney's 'traditionalist' and 'liberationist' approach and the grassroots emphases of Moreton-Robinson (2000) and Budby (2001) have encouraged Indigenous scholars engaged in social science research to rediscover and incorporate traditional *Yarning* strategies and techniques at the level of face-to-face engagement. In Western Australia, Dr Dawn Bessarab has been a prominent exponent of *Yarning*, which she has described in considerable detail:

In Australian Aboriginal cultures there are specific rules, language and protocols for conducting conversations. In Western Australia, Nyoongah people use 'Yarning' when they need to talk about important matters. Yarning is a special way of relating and connecting and begins with a semi-structured interview which becomes an informal and relaxed discussion. . . Yarning is not easy. The researcher must build a relationship that is accountable to all members of Indigenous communities participating in or contributing to the research (Bessarab & Ng'andu 2010 in Lowitja Institute Researcher's Guide 2016, p. 51).

Yarning is also utilized by Aboriginal researchers in northern Australia, often with an emphasis on religious and spiritual matters. In the Daly River region of the Northern Territory, educator and traditional artist of the *Ngengiwumirri* people, Miriam-Rose Ungunmerr-Baumann has outlined the culturally embedded and social nature of *Dadirri* or *Yarning*:

Dadirri is a deep contemplative process of listening to one another. Dadirri means being quietly aware, listening and watching. Dadirri is like contemplation, but requires the presence of another person. Through Dadirri people are recognized and appreciated as unique, complex and connected beings. Through Dadirri we experience ourselves as an important part of a larger community. Dadirri is based on the concept of Listening. We believe Listening is the best way to build understanding and create relationships based on trust . . . (Ungunmerr-Baumann 1993 in Lowitja Institute Researcher's Guide 2016, p. 53).

Across urban, rural and remote Australia, specific versions of *Yarning* have remained integral to culture and community. My own traditional peoples on the North and South coasts of New South Wales (the Gumbaynggirr and Yuin peoples) have maintained key elements of their *Yarning* patterns and protocols across two centuries of colonial encroachment.

Despite its reach, intensity and general disrespect for Indigenous cultural heritage, the colonial experience failed to destroy the *Yarning* tradition. Instead, elders redefined a range of social situations, enabling *Yarning* to continue in less visible forms. *Yarning* was repositioned at the margins of everyday life, often concealed within unthreatening sporting, musical and artistic contexts. Across urban, rural and remote Australia, specific versions of *Yarning* remain integral to the lives of communities and families. In some places, *Yarning* has been elevated to the philosophical and spiritual plane. This transcendent iteration has been identified, explored and reaffirmed by a loose but dynamic group of contemporary Aboriginal scholars.

In 2002 Indigenous scholar Judy Atkinson embraced *Dadirri (Yarning)* as a framework appropriate to higher level application, embedding *Dadirri* as a formal methodology in her benchmark study 'Trauma Trails, Recreating Song Lines: The Transgenerational /Effects of Trauma in Indigenous Australia'. Atkinson emphasized the relevance of *deep listening* as a pre-requisite for positive macro-social transformation in postcolonial Australia. In Atkinson's work *Dadirri* emerges as a psychological and cultural construct. At the same time, *Dadirri* is also a system that informs ethical research and realigns research design to provide cultural safety for all participants (Atkinson 2002, p. 16 in Lowitja Institute Researcher's Guide 2016, p. 54). Aboriginal

Australian researchers who have rediscovered and reinstated *Yarning* as a research approach and methodology have generally done so along 'Pan Aboriginal' lines – employing similar patterns of engagement within remote, rural and urban social contexts. Typically, this has meant Indigenous Australian researchers employing *Yarning* in the process of investigating topics of importance to Aboriginal peoples *within* Australia.

This research project has also incorporated engagement with Indigenous Australian activists and participants on many occasions. Then in April/May and November 2016 *Yarning* approaches, techniques and protocols were employed *outside* Australia. *Yarning*-based engagement represented the underlying qualitative research methodology in discussions and conversations with Canadian First Nations, Native Americans and Alaskan Inuit, and later with Maori scholars and researchers in Aotearoa/New Zealand. The assumption was made that, notwithstanding significant differences of many kinds, the cultural similarities between Indigenous peoples would enable Aboriginal *Yarning* approaches to be successfully introduced and effectively harnessed. Results were overwhelmingly positive. *Yarning* proved to be an inclusive, reassuring and culturally respectful research platform. This showcased some of the strengths of Australian Aboriginal culture, while simultaneously creating 'spaces' in which Indigenous respondents presented and explored aspects of their own cultural heritage and political history in original and creative ways. In short, *Yarning* empowered respondents, by embedding them in the Big Gubba Business project and exploring and clarifying their roles in relation to global Indigenous resurgence.

YARNING IN CONTEXT

As a balance to theory and as a means of exploring and interrogating its relevance, *Yarning* sessions have been conducted as integral components of this research project. Though generally neglected in First Nations theoretical discourse, *Yarning* (or traditional Aboriginal face-to-face verbal engagement) is central to the concept of being an Indigenous Australian and an Indigenous researcher. *Yarning* has added a distinctive and invaluable dimension to this research project. Many believe that traditional *Yarning* has become a 'lost art'. Yet a significant percentage of Australian First Nations researchers have retained a commitment to Aboriginal ways of engaging

with participants, activists and experts. In a *Yarning* situation, respondents generate longer and more sustained statements and provide material which is often thoughtful, detailed and highly original. While *Yarning* can help ensure that Indigenous research is done differently, it cannot prevent such research from being examined, evaluated and judged according to the precepts, proclivities and conventions of Western scholarship.

Western science is perhaps the most powerful creation of Western civilization and scholarly research represents the 'cutting edge' of Western-derived science. 'Academic colonialism' can be best understood as the intellectual activity that occurs at the interface between Western knowledge systems and those of other Peoples – including First Peoples. Academic colonialism occurs when Indigenous subject matter and *knowledge frameworks* are appropriated, re-oriented and 'colonized' by a dominant, unrelenting and insatiable West. More visible and sustained First Nations resistance to Western science as a dynamic dimension of colonialism represents a strengthening Indigenous commitment to cultural and political self-determination. Still, mention or discussion of self-determination can also elicit strongly negative responses in certain Indigenous circles. Some Indigenous appreciate that the concepts and overarching superstructure of human rights values and orientations are of non-Indigenous origin, and can be seen and apprehended as colonial or post-colonial 'impositions'.

RIGHTS BASED SELF-DETERMINATION

Consistent with this realization, a handful of First Nations scholars in North America and Aotearoa/New Zealand have taken issue with rights-based self-determination. In this view, Eurocentric and modernist notions of self-determination embraced by Indigenous activists in contemporary times are at odds with First Nations legal traditions and current political needs. Native American (Cherokee) researcher and author Jeff Corntassel has suggested that there are many problems with a rights-based discussion of Indigenous self-determination (Jones 2016, p. 50). In his view, non-Indigenous versions of self-determination are unable to accommodate traditions and concepts of shared responsibility and localized sovereignty. Even worse, non-Indigenous versions perpetuate and consolidate patterns of Indigenous

disempowerment by steering First Nations communities away from economic self-reliance and internal political renewal. By contrast, Corntassel advocates an emphatically holistic approach that is, he insists, more compatible with Indigenous ways of doing. Corntassel has labelled his community-based model '*sustainable Self Development*' (Jones 2016, p. 50). The underlying concept is that State sponsored versions of self-determination marginalize fundamental First Nations priorities including internal community relations and relationships with the natural world. Clearly, tradition is important to Corntassel and Jones. Both emphasize the centrality of tradition and traditional patterns of land and resource ownership. These versions of tradition entail a significant cost.

The approaches of Corntassel and Jones' risk limiting or even pre-empting First Nations access to human rights instruments and entitlements are available to members of other groups – including minorities. Within Indigenous Australian communities there is a broadly-shared commitment to securing rights and entitlements under the local *whitefella system* or international *big gubba system* – providing traditional rights are not compromised. The underlying understanding is that traditional rights exist *of themselves* under traditional law and convention. Any entitlements under *whitefella* or 'imposed' legal frameworks are generally seen and accepted as *additions* to, rather than *replacements* for entitlements or rights under Aboriginal or *traditional* law or convention. While tradition is fundamental to Indigenous peoples – including Aboriginal Australians – it should not be understood as a system that prohibits engagement with all other systems.

TRADITION

It is not surprising that relationships between tradition, theory and contemporary practice are subjects of disagreement and debate throughout the Indigenous world. In Canada, First Nations political and intellectual engagement is a feature of the national political landscape. Amongst Indigenous theorists across North America there is an emerging consensus that interest in tradition is on the rise, offering a range of benefits above and beyond those commonly identified and represented. Native American (Ojibwe/Anishinaabe) theorist and academic John Borrows explored the relationship between contemporary *theory* and time-honoured *tradition*. He contends

that tradition can provide important contexts in terms of preparing for active response (Borrows 2016, p. 4). In Borrows' view, tradition can embody time-tested wisdom drawn from long experience. Such wisdom can be valuable when it comes to making contemporary decisions. The contrast that traditions represent can highlight the broad range of choices available to Indigenous peoples in their interactions with others including government and corporations (Borrows 2016, p. 4). For Borrows and Canadian Mohawk/Rotinooshonni activist and theorist Taiaiake Alfred, community leadership and the theory/practice interface are topics of special concern. Alfred (1999) unravelled the connections between community development and the broader political domain, emphasizing the importance of *Big Politics* in the context of global Indigenous resurgence:

Indigenous Peoples have successfully engaged Western society in the first stages of a movement to restore First Nations autonomy and cultural integrity. The Indigenous movement is founded on an Ideology of 'Native Nationalism' and a rejection of models of government rooted in European cultural values. We are seeing the emergence of something special. We are witnessing an uneven process of re-establishing systems that promote the goals and reinforce the values of Indigenous cultures. This process is being obstructed by ongoing government efforts to maintain systems of dominance imposed on Native communities in earlier centuries (p. 111).

Alfred (1999) has insisted that First Nations re-invention and re-definition must advance on a broad front – based on self-belief and solidarity, not strict adherence to a prescribed agenda. He also acknowledged the advent of global Indigenous collaboration, emphasizing the willingness and capacity of Indigenous peoples to work together collaboratively at the United Nations:

During the drafting of the UN Indigenous Declaration, First Nations participants reached agreement with little difficulty. We have a shared understanding of what constitutes Indigenous rights. In general, it is easy for us to agree. The main problem has been persuading governments to accept the Declaration as a necessity, rather than perceiving it as a threat to States' interests (Alfred 1999, p. 111).

There is an element of oversimplification in Alfred's claim regarding a 'shared Indigenous understanding'. In fact, frequent behind-the-scenes disagreements punctuated discussions amongst Indigenous within and outside the UN Working Group. Still, in terms of the larger and more fundamental issues, Alfred's overall assessment was well supported by First Nations participants at the UN in Geneva during the 1990s (see Dodson, Clark and Sambo Dorough Interviews, 2016).

It is appropriate to focus on the concept of the Declaration as a moral and political '*necessity*'. This notion has been central to the orientation of most First Nations representatives and commentators, but absent from the mindsets of many States' representatives and those of the leaders of governments directing them. A deep and wide chasm has separated the values and views of Indigenous activists and their diverse supporters on one side, and those of representatives of resistant States on the other. The values and views in question continue to exist and appear to have lost little of their potency. The story of the evolution of the UN Indigenous Declaration is a saga of the longstanding and profound differences that distinguish the worldviews of Indigenous peoples from those of 'defenders of the system' who believe the interests of urban industrial capitalist society must always prevail. It is also a story of more generous, far-sighted and morally engaged States, and numerous non-Indigenous organisations, groups and individuals who have come to demand and advocate cultural diversity, grassroots political re-awakening, the transformation of human rights, the strengthening and realignment of international law, and a renewed focus on ecological balance and sustainability.

RESEARCH PROJECT

This research project was originally proposed by a handful of Aboriginal elders from far western NSW in the early 1990s. The underlying concept was to investigate the nature and extent of the UN presence in Aboriginal Australia. The study would examine the evolution of relationships between the UN and Aboriginal communities and organizations, and between the UN and successive Australian governments. Early research revealed that documentary evidence was scant and largely inaccessible. In accordance with community advice, it was decided to embrace Aboriginal tradition and undertake face-to-face engagement in the form of *Yarning* sessions with

Indigenous Australian participants and activists. It was hoped that the testimony of living Aboriginal people would provide a balance to written records and commentary from non-Indigenous sources. This strategy has been successful because *Yarning* participants have been generous with their time, information and insights. By uncovering and incorporating a significant component of Indigenous oral history, this study will contribute to the re-validation of Aboriginal oral tradition within a larger and predominantly non-Indigenous research framework.

Indigenous activists and representatives who have contributed to this research project have addressed errors and omissions in the story of the UN Indigenous Declaration and in relation to the global Indigenous resurgence more generally. In addition to accessing and incorporating eyewitness accounts and insights; this project has been underpinned by ongoing engagement with theoretical models developed and elaborated by First Nations thinkers. Together with the writings of Indigenous Australian researchers, the works of Aotearoa/New Zealand Maori academics Linda Tuhiwai Smith, Graham Smith and Carwyn Jones have served to clarify and enrich the theoretical context. International connections have not been limited to Oceania. Elements of the work of Native American scholars John Borrows, Gregory Cajete and Lloyd Lee, and Canadian First Nations activists and authors Taiaiake Alfred and Bonita Lawrence, Metis leader and spokesman Clement Chartier, and Alaskan Inuit representatives Dalee Sambo Dorrough and Lori Idlout have also proven invaluable to this study. Whenever practicable, attempts have been made to communicate directly with specific Indigenous and non-Indigenous individuals and to conduct face-to-face *Yarning* sessions (interviews).

Direct engagement with participants, observers and activists has ensured a high level of 'connectedness' throughout the life of this project. At the local level, the benefits of *connectedness* – or relevance to community – far outweigh the value of grand theory. Still, theory has its place. Most First Nations commentators support the view that theoretical frameworks must remain connected and accessible if they are to fulfil their social and political purposes. Within this approach, theory assists the process of analysis and evaluation of Indigenous/ government and Indigenous/non-Indigenous interfaces – including exploration of the evolving theoretical domain. A sound

appreciation of the theoretical landscape can assist the researcher to construct an accurate picture of emerging debates and developments in relevant areas of research. Debates have been central to the evolution of the UN Indigenous Declaration, and to its reception and application in local, national and international settings.

In Aotearoa/New Zealand, Linda Tuhiwai Smith has noted the continuing dominance of academic colonialism and the overwhelming cultural momentum of Western science. Tuhiwai Smith emphasized the centrality of *research* in the history of imperialism:

Research has a significance for Indigenous peoples that is embedded in our history under the gaze of Western imperialism and Western science. Research is framed by our attempts to escape the penetration and surveillance of that gaze whilst reconstituting ourselves as Indigenous human beings in a state of ongoing crisis.

Research has generated a relationship to Indigenous peoples that continues to be problematic. At the same time, new pressures which have resulted from our own **politics of self-determination** . . . and from changes in the global environment have meant there is now much more active and knowing engagement in the activity of research by Indigenous peoples . . . (Tuhiwai Smith 2005, p. 39).

Indigenous politics of self-determination are continuing to impact on First Nations research, and have shaped and inspired aspects of this research project. Tuhiwai Smith has emphasized the importance of new ways of theorizing. This project has incorporated specific approaches and techniques that are contemporary versions of rediscovered research orientations. First Nations researchers incorporating and privileging traditional Indigenous ways of engaging with people and ideas represent *applied* self-determination at the local level. Self-determination is conceived as a salient principle of international law and a key factor in global politics. Yet this is not the sum of its relevance. Self-determination also concerns community empowerment. In addition to identifying the link between self-determination and community control, Tuhiwai Smith highlighted the importance of explicitly *Indigenous* ways of theorizing:

We are beginning to see the development of theories by Indigenous scholars which attempt to explain our existence in contemporary society. Such new ways of theorizing are grounded in a real sense of what it means to be an Indigenous person. Within the Indigenous researcher's imperative is a sense of being able to determine priorities – to bring to the Centre issues of our own choosing and to discuss them amongst ourselves . . . Theory is important for Indigenous peoples . . . Theory gives us a space to plan, to strategize, to take greater control over our resistances . . . Theory can also protect us, because it contains ways of putting reality into perspective . . . If it is a good theory, it also allows for new ideas and ways of looking at things to be incorporated without the need to search for new theories . . . (2005, p. 38).

Tuhiwai Smith insists that First Nations academic research must remain intrinsically different. Such research should extend Indigenous concepts and understandings beyond the individual and the group, enabling separate and distinctive approaches and interpretations to be incorporated within and across the Academy. This is an example of 'indirect and embedded' self-determination, because Indigenous theory-building is an expression of the First Nations commitment to self-determination at the level of the local community and the individual researcher. Self-determination should not be conceived as a vague and remote body of ideas, located within the realms of Grand Theory and *Realpolitik*. For First Nations communities, self-determination is a fundamental grassroots concept and a perpetual but elusive goal.

This thesis contends that the longstanding Indigenous demand for self-determination is bound up with the older, broader and deeper commitment to reassert Indigenous control over Indigenous peoples, places and cultural heritage. At regional and national levels, self-determination may be best understood as the expression of the unwavering desire to articulate and reinstall First Nations authority – counterbalancing the presence and policies of the State. Professor Greg Cajete (Santa Clara Pueblo) of the University of New Mexico has developed a compelling interest in both self-determination and the UN Indigenous Declaration. Cajete characterized UNDRIP as 'something special' for Indigenous peoples declaring:

The Indigenous Declaration is of great consequence in political and social terms. UNDRIP is a comprehensive document that builds on our cultural foundations. The Declaration is a statement of Social Justice, enabling Indigenous Peoples to reclaim political agency in their dealings with government. UNDRIP is in a direct line of descent from the Native protest movements of the 1970s. Today many of us are embracing the global dimension and reaching out to our brothers and sisters around the world. The Declaration has been the catalyst, encouraging us to think and act in more global ways (see Cajete interview, UNM Albuquerque NM USA, 12th May, 2016).

Even in the culturally distinct and politically ‘unique and independent’ environment of the South West United States, the long-term significance of the UN Declaration on the Rights of Indigenous Peoples is being acknowledged and embraced. At the University of New Mexico Dine/Navajo academic and author Lloyd Lee explored his professional relationship with UNDRIP:

Much of what we teach connects with aspects of the UN Indigenous Declaration. In many of our courses we relate Indigenous rights and Native politics to the Declaration. We are deliberately ‘spreading the word’ about UNDRIP. The United States Government is not fond of the Declaration and our state government is not much better. Of course, there is no mention of UNDRIP in the Press. As Native American faculty, we are ensuring that our students and their families and communities are aware of the Declaration and mindful of its potential.

It is not difficult to interest students in the Declaration. They can see that global Indigenous rights are important. They understand that the Declaration, engagement with the UN and building connections with other Indigenous Peoples will contribute to a better future for all of us . . . With so many negative reports and statistics, it is good for students to have something positive to focus on . . . (Lloyd Lee Dine/Navajo Yarning session at Department of Native American Studies, UNM New Mexico, USA, Thursday 12th May 2016).

While academic study of the Indigenous/UN relationship and analysis of the evolution and relevance of the Indigenous Declaration are unheard of in Australia or

Aotearoa/New Zealand, they are occurring in a handful of locations across North America. Additional academic studies, such as this one, should encourage greater First Nations engagement with UNDRIP and awareness of the larger and ongoing global Indigenous resurgence.

CHAPTER SEQUENCE AND ORIENTATION

The chapter sequence which forms the backbone of this thesis is organized along chronological lines. The orientation emphasizes the origins, evolution and impact of attitudes and values and the dynamics of the emerging Indigenous/UN relationship. Both the United Nations and the combination of organisations and individuals representing the world's Indigenous peoples have been dynamic but unstable 'coalitions', representing diverse and often competing interests and operating in highly charged and heavily politicized environments. Indigenous peoples have brought their distinctive diplomatic and leadership orientations and skills to the world body. The Geneva-based UN has inherited and harnessed centuries of European diplomatic culture, drawing on that rich legacy in its dealings with First Nations' representatives. In practical terms, the UN has endeavoured to create and maintain a 'space' for Indigenous peoples while simultaneously accommodating the agendas and activities of NGOs and other significant interest groups. The UN remains the permanent 'meeting house' of States and the interests of States largely determine the long-term trajectory and short-term priorities of the United Nations.

In each chapter, the evolution of the UN Declaration on the Rights of Indigenous Peoples will be explored, analysed and interpreted in detail. This is not a story of right and wrong, or a tale of good and bad. Instead, it is a saga of First Nations peoples and their supporters striving to 'make change happen' and of other groups and individuals endeavouring with equal determination to obstruct, impede and neutralize global social and political transformation. The story begins in earnest with the events and initiatives that led to the inclusion of Indigenous organisations and individuals in the planning and execution of the 1993 UN Human Rights Conference in Vienna, Austria.

Chapter Two explores the influences and initiatives that shaped the Vienna Conference and charts the impact of the Indigenous presence and the ramifications of

the global Indigenous resurgence inside and outside the United Nations. Chapter Three examines and evaluates the roles of the Vienna Conference, the Vienna Declaration and the Year and later Decade of the World's Indigenous Peoples in terms of the evolution of the UN Indigenous Declaration. Chapter Four establishes the political and institutional importance of the Working Group Indigenous Populations (WGIP) and addresses its pre-eminent role in defining the *internal culture* of the emerging Declaration project. The Working Group provided a 'bridge' between the UN precinct in Geneva and grassroots Indigenous throughout the world and has achieved 'heroic status' in the minds of many First Nations participants and activists. Chapter Five uncovers and evaluates the reality of 'drafting' the Declaration. *Drafting* included debating, negotiating and re-negotiating almost every word of every Article of the Declaration. Over time, well-defined voting *blocs* emerged. At many points, formalized 'alliances' composed of 'likeminded' States and equivalent Indigenous voting blocs or 'coalitions' dominating proceedings.

Outside the UN, First Nations community activists were frustrated by what appeared to be an inordinately slow progress. Inside, many doubted that the Indigenous Declaration would ever be finalized. Disagreement and acrimony reigned supreme much of the time. It is important to determine what was in dispute. While a handful of commentators have engaged with some of the more controversial Articles (see Watson & Venne in Pulitano 2012 and Lightfoot 2016), it would appear that no one has attempted to examine and evaluate *all* of them. In Chapter Six the forty-five Articles of the *1993 Draft Declaration* are organized into ten categories and examined in detail. The analysis reveals patterns not previously identified in the academic or specialist literature concerning the Declaration. The patterns are important in terms of later modifications to the Draft and the final version that emerged in late 2007. Chapter Seven continues the process of close analysis. This time, the forty-six Articles of the final 2007 version of the Declaration are compared with their 1993 counterparts, revealing patterns of consistency, limited change and wholesale transformation – depending on the subject matter in question.

Chapter Eight is the final chapter and includes commentary and analysis regarding the long-term relevance and significance of the Indigenous Declaration project and its

relationship with global First Nations resurgence. The Conclusion also contains an exploration of the ways in which the Declaration Project changed the global Indigenous community, and the worldviews and self-concepts of Indigenous themselves. Chapter Eight also positions the Declaration Project along the unbroken continuum that represents the lived experience of the world's First Nations peoples. The UN Indigenous Declaration does not stand alone, but serves as a link between the aspirations of the past and achievements of the future.

At a different level, the making of the UN Declaration on the Rights of Indigenous Peoples represented a largely unrecognized but distinctive dimension of the political evolution of the modern United Nations. Responses to the Declaration Project were sometimes strongly negative, revealing the nature and scale of resistance to change and reform in the international arena. Still, more perceptive observers and commentators, including Native American literature scholar Lee Schweninger, have recognized that the Declaration has created and consolidated a diverse range of spaces and opportunities for First Nations global outreach:

The UN Indigenous Declaration sanctions and provides opportunities for Indigenous Peoples across the world to take history into their own hands and to tell their own stories . . . (Schweninger in Pulitano 2012, p. 272).

Perhaps the most compelling aspect of the Indigenous Declaration saga concerns its closeness to our own time and place. After centuries of oppression and marginalization, Indigenous peoples have returned to take their place on the world stage. The United Nations Indigenous Declaration Project has underpinned their return. This thesis strives to address, unravel and understand that story.

CHAPTER 2 - THE ROAD TO THE 1993 VIENNA HUMAN RIGHTS CONFERENCE

BACKGROUND

One unintended consequence of the re-casting of the Human Rights agenda during the 1980s was the creation of a 'workable space' where Indigenous spokespeople could organize, interact and plan for the future. The rising wave of Human Rights activism had become a political raft for the dispossessed and downtrodden. Human Rights was also a near perfect vehicle, enabling Indigenous representatives to secure the traction and publicity necessary to 'make change happen'. From the mid-1980s, Indigenous Australian inroads into the formal structures of the international community – including the ILO and UN – had been building (Cook & Goodall 2013, p. 313). Kevin Cook and other staff members at Tranby Aboriginal College were at the forefront and could see opportunities were opening up and political alignments were becoming more moveable. They recognized that a more fluid political context was emerging in the aftermath of the Cold War (Cotton & Lee 2012, p. 354). Others shared this perception, including people in the diplomatic domain. Australian Government staffer Ruth Pearce who was based in Geneva took the view that:

The emerging international order inspired renewed optimism and confidence. In this context, I was pursuing an expanding multilateral agenda. Australia's main interests included Human Rights, the rights of Indigenous Peoples and the status of women – (all of which) broadly matched the UN focus (Cotton & Lee 2012, p. 354).

At Tranby, Cook was central to ensuring grassroots Indigenous Australian's input at the UN. For him the UN 'initiative' was a key element in the creation of an enduring international Indigenous presence. In Cook's case, the push towards international representation reflected his commitment to Aboriginal land rights, trade union experience and longstanding involvement with national liberation movements in

regions geographically distant from Australia. The consensus-based orientation that characterized Cook's approach to the global agenda coalesced with his close engagement with Indigenous co-operatives of many kinds [Cook & Goodall, 2013, pp. 313–314]. Cook and Goodall have confirmed that there was an upsurge of interaction, dialogue and networking between Indigenous organisations. Even non-Indigenous observers were overwhelmed by the dynamism and sense of purpose that characterized Indigenous engagement. About this time, non-Indigenous Canadian anthropologist Ronald Niezen was invited to accompany Canadian First Nations representatives to Switzerland and to sit in as an observer at the UN Commission on Human Rights and the World Health Organization (WHO) in Geneva [McGill Reporter <http://www.mcgill.ca/reporter/38/02/niezen/>]. Niezen was quick to witness and appreciate that something extraordinary was happening. For him, international Indigenous diplomacy represented the emergence of a remarkably successful transnational lobbying effort on behalf of Indigenous peoples worldwide – with Canadian Aboriginal groups on the frontline (Niezen, 2002, p. 1). Niezen was impressed by their teamwork and efficiency and suggested organizational skills and experience were central to the equation. He noted that groups from Canada were particularly well organized and suggested this was a direct result of their experience in the Canadian context (Niezen 2002, p. 1). In Canada, intensive lobbying and direct appeals to the wider public had been both encouraged and effective for many years. Thus Canadian First Nations representatives pursued an equivalent approach in the European environment.

Striving to be colourful but non-threatening, they built strong relationships with members of the media. They knew how to be 'newsworthy' and appeared comfortable in the European cultural domain. The Canadians provoked comment, drawing attention to the emerging transnational Indigenous peoples' movement. They employed original strategies and approaches with significant media attention in mind. For example, at one Indigenous Rights meeting in Geneva the Canadian Six Nations delegation quietly informed Swiss authorities that henceforth they would be travelling with passports issued under the authority of their own specific Indigenous communities (Niezen 2002, p. 1). A short time after the 'passport initiative', the Grand

Council of the Crees, using facilities made available to them in Amsterdam, built and launched a suitably eye-catching traditional Cree canoe which they then paddled along that city's canals at various times during the peak tourist season (Niezen, 2002, pp. 1–2).

As well as capturing an impressive volume of media attention, Indigenous protests and demonstrations forced States to reconsider their treatment of Indigenous peoples. In addition to elements of the media and the 'informed public', NGOs began to take a more considered interest in Indigenous issues. In December 1992 Amnesty International – one of the more prominent and successful NGOs – published a position paper entitled 'Facing up to the Failures: Proposals for improving the Protection of Human Rights by the United Nations' (Amnesty International, December, 1992). The Amnesty International (AI) team noted that the UN Human Rights programme had undergone significant development and expansion since the adoption of the Universal Declaration in 1948 and especially since the last major conference on Human Rights in Tehran in 1968. AI were quick to distinguish between UN success in building a body of human rights *standards* and repeated *failure* to adequately respond to grave Human Rights concerns (Amnesty International Dec 1992, Index: 10R 41/19//92, p. 3). Consistent with this perception, the 'marginalization' and 'compartmentalization' of UN operations were special targets of AI analysts who seized on Secretary-General Boutros-Boutros Ghali's statement that:

Each area within our organization sees the relevance of Human Rights in [terms of] its own objectives and programmes (Amnesty International AI Index 10R 41/19/92, p. 5).

For many observers, this was further evidence of the lack of consistent and cohesive leadership at the UN. Amnesty International also contended that implementation mechanisms pertaining to economic, social and cultural rights lagged far behind those in the fields of *civil* and *political* rights [AI Index 10R 41/19/92, p. 5]. During this period, Indigenous peoples were in the vanguard of those pursuing their economic, social and especially *cultural* rights with increasing determination. Under the sub-heading *Developing a Human Rights Programme in Neglected Areas*, AI devoted considerable space to *vulnerable groups* including Indigenous peoples. While the Amnesty

International categories were 'logical', there were problematic differences between some categories and there was no allowance for overlapping categories. Still, as a whole, the AI approach proved positive, bringing much needed media attention and engagement to the Indigenous domain.

REGIONAL MEETINGS FOR AFRICA AND LATIN AMERICA AND THE CARIBBEAN

In the two years prior to the Vienna Conference, in addition to numerous Indigenous-related articles and interviews appearing in the global media, major gatherings were organized. Indigenous and NGO lobbying and the active support of particular States ensured that Regional Meetings were engineered on an impressive scale. The first was the 'Regional Meeting for Africa', held at Tunis, Tunisia from the 2nd to 6th November, 1992 [UN A/CONF.157/AFRM/13 p. 2]. In his address as leader of the host nation, the President of the Republic of Tunisia made a number of observations, declaring:

We are gratified by the efforts of States, governments and peoples and by the outstanding role played by international and regional organizations. We also pay tribute to the non-government organizations [NGOs] for their significant contribution. NGOs must also be thanked for their highly-constructive contribution to the work of governments and international bodies . . . (UN A/CONF.157/AFRM/13, 24th November, 1992, p. 2).

Yet despite the nature of the event and the presence of considerable numbers of Indigenous delegates, the President failed to mention Indigenous Peoples or the UN Year of Indigenous People. Instead, he focussed on the African continent, noting the gradual decline of the apartheid regime in South Africa and the lack of progress in terms of the creation of a Palestinian homeland (UN A/CONF.157/AFRM/13, 24th November, 1992, p. 2).

A short time later, the equivalent meeting in the western hemisphere unfolded differently. As part of the preparation for the Vienna World Conference on Human Rights, the Regional Meeting for Latin America and the Caribbean was held in San Jose, Costa Rica from 18th to 22nd January, 1993. A total of twenty-three member States

participated. This number paled into insignificance when compared with NGO representation. Divided into three categories, participating NGOs totalled over 100 organizations. There were seven in Category I (mainly unions), forty-one in Category II (the 'global' category) and over sixty in Category 'Other' (Latin American and Hispanic) (UN A/CONF.157/LACRM/15, A/conf.157/PC/58, pp. 8, 10]. Diversity was also impressive. Indigenous representation included the International Indian Treaty Council, the Indian Council of South America, the Consejo Internacional de los Tratados Indigenas, the Consejo Mundial de Pueblos Indigenas and the Inuit Circumpolar Conference (UN A/CONF.157/ LACRM/15, A/CONF.157/PC/58, p. 10).

Notwithstanding the large number of attendees and variety of representation, the Agenda for the meeting appeared a model of simplicity. The Agenda featured just thirteen items and was contained within a single page. Item 6 was headed 'Commemoration of the International Year for the World's Indigenous Peoples – possibly one of the earliest uses of the plural form in an official UN document. In addition to Item 6, the ongoing circumstances of Indigenous populations were also relevant to Items 9, 10 and 12. In Item 10, Indigenous persons were included as 'persons belonging to vulnerable groups' whose human rights were deemed to be 'threatened by contemporary trends and new challenges' (UN A/CONF.157/LACRM/15, A/CONF.157/PC/58, p. 22). A document which received considerably more attention was a letter addressed to the Chairman of the Regional Meeting. The letter was written by Rigoberta Menchu Tum, an Indigenous Guatemalan woman of the K'iche ethnic group, read on her behalf and in her absence. The letter elicited a respectful response as delegates were reminded that Menchu Tum was the recipient of the 1992 Nobel Peace Prize. The official citation stated:

In recognition of her work for social justice and ethno-cultural reconciliation, based on respect for the rights of Indigenous peoples (nobelprize.org - official website).

Menchu Tum's letter included an overview of the issues confronting Indigenous peoples, together with a concise statement of purpose focussed on the Indigenous–UN relationship. Rigoberta devoted a paragraph to the Draft Declaration and the Working Group and praised the efforts of those concerned as follows:

The attainment of this International Year and the progress represented by the elaboration of the draft universal declaration on the rights of Indigenous peoples are the product[s] of the determined participation of many fellow Indigenous peoples and their organizations, non-governmental organizations, the successful conduct of the Working Group on Indigenous Populations and the understanding shown by a number of States . . . (UN A/CONF.157/LACRM/11 20 January 1993 English (translation) Original: Spanish, ANNEX 2).

EMERGENCE OF THE DEVELOPMENT ISSUE

An additional connection with Indigenous peoples concerned the domain of Development and Human Rights. Development had become a highly-contested area in international relations and it was not until 1986 that the *Declaration on the Right to Development* was adopted by the General Assembly. Unlike most other First World States, Australia under the leadership of the Hawke Labor government, supported the Declaration [Cotton and Lee 2012, p. 354]. As an academic economist and trade union leader, Hawke had developed a sense of the connections between Human Rights and development, and was predisposed to the AI view that the structures and operational priorities of the UN acted against any convergence of Human Rights and Development initiatives. This was a problem of considerable human consequence. A short time earlier, Secretary-General Boutros-Boutros Ghali had re-affirmed that:

Human Rights are an essential component of sustainable development. Indeed, sustainable development is not possible without Human Rights (UN Doc. A/47/1 (para. 100) AI Index: IOR 41/16/92, p. 23).

Adopting a similar ‘broad brush’ orientation, Article 6 of the *Declaration on the Right to Development* (1986) stated ‘Equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political economic, social and cultural rights. (Moreover) States should take steps to eliminate obstacles to development resulting from failure to observe civil and political rights’ (AI Index: IOR 41/16/92, p. 23). Clearly, *Development* – broadly but consistently defined – was a central focus of UN activity in the late ‘80s and early ‘90s and was often connected with Human Rights policy initiatives.

POLITICS OF DEVELOPMENT

In general terms, Southern Asia and Africa were the regions most preoccupied with the politics of Development. Two months prior to the commencement of the Vienna Conference, at the fourth session of the UN World Conference Preparatory Committee from 19th April to 7th May 1993, a paper was submitted by the Asian Indigenous Peoples' Pact or AIPP. The AIPP was an umbrella organization for a diverse collection of community-based Indigenous 'cells' throughout the region. Eager to make a place for themselves as part of the emerging panoply of Indigenous coalitions, the AIPP convened a Conference on the Rights of Indigenous and Tribal peoples in Chiang Mai, northern Thailand, from 18th to 23rd May 1993. A total of 74 delegates represented Indigenous communities throughout Southeast Asia (UN A/CONF.157/PC/42/Add.12, 3 June, 1993, p. 1). The AIPP had the Vienna gathering in their sights and formally requested that their views be considered by the World Conference. The title of the AIPP Declaration was 'Declaration on the Rights of Asian Indigenous/Tribal Peoples: Threats to our Existence' (UN A/CONF. 157/PC/42/ADD.12, p. 2). Many elements of the AIPP Declaration are consistent with sections of the later UN Declaration on the Rights of Indigenous Peoples (UNDRIP 2007). In particular, the Introduction to the AIPP document is consistent with the opening paragraph of the final Declaration (2007). Importantly, the AIPP authors positioned the ongoing struggles of Indigenous peoples within the context of regional and national politics, insisting that:

The issues and concerns of Indigenous peoples . . . are an integral part of the national and international political agenda . . . (We reject) encroachment onto our lands for . . . energy projects [including nuclear waste dumping], national parks, industrial zones, agribusiness projects and tourism. As the traditional custodians of this region, we assert that our relationship with nature is sustainable . . . The world can benefit from our experience in the management of nature for a sustainable future (UN A /CONF.157/PC/42/Add.12, 3 June 1993, p. 2).

This document was consistent with Indigenous Australian statements from the early 1990s. Interestingly, the term 'traditional custodians' aligns with Australian and New Zealand usage at the time. Such perspectives contrast with statements by representatives of many member States. Yet there were signs of change within the

Australian camp. As early as 1992, Australian Foreign Minister Gareth Evans and bureaucrat Bruce Grant adopted a stance that seemed designed to accommodate elements of the prevailing Indigenous approach. Making the case for a more proactive and engaged United Nations, they argued that:

It is not enough for the UN to be a forum for statements of concern about the environment. It must also be able to demonstrate that it can do something; that it has the means of co-ordinating international efforts and of crafting agreements which directly address environmental problems (Evans & Grant 1992, p. 153).

In Evans and Grant's view environmental problems were important – especially for Indigenous populations. Much more needed to be done to address them. States and global corporations were not the only legitimate or authentic participants. Indigenous representatives could be expected to assert their rights as custodians of the lands and seas occupied and maintained by their forebears since time immemorial. Such issues were of particular concern to members of the UN Working Group on Indigenous Populations who had been meeting in Geneva on an annual basis for over a decade.

ROAD TO VIENNA VIA GENEVA

From 20th to 31st July 1992, the UN Working Group on Indigenous Populations met in Geneva, Switzerland. This was the tenth meeting for the Group and the last before the UN World Conference on Human Rights in Austria the following year. The 1993 Conference was scheduled to commence in Vienna on 13th June. Despite the claims of many commentators, the World Conference did not represent the first major step in the process of global Indigenous resurgence. The Working Group was already an organizational and political reality, and represented a new and important dynamic at the United Nations. The WGIP had existed for over a decade. The Group provided the framework of ideas and the explicit written points that would ultimately emerge as the 'Draft Declaration on the Rights of Indigenous Peoples'. The Draft Declaration was gradually 'hammered' into shape by Indigenous representatives, becoming the *Declaration on the Rights of Indigenous Peoples* adopted by the UN General Assembly on 13th September 2007 (UNDRIP 2009, p. 90]. The Draft Document produced by the Working Group was a reflection of the priorities of Indigenous communities in the

1990s. It was more compact, less idealistic and less 'poetic' than the 1948 Universal Declaration of Human Rights. The Indigenous Draft Declaration had the benefit of a much longer gestation than the UDHR. Yet in many quarters it was considered a less significant project than its ground breaking 1948 precursor. This view was not shared by Indigenous activists determined to secure the necessary consensus and eager to steer the Draft Declaration through the slow and circuitous processes that constituted the 'UN system'.

DRAFT DECLARATION AND ERICA-IRENE DAES

In 1992 Indigenous leaders and spokespeople seized the opportunity offered by the 500th Anniversary of the arrival of Christopher Columbus in the western hemisphere. There was strong support for a series of protests and demonstrations. In organizational terms, the Indigenous initiative was the creation and focus of a loose coalition of Indigenous representatives based in Geneva. The Draft Declaration had become the centrepiece of an ambitious strategy to construct a global and permanent Indigenous presence. It reflected a desire for change, underpinned by a new and inclusive spirit of Indigenous transnationalism or 'Indigenism'. The attitudes and values of the new wave of educated Indigenous spokespeople were identifiable. The dominant themes of the Draft Declaration were social justice and Indigenous cultural and political resurgence. The prevailing tone was purposeful and pragmatic. Indigenous thinking incorporated an appreciation of the winner-take-all mentality of elites within the settler States. Painful experience had fuelled scepticism and created profound mistrust. Nevertheless, Indigenous representatives in Geneva had an ally of some consequence.

The second Chairperson of the Working Group was Erica-Irene Daes of Greece. Daes was a charismatic figure who was born in 1925 on the island of Crete, served as a member of the Greek resistance movement following the German invasion of May 1941, and went on to become an outstanding figure in legal and academic circles. According to Judge Rosalyn Higgins of the International Court of Justice, Daes' place in the UN Human Rights domain was unique. Described by Alfredsson and Stavropoulou as an international lawyer and citizen of the world (Alfredsson & Stavropoulou 2002, p. ix), Daes established and refined a distinct 'Daes way of doing

things'. Prodigious thoroughness and masterful handling of a vast and diverse array of materials characterized her approach. In striving to broaden and deepen 'minority rights' Daes sought to build on Article 27 of the Covenant on Civil and Political Rights (Alfredsson & Stavropoulou 2002, pp. 2-3). Asbjorn Eide, former Director of the Norwegian Institute of Human Rights and first Chairman (1982–1983) of the UN Working Group on Indigenous Populations, described Daes as dynamic and forceful. Eide noted that Daes had broken new ground in her exploration of the duties of the individual to the community and had also prepared a number of studies, demonstrating a special and comprehensive interest in the rights of Indigenous peoples [Alfredsson & Stavropoulou 2002, p. 83].

Aboriginal and Torres Strait Islander Commission (ATSIC) CEO Dr Peter Shergold described her chairmanship as 'vigorous' (ATSIC 1992, p. vii) and took the view that under the direction of Daes, the Working Group's attention was focussed on the task of drafting the Declaration on the Rights of Indigenous Peoples (ATSIC, 1992, p. vii). Dr Bertram Ramcharan, UN Deputy Commissioner for Human Rights in Geneva, claimed that he had been fortified by her energy and her resolve, and that Daes led the Working Group with wisdom and commitment (Alfredsson & Stavropoulou 2002, pp. 99,100). Ramcharan also declared that as a direct result of her efforts and those of her predecessor, Asbjorn Eide, the Working Group became the principal forum for Indigenous organisations at the UN (Alfredsson & Stavropoulou, p. 100). Consistent with this view, Lee Swepston, Chief of the Equality and Employment Branch and Co-ordinator for Human Rights Questions at the International Labour Office, Geneva and Gudmundur Alfredsson, Professor of International Law and Director of the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, at the University of Lund, and Secretary of the Working Group from 1985 to 1990, were generous in their assessments.

They insisted that Daes successfully facilitated the participation of indigenous and tribal peoples from around the world in the work of the UN, and actively supported their demands for dignity and identity at both national and international levels (Alfredsson & Stavropoulou 2002, p. 69). With unusual candour, Swepston and Alfredsson declared that Mme Daes was the 'principal architect' of the UN Draft

Declaration on the Rights of Indigenous Peoples, which they described as a 'beacon' for indigenous peoples throughout the world, a document sometimes referred to as the 'Daes Declaration' (Alfredsson & Stavropoulou 2002, pp. 100, xi). As Chairperson and UN 'insider' Daes' performance was well received by Indigenous representatives, enabling her to harness their energy and consolidate the goodwill of participants within and outside the Working Group. Over a decade later on 27th May, 2004, Professor Daes spoke at Monash University in Melbourne. Her topic was 'The Participation of Indigenous Peoples in the United Nations System's Political Institutions' [www.humanrights.gov.au/9/10/2015 p 1](http://www.humanrights.gov.au/9/10/2015_p1)). Daes revealed an explicit and far-reaching reform agenda for the UN. In particular, Daes targeted the dominance of nation States at the UN. She spoke of the desirability of the UN 'reflecting the *full* political, cultural, religious and linguistic diversity of our world', conceding that in earlier times 'Indigenous peoples had been completely excluded from access to the political institutions of the United Nations system' (Daes 2004, p. 1). She declared self-determination a major area of concern for Indigenous communities and emphasized the economic dimension of Indigenous disadvantage, noting that:

Self-determination for Indigenous peoples includes the right to 'means of subsistence', to freely dispose of their natural wealth and resources, to determine their political status and to pursue their economic, social and cultural development' (Daes 2004, p. 1).

DAES AND THE 'DEMOCRATIZATION' OF THE UNITED NATIONS

Daes described Indigenous peoples as a large and important segment of the world's population, numbering at least 350 million (2004, p. 2). For her, the special importance of First Nations populations concerned the distinctive philosophies and values that set them apart (Daes 2004, p. 2). In Daes' view, the participation of Indigenous peoples in international decision-making political institutions was not only a matter of social justice, but of improving the wellbeing of humanity generally (Daes 2004, p. 2). Daes was measured in her optimism, stating that after six decades, the UN could take pride in the progress that had been made to add more voices to the human symphony – particularly those of Indigenous persons. In addition, Daes expressed a determination to make the UN more democratic and accessible, outlining

the role of Indigenous representatives and NGOs in the ‘democratization’ of the UN. The Working Group was singled out for special praise:

When it met for the first time in 1982, the United Nations Working Group on Indigenous Populations became the *first* United Nations body to admit grassroots people and organizations, without regard to consultative status with the Economic and Social Council . . . Access to the UN should be freely available to all organizations that genuinely represent Indigenous peoples in all countries (Daes 2004, p. 2).

Daes saw the Indigenous presence at the UN as central to the agenda of reform. Direct participation by Indigenous representatives and NGOs paved the way for direct participation on the part of other non-state participants. In Daes’ assessment, popular participation gave rise to political momentum, enabling the Indigenous cause to be at the forefront of United Nations work in the 1990s (Daes 2004, p. 2). In all of this, the Working Group was the catalyst for change, convening seminars and technical meetings in the field of Indigenous rights at which representatives of Indigenous peoples and governments were [for the first time?] accorded equal status (Daes 2004, p. 3). The first such seminar took place at the UN in Geneva in January 1989. This was followed by the 1991 seminar on Indigenous self-government, in Greenland, and the 1992 technical conference on Indigenous Peoples and Sustainable Development in Chile. Daes also revealed that Indigenous representatives organized their own distinct caucus during preparatory meetings for the Earth Summit, demanding recognition as equal partners in global environmental management and protection. Jointly assisted by the governments of Norway and New Zealand, Indigenous elements drafted most of the text of the *Special Chapter* in the form in which it was ultimately adopted by the Summit (Daes 2004, p. 3). Daes was determined to open the UN doors to NGO spokespeople of various kinds and especially to representatives of the world’s Indigenous and minority populations. It seems Daes’ underlying concept was the creation of a more accountable and democratic United Nations. In this scenario, diversity would continue to strengthen and enrich the UN in ways already apparent in the operations of the Working Group on Indigenous Populations.

ORIGINS OF THE WORKING GROUP ON INDIGENOUS POPULATIONS

Professor Megan Davis, Indigenous Australian and UN Indigenous Fellow of the Office of the High Commissioner for Human Rights and member of the International Law Association Indigenous Rights Committee, participated in Commission on Human Rights Working Groups in Geneva (1999–2004). Davis has written extensively on UNDRIP and other United Nations initiatives (2008, p. 1). She stated that at its first meeting in 1982 the Working Group on Indigenous Populations comprised just five independent members (Davis 2008, p. 6). The mandate of the Working Group was to review:

. . . developments pertaining to the promotion and protection of the human rights and fundamental freedoms of Indigenous populations . . . and to give special attention to the evolution of standards concerning the rights of such populations (Davis 2008, p. 6).

The Working Group was a product of notable developments during the early 1980s. In 1981 a so-called 'Collaborative Working Group' was formally proposed to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities. The following year (1982) the Working Group on Indigenous Populations was endorsed by the Commission on Human Rights and authorized by the UN Economic and Social Council (ECOSOC) (ATSIC 1992, p. vi). In a related initiative, the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities appointed Special Rapporteur, Jose Martinez Cobo, to conduct a comprehensive study of discrimination against Indigenous peoples. The 'Cobo Study' (*Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/87/Add.4 (March 1987) in Davis, 2008, p. 4) was many years in the making and the first of its kind in the world. Cobo focussed on health, housing, education, cultural rights, land rights, political rights and the formal administration of justice (Davis 2008, p. 4).

The Cobo Study generated largely unanticipated but significant changes. During almost two decades of the inquiry, Indigenous participants formed dynamic alliances with civil society groups (mainly NGOs) (Davis 2008, p. 6) whose members were often largely unaware, but genuinely curious about the Indigenous dimension. Not

surprisingly, the Indigenous presence at UN human rights gatherings and informal meetings ‘exploded’, generating significant press coverage. Stories told by Indigenous representatives were remarkably consistent, revealing the global reach and profound impact of colonialism. The Indigenous narrative reflected loss of lands, loss of autonomy and control, loss of languages (Davis 2008, p. 6) and entrenched patterns of discrimination. Indigenous advocates focussed on the need for greater UN scrutiny of States ‘special treatment’ of Indigenous within their territories. The Working Group was created to some extent (but not entirely) in response to Indigenous and NGO lobbying and was – according to Davis – the first human rights mechanism established to consider Indigenous issues.

‘UNIQUE CHARACTER’ OF THE WORKING GROUP

From the beginning, members of the Working Group saw their roles as extraordinarily important – even ‘historic’. As a collective, the WGIP operated along lines that were distinct and ‘Indigenous friendly’. In gathering information about the historical and contemporary experiences of Indigenous peoples, group members and their assistants were aided by flexible working procedures and ‘innovative rules’ that encouraged and consolidated Indigenous participation (Davis 2008, p. 7). The behaviour and ‘alternative orientation’ of the Working Group created a cultural context that readily accommodated ‘frank and fearless’ discussion concerning the conduct of States that may not have been accepted at higher levels within the UN hierarchy (Davis 2008, p. 7). In 1985 during its Fourth Session, the Working Group took the decision to formulate or ‘elaborate’ an ‘International Instrument on Indigenous Rights’ (Davis 2008, p. 7). There was a shared view that a ‘protection gap’ existed in international human rights law in terms of legal standards pertaining to Indigenous peoples. Davis has suggested that although the drafting was the responsibility of just *five* independent members of the Group, much larger numbers of Indigenous individuals participated in the drafting of the lengthy text during the early years (2008, p. 6).

The diverse and largely unco-ordinated input from grassroots Indigenous communities and organizations almost certainly contributed to the somewhat jumbled and complex structure of the document. Davis has argued that the Draft Declaration was lengthy and over-elaborated, given that its role was to serve as an international human rights

instrument [2008, p. 7]. Julian Burger, who oversaw the Indigenous Unit at the UN Office of the High Commissioner for Human Rights in Geneva and also played a role at the UN Secretariat for WGIP, noted that indigenous activists from different regions of the world had 'found the time to travel to the UN in Geneva to offer their views and suggestions to the five member expert Working Group (Burger in Davis 2008, p. 7). Presumably such individuals would have been bitterly disappointed had they not seen evidence of their input within the pages of the Draft Declaration.

Matthew Coon Come, Grand Chief of the Grand Council of the Crees, was a contributor to the Draft and saw the Declaration in the following terms:

Every paragraph of the Draft Declaration is based upon known instances of the violation of the human rights of Indigenous peoples . . . The Draft declaration began from a cry . . . for justice. It is drafted to confirm that the international standards which apply to all the peoples of the world apply to Indigenous peoples. It is an inclusive instrument, meant to bring Indigenous peoples into the purview of international law as subjects of international law (Matthew Coon-Come in Sarah Pritchard and Charlotte Heindow-Dolman 'Indigenous Peoples and International Law: A Critical Overview' 1998 in *Australian Indigenous Law Reporter*, Volume 3, 1998, pp. 473, 477).

The Working Group outgrew its modest start and went on to become one of the most influential Indigenous organizations in modern times. The WGIP has been noticed, even in circles distant from the corridors of the UN. Prominent Australian historian Henry Reynolds has argued that the 1982 establishment of the Working Group on Indigenous Populations was the most important initiative of the United Nations, relative to the needs and aspirations of the world's Indigenous peoples. In 1996 Reynolds suggested that the 'compilation' of a *Declaration on Indigenous Rights* was the central achievement of the Working Group. Reynolds endorsed the view of Australian law academic Sarah Pritchard that the Declaration on the Rights of Indigenous Peoples represents the beginning of Indigenous empowerment through international law (1996, p. 160). Similarly, Canada's Ronald Niezen emphasized the significance of UN engagement with Indigenous peoples and the extraordinary role of the Working Group. In addition, Professor Niezen has focussed on the emergence of

predominantly North American Indigenous NGOs and the acceptance of their presence at the UN as a necessary precursor to the 1982 formation of the Working Group (2003, p. 46).

THE AUSTRALIAN CONNECTION

In outwardly prosperous, but inwardly conflicted Australia, the 1970s witnessed a dramatic upsurge in political agitation on the part of Indigenous peoples and their supporters. Australia's First Peoples took to the streets, appeared in the media and raised the profile of Indigenous issues to a level not seen for generations. On 25th August 1979, the issue of a treaty or covenant between the Commonwealth of Australia and Indigenous Australians had been brought back into focus by a group of prominent non-Indigenous Australians who launched their Treaty Campaign with a full page advertisement in the *National Times* (Reynolds 1996, pp. 151-152). Four years later, in a manner consistent with the prevailing political mood, the Senate Committee stopped short of recommending the creation of a fully-fledged Treaty. Instead, they declared their support for a *Compact*, to eventually be inserted into the Constitution by Referendum.

The Hawke and later Keating federal Labor governments strove to adopt a supportive posture, but one that was calculated to lock in mainstream support. Discernible sensitivity toward Indigenous priorities and aspirations at home and abroad was considered morally appropriate and politically astute. By 1992 the UN choice of the expression 'A New Partnership' as the public relations 'catchphrase' for the International Year of the World's Indigenous People sat comfortably with the Keating cabinet. Many shared a willingness to hear the Indigenous side of the story and were unperturbed by the scale of Indigenous response to the Five Hundredth Anniversary of the arrival of Christopher Columbus in the New World (1992). The Indigenous reaction – arising from the Americas in the first instance – was described by representatives of the Native American Council of New York City (NAC NYC) in considerable detail (Ewen 1994, p. 21].

INDIGENOUS PRESENCE ON MANHATTAN ISLAND

According to the NAC NYC Elders, the Native American Council (NAC) came into being in 1990 as a direct response to a call from both elders and youth to draw attention to the circumstances and aspirations of Native Peoples in the Americas. Intense lobbying ensued in an effort to ensure that 1992 be declared the Year of the World's Indigenous Peoples, but the lobbying fell short of its aim. NAC NYC Elders claimed pressure from Spain, Brazil, the United States and other parties meant that 1992 was 'unavailable' to the Indigenous cause and 1993 was selected as an alternative (Ewen 1994, p. 21). The painstaking Indigenous focus on the linguistic details of the UN initiative was impressive, but predictable. The New York elders worked with others to modify the terminology. The original version of the UN designation was *International Year for the World's Indigenous People*; however, this was rejected by Indigenous representatives.

It was successfully argued that Indigenous people found the word '**for**' offensive, as it reflected and perpetuated the paternalistic attitude that had characterized relations with colonial and post-colonial states since the time of Columbus. Instead, the word '**of**' was adopted as an alternative. Interestingly, many Indigenous representatives also preferred the plural term '*Peoples*' as opposed to '*People*'. The noun '*Peoples*' more accurately conveyed the notion of numerous separate and distinct nations, with unique cultures and unique environments. There was a demand to emphasize the reality of overwhelming cultural and political diversity. Later the plural form was rejected by States' representatives on the grounds it might privilege unacceptable 'implications' concerning renewed claims for sovereignty on the part of Indigenous spokespeople and their communities (Ewen 1994, p. 22).

AUSTRALIAN GOVERNMENT AND SELF-DETERMINATION

The response of the Australian Government to concerns about sovereignty was balanced and restrained. ATSIC CEO Dr Peter Shergold argued that insofar as the Working Group was concerned, the most sensitive issue was the inclusion or omission of a statement in support of the *right of self-determination* (ATSIC 1994, p. vii). Shergold noted that the majority of member States expressed significant reservations – largely on the basis of the belief that Indigenous self-determination might undermine the objective of preserving territorial integrity. This was not a concern for

the Australian Government. The Australian delegation argued strongly that explicit reference to self-determination should be *retained* in the Draft. They urged that a paragraph outlining the role and benefits of self-determination should be combined with a statement in support of the acceptance of *'the framework of existing States'*. The Australian delegates also endorsed specific recognition of Indigenous peoples as permanently *separate and distinct*. Acceptance – on the part of member States – of the Indigenous right of self-determination was starting to look like Mission Impossible. The Australians contended that inclusion of a self-determination clause would assist First Nations communities to overcome barriers to full democratic participation (ATSIC 1994, p. vii). The relevant documents indicate there was a high degree of congruence between the views of the Australian Government and those of the ATSIC leadership.

The official ATSIC view presented by Chairperson Lois (Lowitja) O'Donoghue was:

'Self-determination' is an aspirational concept . . . To replace the term with 'self-management' would drastically weaken the Draft. . . (ATSIC, 1994, p. vii).

A consensus emerged that any weakening of the Draft should be strenuously resisted. Though not spelled out in the formal statement, the intention to reject a *weaker* Draft was based on the understanding that Indigenous Australian enthusiasm for a 'watered down' Draft would be minimal. Looking further ahead, some representatives – including Jack Beetson from Tranby Aboriginal College, representing the National Coalition of Aboriginal Organisations – feared the possibility of community-wide rejection of the entire UN initiative if 'The Mob' developed a sense of 'betrayal' or 'abandonment' at the hands of the *Big Gubbas* at the United Nations. In such a scenario, continuing Aboriginal acceptance of the ethos and 'organisational culture' of the UN could be dramatically – and perhaps permanently – undermined. In a statement to the Working Group during the Tenth Session at Geneva in July, 1992; Beetson expressed the views of many Indigenous Australians, emphasizing the importance of Land Rights and the need to urgently address the crisis in Aboriginal health (ATSIC 1992, pp. 47, 49).

DIVERSE VIEWS OF INDIGENOUS AUSTRALIANS

Jack Beeton identified the connection between the dispossession and dispersion of Aboriginal Australians during the colonial period and contemporary problems in health, education and economic development. He highlighted the demand for land, culture and self-determination. He also proclaimed the need for formal recognition of Indigenous Australians as the continent's First Peoples (ATSIC 1992, p. 49). In conclusion, Jack Beeton displayed the 'street wise' political 'nous' characteristic of many community-oriented Indigenous leaders declaring:

While we have supported the statements by ATSIC and the Australian Government representative in regard to self-determination . . . we believe there is a vast difference between the statements made and the practical application (of such statements) . . . We have yet to see the implementation of our people's fundamental human rights – especially our right to control and determine our own lives and destinies (ATSIC 1992, p. 50).

Towards the end of the Conference, separate statements were presented concerning *The Future of the UN Working Group on Indigenous Populations* by Robert Tickner, Minister for Aboriginal Affairs on behalf of the Australian Government and Lois (Lowitja) O'Donoghue on behalf of the Aboriginal and Torres Strait Islander Commission (ATSIC) [ATSIC 1992, pp. 100–105]. Tickner maintained that the Working Group was of great significance to Indigenous peoples. He advocated a 'big picture' approach to the Draft Declaration and outlined a significantly expanded role for the Working Group. O'Donoghue expressed the increasing frustration of many Indigenous Australians. In forthright language O'Donoghue revealed:

I . . . had originally hoped that the 10th Session of the Working Group – this Session – would be the one at which the Draft could be finalized . . . Ten years is a long time – too long. We now recognize reluctantly that the second reading of the Draft Declaration cannot be completed this year . . . (ATSIC 1992, p. 104).

The creation and finalization of the Draft Declaration was of importance to O'Donoghue. While the continuing existence and consolidation of the Working Group were issues of concern to many Indigenous activists, the desire to ensure completion

and acceptance of the Draft was the primary and dominant theme of the ATSIC presentation.

We must bring this stage of the Declaration's development to a satisfactory completion. The talking must cease. The Draft must be completed . . . We must not have to wait one day longer than necessary for a statement to protect our rights and further our interests around the world (ATSIC 1992, p. 104).

The Draft Declaration was deemed to be of special consequence. Within Indigenous Australian circles there was a sense that momentum was being lost. Some claimed that extreme elements within the ranks were wielding unacceptable influence. The disturbing possibility of a 'stalemate' within the Working Group was discussed. A significant proportion of States' representatives were uncomfortable with the emphasis on *self-determination* – but that was no surprise. O'Donoghue was implacable, insisting that political self-determination and economic empowerment were the ultimate goals of the world's Indigenous peoples and that the Draft Declaration was a crucial step along the path to a better future. The ATSIC Chairperson concluded with the claim:

*There can be no more important contribution that this Working Group can make [than the Draft Declaration] to the International Year **for** (sic) the world's Indigenous Peoples (ATSIC 1992, p. 104).*

CONTEMPORARY UNDERSTANDING OF SELF-DETERMINATION

The ATSIC leadership was in-step with other Australian representatives. Even government representatives with no direct or apparent connection to ATSIC or Indigenous communities, were committed to the inclusion of self-determination as a central feature of the Draft. Yet this was not an extreme version of the concept. Mr Colin Milner of the Legal Office, Department of Foreign Affairs and Trade, presented a submission devoted entirely to the issue of self-determination. In particular, Mr Milner argued for what he described as a '*more contemporary*' understanding of self-determination (ATSIC 1992, p. 80). Adopting a restrained and positive tone, Milner outlined the view that self-determination should not be understood in 'all or nothing' terms. Instead, he argued:

There may be ways in which the right of self-determination may legitimately be exercised short of the choice of separate status as an independent sovereign state (ATSIC 1992, p. 82).

The position outlined by Colin Milner was politically pragmatic and legally defensible. Milner offered the possibility of greater empowerment for Indigenous communities in combination with reassurance for States anxious to preserve their territorial integrity. Through the response provided by DEFAT Legal Office, the Australian Government was addressing the concerns of many member States. Milner reminded his audience that this was not the first time the right of self-determination of Peoples and the right of territorial integrity of States needed to be balanced. Mr Milner contended that the need for balance had arisen previously in relation to a number of legal instruments – including the Declaration on the Granting of Independence to Colonial Countries and the Declaration of Principles of International Law – in accordance with the Charter of the United Nations (ATSIC 1992, p. 82). The paragraph, proposed by Milner for inclusion in the Draft Declaration, was taken from the Friendly Relations Declaration (UN Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States – 1970) (Reynolds 1996, p. 164) and read:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair . . . the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination . . . and thus possessed of a government representing the whole people belonging to the territory . . . (ATSIC 1992, pp. 82-83).

SELF-DETERMINATION IN PERSPECTIVE

In *Aboriginal Sovereignty*, Henry Reynolds described this statement as a ‘*crushing coda*’. In Reynolds’ view, the perceived needs of States took precedence at the UN despite the abundance of fine words about peoples’ rights (1996, p. 164). Not given to slavish acceptance of the pre-eminence of States, Reynolds outlined a way forward. Reynolds’ approach was based on a nuanced sense of the distinctive circumstances of Indigenous peoples. He suggested that what he termed ‘*enclave*’ Indigenous

populations would respond to with the cry for far-reaching change and demand authentic and far-reaching de-colonization. In the view of Canadian scholar Douglas Sanders, Indigenous peoples have a right to self-determination for a number of reasons that are widely recognized and generally accepted. The argument is not a complex one. Sanders explained:

Indigenous peoples are cultural minorities . . . requiring some autonomy to maintain and develop their distinctiveness. . . . This points to autonomy or self-government (in Reynolds 1996, p. 165).

Danish political commentator Frederik Harhoff took a long-term view, insisting:

Indigenous peoples require a significant level of political autonomy for full and final completion of the post-World War II de-colonization process (Reynolds 1996, p. 165).

In 1987 in his landmark paper entitled 'A Study of the Problems of Discrimination Against Indigenous Populations', Jose Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, suggested:

Self-determination . . . is a basic pre-condition if Indigenous peoples are to . . . enjoy their fundamental rights and determine their future while . . . preserving, developing and passing on to future generations their specific ethnic identity (in Reynolds 1996, pp. 165-166).

Self-determination is a term which occupies a central position in the lexicon of Indigenous human rights. It is also a term with a wide range of different meanings in different contexts, and in the hands of different authors. According to Normand and Zaidi (2008, p. 212), self-determination occupies a unique and highly-politicized position in the intellectual history of the UN. Self-determination has received extraordinary attention in many UN documents for over half a century. Significantly, it is the only substantive right described in the same language in both the *International Covenant on Civil and Political Rights* and the *International Covenant on Economic, Social and Cultural Rights* (Common Article) (Normand & Zaidi 2008, pp. 212, 400). UN human rights bodies often describe self-determination as the 'cornerstone' of the

human rights framework (Normand & Zaidi, 2008, p. 212). Importantly, the prominence of self-determination, as a legal right, has diverted attention away from deep-seated and complex divisions that have formed and re-formed around self-determination as a political and geopolitical issue. Normand and Zaidi argue that the appearance of international agreements on the right to self-determination is highly misleading, as it has been one of the most divisive debates within the domain of human rights.

The concept of the emergence of separate nation states as a direct expression of self-determination remains current in academic and diplomatic circles, but there are other possibilities. Reynolds asserted that – in his estimation – a minority of scholars and activists favours secession as a solution to the vexed problem of nations and states (Reynolds 1996, p. 166). While many commentators in government circles have expressed anxieties concerning the possibility of ‘national implosion’ or ‘dismemberment’, it is likely they were misinterpreting the agendas of Indigenous leaders. Indigenous people do not always intend to invoke the concept of the creation (or re-creation) of new or separate sovereign states. Instead, they often advocate significant changes *within* existing successor States including Australia, Canada, New Zealand and the United States. Such changes are less threatening and more achievable than formal secession, but are rarely discussed in detail in the public domain. At regional meetings and numerous informal gatherings that preceded Vienna, self-determination was a powerful rallying cry, but also served to distort and conceal significant differences of orientation.

SELF-DETERMINATION AND INDIGENOUS RESPONSES

John Henriksen is a prominent Norwegian Saami lawyer, representative of the Saami Council and staff member based in the Office of the UN High Commissioner for Human Rights in the UN Secretariat in Geneva (Henriksen 1999, p. 1). Henriksen has written a number of articles concerning self-determination from a standpoint consistent with his Saami heritage. He has argued that while self-determination became a major issue in international relations with the drafting of the Treaty of Versailles and establishment of the League of Nations in the aftermath of WWI, the concept that prevailed was a different version of self-determination. Since 1945, instead of a

'Principle', we invoke a 'Right' of self-determination which has evolved to the point where, according to Professor Hurst Hannum, it has undoubtedly attained the status of a 'right' in international law (Henriksen 1999, p. 2). For Indigenous communities, this is not as positive as it may seem, because the application of the concept has mainly been in the area of traditional de-colonization and the UN has been reluctant to recognize any further extension of this right (Henriksen 1999, p. 2). Clearly, self-determination is likely to remain a highly controversial area in both theory and practice. In the late '90s Henriksen identified signs of change at the UN in relation to understanding the scope of the right of self-determination, as indicated by the history of the Draft Declaration. In his view, emerging self-government (in Greenland and Nunavut) and enhanced regional autonomy also represented movement away from the rigidity and ethnocentrism of earlier decades (Henriksen 1999, p. 2).

Henriksen suggested that attitudes at the national level were likely to be more flexible and pragmatic than those at the international level (Henricksen 1999, p. 2), where longstanding and deep-seated differences were notoriously difficult to overcome. He also identified patterns of influence – particularly changes at the national level – which could be seen to directly influence the international debate. Henriksen endorsed this process of 'learning from the specific example' in the search for an effective and non-discriminatory implementation of the right of self-determination (1999, pp. 2,3). Like other Indigenous academics and commentators, Henriksen urged recognition of Indigenous peoples' right of self-determination and emphasized 'the view that this might best be done through mechanisms and arrangements *within* the framework of a nation state'. He embraced the democratic exercise of the will of the people at the level of community and insisted that such choices remain the prerogative of Indigenous peoples 'whose right of self-determination cannot be qualified' (Henriksen 1999, p. 25).

Like Henriksen, S. 'James' Anaya has argued that Indigenous peoples and their political representatives have been significant players in the domain of international law – though that has rarely been their specific intention. In pressing their demands at the international level, Indigenous peoples have directly undermined the premise of the State as the highest form of human association (Anaya 2001, p. 112). Anaya has

claimed that the model that is emerging from the interplay of Indigenous demands and State responses is one that recognises that Indigenous people are distinct from, yet simultaneously part of, the national polity. He contended that under this model, self-determination may be achieved, not by independent statehood, but by the development of arrangements that uphold *both* the spheres of autonomy commensurate with cultural patterns *and* Indigenous rights of participation in the political processes of the nation states in which they find themselves (Anaya 2001, p. 112).

CONCLUSION

The years preceding the Vienna Conference (June, 1993) contained numerous developments that contributed to major human rights initiatives that came to be associated with Vienna. Closer examination reveals that specific political and cultural influences combined to form a gently rising tide, lapping at the edges of global political consciousness and appropriating the underlying concepts of human rights. Vienna was a large, colourful and multi-layered event and the Indigenous dimension was just one of many. At the same time Vienna provided an opportunity for Indigenous activists to formalize and consolidate achievements that had been decades in the making. The key elements unveiled in the Austrian capital had been conceived and nurtured much earlier and in many other locations, by persons and organizations largely unknown.

CHAPTER 3 - THE UN WORKING GROUP INDIGENOUS POPULATIONS

ORIGINS OF THE UN WORKING GROUP

The UN Working Group Indigenous Populations (WGIP) has achieved a special status amongst international bodies concerned with Indigenous rights. The Working Group represented a necessary stage in the building of a global Indigenous presence. Without the Working Group, the Year and later Decade of Indigenous Peoples would probably not have eventuated. And the Declaration on the Rights of Indigenous Peoples (2007) may have become simply a brief reference in the footnotes of academic texts. Had it failed to secure adoption by the General Assembly, the Declaration may have been repositioned in UN and world history as a poignant, but irrelevant rallying cry for activists around the world.

The Working Group gave large numbers of Indigenous individuals and communities access to the UN complex (the *Palais des Nations*) in Geneva and to the influential people who worked there. The WGIP also attracted and retained the interest of elements of the world press. Meetings were colourful and impressive events. Hundreds of Indigenous representatives, NGO personnel and UN staffers mingled with the media and members of the public in a free-flowing and dynamic milieu. Exchange of ideas and social interaction between Indigenous and non-Indigenous professionals were transformed into ongoing access and engagement at many levels. For six weeks every northern spring, First Nations people had a place and space to call their own within the UN system.

Though often associated with the 1990s UN Decade of Indigenous Peoples, the Working Group on Indigenous Populations came into existence much earlier. In 1982 the Working Group held its first full-scale meeting and immediately became a focus of Indigenous lobbying and agitation (Watson, I, *One Indigenous Perspective on Human Rights* 2001 in Garkawe, Kelly & Fisher 2001, *Indigenous Human Rights*, p. 23). Not

surprisingly, Indigenous Australians were involved from the outset. Professor Mick Dodson recalled that in the early 1980s Aboriginal organizations were looking for lawyers – particularly Indigenous lawyers.

“They wanted Indigenous lawyers to get involved. There weren’t many of us around back in the 1980s and they had no trouble finding me” (Interview with Professor Mick Dodson, Melbourne, 25th February, 2016, p. 2).

INDIGENOUS AUSTRALIANS FLYING THE FLAG

Mick Dodson travelled to Geneva and was present at a number of meetings of the WGIP. Though sometimes small in number, the Indigenous Australians made their presence felt.

“The Indigenous Australian delegations were very prominent at the early Working Group sessions. At times, we probably had influence out of all proportion to our numbers” (Dodson, 25th February, 2016, p. 2).

Dodson has affirmed that regardless of their actual numbers at any given time, Australian First Nations people were a ‘meaningful presence’ in Geneva. In comparative terms, the Australian delegation was substantial. Still, numbers do not tell the full story. Dodson argued that Indigenous Australian influence was more pervasive than the numbers would suggest.

“We actually had one of the largest delegations. If anything, we were over-represented. We only have around one million Indigenous people in this country. [Whereas] South America and Asia have many millions of Indigenous people and were therefore probably under-represented relative to their populations” (Dodson, 25th February, 2016, p. 4).

Rather than focussing on numbers, Native American [Ojibway] Professor John Borrows of the University of Victoria (British Columbia) suggested:

“There was probably something distinctive or ‘special’ about the Australian contribution to the Working Group” [Borrows, 20th April, 2016, p. 3]

Borrows attempted a deeper analysis to explain the close, yet complex relationship between the emerging ethos of the Working Group and the cultural heritage of Indigenous Australians:

“Personalities were important and the Australians were well chosen in terms of their attributes. Still, it was what they brought with them as a group that was most important. They brought a special sensitivity and awareness in the area of language – especially the language of Discrimination – as it has been used in Australia for many decades. The [Indigenous] Australians had a great depth of

experience of ‘racialization’. They ensured that their shared experience and awareness of that experience fed into the writing of UNDRIP. The intellectual dimension of UNDRIP – and that is a very important dimension – owes at least some – perhaps more than some – of its DNA to the Indigenous Australians” (Borrows, 20th April, 2016, p. 3).

Even during the early years in Geneva, Mick Dodson was not alone. Other young activists – some of whom have since become major political figures in Aboriginal Australia – were also on the Geneva circuit. Geoff Clark (last and only elected Chairman of the Aboriginal and Torres Strait Island Commission (ATSIC)) was also part of the ‘Australian push’. Clark explained:

“I was involved with the project – working towards a UN Declaration – in the early days. There were just a few of us [at senior level]. There was Peter Yu, Bob Weatherall, Mick Mansell [who is not often associated with the Declaration], Pat Dodson – who was involved before Mick, but was soon replaced by his brother – and some others around the fringes. That was the core group” (Interview with Geoff Clark, outside Warrnambool, Victoria, 27th February, 2016, p. 1).

Clark affirmed that even in the 1980s, Indigenous Australians had established the beginnings of a global network of Indigenous ‘contacts’ – organizations and individuals with similar goals and agendas.

“We were heavily involved with the (US based) Indian Treaty Council and especially with Sharon Venne. We had many international phone ‘hook ups’ [as they were known] and also in-person meetings. It was a time of high aspirations. Each Indigenous group or organization had high aspirations – possibly unrealistic at times, but definitely at a high angle” (Clark, 27th February, 2016, p. 1).

A NEW BEGINNING ON THE GREAT PLAINS

As early as 1974, Native Americans from the Great Plains States organized an Assembly of over 3,500 First Nations representatives from across the Western Hemisphere at a location of spiritual and political significance. The meeting took place at Standing Rock on the border of North and South Dakota on the land of the Lakota (Sioux) nation. During the gathering Lakota chiefs and elders secured mandates to take things further

in the years ahead. The decision was made to establish a permanent office in New York – within ‘striking distance’ of the UN complex. The Lakota enlisted the support of lawyers who assisted them in many ways. At this point, traditional leaders directed the chiefs to use their pre-existing treaties with the United States and Canadian governments as the bases for numerous and complex claims against those governments (Interview with Chief Bill Means of the Lakota (Sioux) people from Pine Ridge, South Dakota, conducted at the UN complex, New York, on Tuesday, 10th May, 2016, p. 1).

Lawyers and elders understood that the so-called ‘Indian Treaties’ were fundamental to the United States Constitution and that Article 6 was specifically concerned with the formal definition and description of ‘treaties with native peoples’ (Means, 10th May, 2016, p. 1).

The rights of First Nations peoples under the Canadian Constitution were less explicit. The consensus view amongst First Nations leaders was that an upsurge in claims by Native Canadians would be likely to assist the process of gaining useful publicity and increasing pressure on the Ottawa Government. Many Indigenous and their supporters hoped that an Indigenous resurgence would ultimately impact upon the Supreme Court of Canada, and feed into ‘Repatriation’ and rewriting of the Constitution which had been a ‘sleeping’ political issue since the 1960s. Professor Shin Imai of Osgoode Hall Law School at York University, Toronto explained the Canadian situation in the following terms:

“In 1982 in Canada, there was discussion and disagreement about the Canadian Constitution. In particular, Section 35 which concerned Aboriginal rights, normally referred to as ‘treaty rights’ became a key issue – perhaps *the* key issue. It is important to understand that ‘Repatriation’ of the Canadian Constitution, included *changes* to the Constitution. Such changes would occur under the Canadian legal framework, not the British. In legal terms, the Supreme Court of Canada *created* Aboriginal rights dealing with both the land and the people. This meant that in Canada, Aboriginal rights became [and will remain] legally tangible. Across Canada re-examination of the Constitution was important – especially symbolically – and remains important today” (Imai, 3rd May, 2016).

News of the Standing Rock gathering and similar developments in North America eventually reached Australia and attracted the attention of left-leaning academics, human rights activists, elements of the Trade Union Movement, church leaders and particularly staff at Tranby Aboriginal College in Sydney. A global Indigenous groundswell appeared to be gathering strength. New York became important to the Lakota people and to the American Indian movement in general. Chief Bill Means outlined his understanding of the sequence of American Indian political revival:

“It was back in 1977 that we attended our first conference as an NGO [non-government organization]. It had taken us two and a half years of lobbying to gain recognition as an organization with consultative status at the UN. In those days, Jimmy Carter was President of the United States. Carter made a name for himself accusing [the governments of] other countries of human rights abuses. We [the leadership of the American Movement] decided to use the renewed focus on human rights to argue for a better deal for Native American peoples” (Means, 10th May, 2016, p. 1).

Canadian Metis lawyer and Chairman of the Metis National Council, M Clement Chartier QC, also nominated 1977 as the start of the formal Indigenous / UN relationship.

“I believe the first formal meeting took place in 1977. The year before that [1976] saw the UN Habitat Conference in Vancouver where there was a ‘side event’ concerning First Nations issues – which I attended. I was a Law student at the University of Saskatchewan in Saskatoon at the time. My next opportunity was at the 1979 UN Rotterdam Conference, which I also remember clearly. In personal terms, my interest [in the Indigenous/UN relationship] began in 1976.”

Chartier has emerged as a leading member of the Canadian legal fraternity and an outspoken champion of the Metis cause. In academic circles he is regarded as an astute observer of the Canadian political landscape, a tireless networker and lobbyist. In the late 1970s Chartier became President of the Native Youth Council of Canada. Though still a young man, Chartier had the opportunity to engage with people and ideas from many other parts of the world. Of all the new political currents re-defining

the political landscape, it was the rising global Indigenous movement that caught his attention and shaped his thinking for years to come (Chartier, 4th May, 2016, p. 1).

THE INDIGENOUS RESURGENCE UNFOLDS

With growing interaction and engagement between Indigenous leaders and delegates from North, South and Central America, Europe, Oceania and Asia, knowledge of conditions in other regions and awareness of different political structures and community priorities grew strongly. Confidence and an appetite for change also rose to new heights. Chief Bill Means [Lakota] described his first visit to Geneva and experiences as a spokesman in some detail.

“Our first international Conference as an NGO was in Geneva, Switzerland. We marched into the United Nations building with a specific purpose. We were there to talk about racism. It was during the UN Decade to combat Racism. Indigenous peoples were considered an important part of that issue – and we were. I spoke at that Conference in Geneva. We finished the meeting by drafting what became known as the *‘Foundation Declaration of Principles concerning the Rights of Indigenous Peoples’* [1977]. Then in 1981 the UN hosted the World Conference on Indigenous Rights which was also in Geneva. It was there that the first formally recognized Indigenous body at the UN emerged. It became known as the ‘Working Group’. I remember the Indigenous Australians. There was Shorty O’Neill and of course Mick Dodson. I was impressed with Mick’s legal skills. He wrote so well for us – for the Indigenous cause. He was a very skilful lawyer – one of the best” (Means, 10th May, 2016, p. 1).

CREATING INDIGENOUS HISTORY

Like many others, Means had a sense that Indigenous history was being created in New York. The Working Group was a big step up, but the central responsibility of the Group was an even bigger deal. The Working Group was given the task of overseeing the development of an Indigenous Declaration, which was intended to have a global reach and to incorporate significant input from representatives of all the world’s Indigenous peoples. Means recalled:

“1981 was the year of the birth of the Working Group and the WGIP was central to the development of the Declaration. In particular, the UN Sub-Committee called for an Indigenous presence in *both* Geneva and New York. That was good thinking. Both cities are expensive, but there was more support [for the Indigenous cause] in Geneva. There was also a call for the creation of an Indigenous Declaration. And so the process began. It was not a regular process. It was a long, drawn out UN process that ran thirty years from 1977 to 2007 – if we include the years leading up to the Conference – and included the production of many different kinds of documents. Eventually all were produced, but it was a slow and painful business” (Means, 10th May, 2016, p. 1).

Indigenous activists in Canada, USA, New Zealand and Australia were determined to take the Indigenous story to a wider audience and to out manoeuvre state and national governments that continued to obstruct and resist the Indigenous cause. Perhaps the central and most controversial issue was self-determination. Clark insisted that from the early 1980s:

“The big issue for most of us – and definitely the big issue for me – was self-determination. Self-determination stood at the top of the list. We were in the business of demanding sovereignty rights. We even wanted the right to self-defence. We demanded every right that we had been denied through the process of colonization. So in the early days – up to 1990 – we took a very hard line” (Clark, 27th February, 2016, p. 1).

THE RISE OF THE INDIGENOUS CAUCUS

Realizing there were limited opportunities to persuade other First Nations representatives to support their hardline and ambitious agenda, the Indigenous Australians in Geneva created new situations designed to lift the tempo and momentum of the engagement. It was agreed by Dodson, Clark and Weatherall that the structure of policy development and application needed ‘refinement’. The result became known as the ‘Indigenous Caucus’ – described by one Canadian observer as a classic Australian concept with a very Australian name. While the concept was not entirely Mick Dodson’s in origin, he became one of the leading champions and

exponents of the initiative. The caucus was a gruelling affair, which took its toll on the majority of participants. Dodson provided a vivid account:

“Indigenous delegates met together separately from the UN mainstream each day. The purpose was to get our act together, in terms of what we were going to present and what our priorities were going to be at that time. The regular UN sessions ran from 10.00 till 1.00, then from 3.00 till 6.00. So there were spaces where we could get together to get organized. I was the Chair of the Indigenous Caucus for a number of years. We would meet during the long lunch break or early in the day for a couple of hours before the morning session, or even at the end of the day after the close of the afternoon session – depending on circumstances at the time. In other words, we developed and ran our own parallel system” (Dodson, 25th February, 2016, pp. 2-3).

In light of this initiative, it is not surprising that Indigenous Australian delegates gained a reputation for hard work and organizational *nous* as well as irreverence and good humour. Clark contended:

“The Working Group was very important in the larger scheme of things . . . Delegates from other parts of the world developed a strong respect for Aboriginal Australians because they could see that we would take an equally strong line on issues that related to them specifically. But it wasn’t all positive in Geneva. With [Indigenous] sovereignty watered down to ‘territorial integrity’, frustration crept in and people got disheartened” (Clark, 27th February, 2016, p. 1).

THE ‘S’ DEBATE

Perhaps the most revealing issue surrounding the Working Group was what has become known as the ‘S’ Debate – which concerned the choice of the term ‘Indigenous Peoples’ in place of the earlier title ‘Indigenous People’. It is arguable that in the ‘urban mythology’ of the contemporary global Indigenous movement, the ‘S’ Debate has achieved a life of its own, transcending both the activities of the Working Group and the perceived importance of the United Nations. At the level of its underlying foundations, the ‘S’ Debate entails ideas and values regarding the importance and intrinsic worth of Indigenous humanity. The S Debate has featured

prominently in discussions and written documents generated at the UN in Geneva. Yet the 'S' Debate was born elsewhere. It first took shape as a dynamic and compelling intellectual focus, a short distance away in the halls and corridors of the International Labour Organization (ILO) – the only tripartite UN agency and the first specialized agency of the UN (from 1945) (ILO website). With few exceptions, Indigenous representatives supported the acceptance of the term 'Peoples' and – as affirmed by Dodson and Clark – particular Indigenous Australian delegates were prominent champions of the S amendment. On the other side of the equation, States' representatives were eclectic in their choice of preferences and wide-ranging in their selection of arguments.

Patrick Thornberry noted that in a novel and adventurous departure from normal practice, the Introduction to the Report suggested:

“ . . . Governments should consult representatives of Indigenous and tribal populations in their countries (if any). There is clearly no requirement to do so, but as one of the major objectives of the proposed revision is to promote consultation with these populations in all activities affecting them, this consultation may appear desirable to governments” (*Partial Revision*, in (ILO) Report of the Committee of Experts VI (1), 1988, p. 2).

In addition, the Workers' Delegation to the Committee included Indigenous members, but there was no direct or ongoing First Nations participation. Eventually comments were summarized and submitted to the 1989 Session of the Conference, together with a further draft from which the word 'Populations' had been removed.

Thornberry (2002) has argued that in the matter of general instruments on Indigenous peoples, the ILO was first in the field. Taken together, ILO Conventions 107 and 169 represented the bulk of contemporary hard law of international Indigenous rights [Thornberry, 2002, p. 320]. Thornberry has provided a comprehensive treatment of this issue and traces its genesis to the November 1986 decision of the ILO governing body to include on the Agenda for the 75th Session of the ILO – to be held in 1988 – a discussion surrounding partial revision of ILO Convention 107. This led to the eventual 'sidelining' of ILO Convention 107 and its 'displacement' by ILO Convention 169

(Thornberry 2002, p. 339). Thornberry has explained that while working within the context of the ILO, Convention 107 and Convention 169 merged with the general world of human rights.

Developments at the International Labour Organization did not go unnoticed. Staff and members of the Board of Directors at Tranby Aboriginal College in Sydney were monitoring the ILO as closely as they could. In Geoff Clark's analysis, it was the Tranby leadership who first focussed the attention of Aboriginal organizations across Australia on the significance of the ILO. Tranby personnel identified the ILO as the best place to present the Indigenous case and commence the process of achieving global change in the interests of Indigenous peoples. Clark explained:

“Tranby was central to the Australian initiative at the ILO and Tranby's Director, 'Cookie' [Kevin Cook] was the mastermind of that. Tranby went to great lengths to connect with Indigenous organizations from other parts of the world. Cookie correctly determined that the best approach to the UN was through the ILO and it was very convenient that they were both located in Geneva, just a short distance apart. The Tranby connection has been neglected in the literature, but Tranby was crucial to the whole UN project from an Indigenous Australian point of view” (Clark, 27th February, 2016, p. 4).

Like Kevin Cook and Geoff Clark, Patrick Thornberry gives considerable emphasis to the Indigenous/ILO relationship. Thornberry has asserted that the ILO – rather than the UN – can claim much of the credit for bringing the rights of Indigenous peoples to the forefront of contemporary human rights discussion. At regular intervals since its inception in 1919, the ILO has concerned itself with employment conditions of Indigenous workers and the circumstances of their families (Thornberry, 2002, p. 320). During the 1980s the willingness of the ILO to engage with Indigenous issues and Indigenous communities encouraged elements within the UN to follow suit. In 1989 the final text of the new convention was adopted by the Conference with a vote of 328 in favour, 1 against and 49 abstentions. ILO Convention 169 came into force two years later on 5th September, 1991 (Thornberry, 2002, p. 340). The preamble to Convention 169 is unusually revealing, outlining the transformation in attitude and understanding that had occurred within a single generation. *'Integration'* – the

cornerstone of Convention 107, was nowhere to be seen in the Preamble of the successor document. In its place was a statement which indicated both awareness and acceptance of significant global change:

“Considering that the developments which have taken place in international law since 1957, as well as developments in the situation of Indigenous and tribal peoples in all regions of the world have made it appropriate to adopt new international standards on the subject with a view to removing the *assimilationist* orientation of the earlier standards . . .” (From the speech of the representative of the Secretary-General, International Labour Conference, 76th Session, 1989 *Provisional Record 25*, p. 1 in Thornberry 2002, pp. 341-342).

While there appears to have been consensus concerning changes in the circumstances and aspirations of Indigenous peoples, there was little consistency in the responses of States’ representatives to the word ‘Peoples’.

“The representative of Bolivia resisted the new term, arguing that ‘populations’ would create fewer conflicts than ‘peoples’. Gabon, on the other hand, adopted a common sense approach urging that ‘peoples’ better emphasizes the identity demanded by the persons concerned. Australia took a stand in favour of a broader view, arguing that acceptance of the term ‘peoples’ would be consistent with rejection of the *integrationist* approach. The United States adopted a position entirely based on relationship with its own Indigenous, declaring that use of the word ‘peoples’ should accurately reflect the tribal governments recognized by the US federal government. Perhaps the position of Mexico was most in tune with the views of Native peoples. The Mexican delegate explained that ‘peoples’ was the appropriate choice in order to use the same language as other international organizations and above all to embrace the term used by the Indians themselves (Thornberry, 2002, p. 343).

Anxieties regarding future demands for self-determination appeared to colour the thinking of those reluctant to accept ‘peoples’.

THE BIG KIDS ON THE BLOCK

Some years after Mick Dodson, Clark also chaired the Indigenous Caucus (1989–1992) and even chaired official UN Working Group sessions in Chile, meeting President Pinochet and his son on one occasion. Yet South America was a ‘whole different ball game’ where the UN was concerned. Clark has offered the view that the US Central Intelligence Agency [CIA] was heavily involved in ‘planting’ unheard of and generally ‘moderate’ or pliable Indigenous delegates as a way of undermining the hardliners or ‘radicals’ who were gaining momentum at both the gatherings of the *Indigenous Caucus* and the official UN hearings (Clark, 27th February, 2016, p. 2). The presence of moderate ‘stooges’ acted to slow down the process of responding to the views of community spokespeople from many parts of the world. Rather than accepting such obstruction and ‘sidelining’, many Indigenous sought direct support from the ‘staunch’ Australian and North American delegates who had created a ‘welcoming space’ on the fringes of the Working Group. Clark explained:

“We Australian Aboriginal people were important contributors at the Working Group. Not surprisingly, the Australian Government wanted to be seen as *important* as well. Eventually, the Australian Government decided that they wanted to lead the CANZUS group which consisted of Canada, Australia, New Zealand and the United States. When the Australian Government made moves in that direction, they created huge problems for us. They would go on the offensive and try to re-set the agenda at the Working Group. Back in Australia they behaved in a similar way. Conservatives of various kinds got more ambitious as they became empowered. Towards the slow and painful end of ATSIC [April, 2004 to March, 2005] conservatives sprang up all over the place – not just on the Liberal side of politics, but on the Labor side as well” (Clark, 27th February, 2016, p. 2).

SUPPORT FROM SCANDINAVIA

Through the late 1980s and early 1990s, other Western governments adopted stances markedly different from those of the CANZUS States. The governments of the four Scandinavian nations (Sweden, Denmark, Norway and Finland) had become increasingly concerned about conditions in Indigenous communities in post-colonial settler democracies. It was no co-incidence that each had a long history of often

turbulent relations with their respective Indigenous minorities. Sweden, Norway and Finland had Sami (formerly Lapp) populations and Denmark had a longstanding relationship with Greenland and the Inuit. For the Scandinavians, close engagement with the Working Group meant confronting the little known 'wild side' of Anglo colonialism. Mick Dodson emphasized that the Indigenous Caucus enjoyed the strong and consistent support of all four Scandinavian governments.

“The Scandinavians got right behind the Indigenous agenda and eventually brought a number of other governments – mostly European governments – along with them” (Dodson, 25th February, 2016, p. 3).

Early in the process and at a critical stage, the Scandinavian governments declared themselves *'Friends of the Declaration'*.

In Dodson's view, that was a big help. For him, the 'Friends' initiative and the way it was presented, helped tip the balance in favour of the successful operation of the Working Group and the eventual adoption of the Declaration.

“The Scandinavians were a great support to the Indigenous movement in the '80s and '90s and were happy to put money into Indigenous rights. They put a lot of money into the Voluntary Fund which enabled large numbers of Indigenous people – including community people – to attend the Working Group” (Dodson, 25th February, 2016, p. 3).

BECOMING A UNITED NATIONS 'INSIDER'

Les Malezer, CEO and Director of the Foundation for Aboriginal and Islander Research Action (FAIRA), Brisbane and former representative at the Working Group during the 1980s and 1990s, emphasized another aspect of the story – the dramatic impact of the Working Group on non-Indigenous professionals.

“The Working Group was not just something for Indigenous peoples. The Working Group served to educate a lot of non-Indigenes – especially diplomats at the UN” (Interview with Les Malezer at FAIRA Offices, Woolloongabba, Brisbane, 8th March, 2016, p. 2).

Malezer is an experienced Indigenous Australian spokesman and activist from South East Queensland who spent many months and ultimately years in Geneva during the 1990s, at considerable cost to his personal life and financial security. In many ways, Les Malezer has been a Working Group ‘insider’ and UN ‘go to person’. Malezer has suggested that the story of the Working Group is an unusually interesting one. Describing the early 1990s as the most “difficult and important period in the history of the Declaration”, Malezer has noted that by the time the Draft Document had become ‘well developed’, many Indigenous delegates were “digging in their heels and refused to accept *any* changes” (Malezer, 8th March, 2016, p. 2). This was anathema to Malezer, who realized that the UN system and UN organizational culture were based on compromise and the slow, often painful building of consensus. Malezer explained:

“For some years [in the late 1990s] there was an unofficial ‘chairman’s text’ that became in effect the ‘Declaration in Progress’. From time to time, changes in terms of the internal dynamics of the UN impacted on the development of the Draft Declaration – but these changes were not always negative. For example, at one point, the Human Rights Commission became the Human Rights Council – which was an expression of what I would see as profound changes including the elevation of human rights to the status of a more central and better-resourced element of the UN system” (Malezer, 8th March, 2016).

As the new century unfolded, some Indigenous representatives became determined to extract further concessions from the States, in order to placate the ‘mob back home’. At the same time, on the other side of the barricades, States’ representatives presented a series of amendments that focussed on key elements of the Draft. Many of these were immediately identified as ‘unacceptable amendments’ and were strenuously criticized by Indigenous representatives – especially within the Indigenous Caucus. Malezer took a different view, revealing he was never particularly worried about the late (2005 – 2007) amendments.

“There were just nine [9] late amendments and as far as I was concerned, they were all relatively trivial.” It was at that stage that I became Co-ordinator for the Pacific Section of the Indigenous Caucus. Geoff Clark was also active on the

ground in Geneva at that time. So FAIRA was represented in Geneva on an official basis and so was ATSIC, with Geoff at the helm. FAIRA was running on a shoestring, but ATSIC had significant resources – Geoff Clark made sure of that. We worked very closely with ATSIC at CERD [the UN Committee to End Racial Discrimination] and it was a good working relationship” (Malezer, 8th March, 2016, pp. 2-3).

AUSTRALIA, ATSIC AND THE UNITED NATIONS

By the early 2000s a pattern of Indigenous Australians representing government and non-government organizations working closely together in Geneva was well established. Unlike many delegates from North America and New Zealand, the Australians generally kept their differences under wraps, and presented a positive and united front. The departure of the Keating federal Labor government and the rise of Liberal Prime Minister John Howard posed a direct threat to the Indigenous Australian global agenda. This had major ramifications at the UN, because other First Nations representatives and the Working Group itself had come to rely on the planning, teamwork and diplomatic skills of the ‘crew from Down Under’. Weakening the Indigenous Australian presence meant undermining the operation of the Working Group and jeopardizing the chances of the Draft Declaration being adopted at a later date. Members of the CANZUS Group were anxious about many elements of the emerging document, consistently opposed to any UN initiative that might be seen as threatening their territorial sovereignty, and diluting their control over Indigenous policy and Indigenous communities. Canada, Australia, New Zealand and the United States were also eager to enlist the support of less resistant states. It was hoped that frequent and emphatic demonstrations of resistance to Indigenous demands would impress and persuade the representatives of ‘wavering’ governments.

Indigenous Australians who had been supported materially and psychologically by ATSIC and a raft of non-government organizations now found themselves isolated and almost friendless in an increasingly tenuous situation. Malezer argued that Howard was a dominant figure in the new political context and insists that some of his decisions had extraordinary significance.

“The abolition of ATSIC was probably the most important and damaging decision for Indigenous Australians in a generation. There has not been enough attention given to the removal of ATSIC during that critical period. People think it was a simple black versus white situation, but it was much more complicated than that” (Malezer, 8th March, 2016, p. 3).

This comment conveys something of the ‘siege mentality’ that prevailed in Indigenous Australia in the early 2000s. The Howard Liberal government was in office and the post 9/11 political climate was characterized by a resurrection of xenophobia and an upsurge in backward-looking racism and nationalism. A review of ATSIC was commissioned in 2003. The title of the controversial report was – *‘In the Hands of the Regions: A New ATSIC’*. The report recommended reforms designed to give greater control of ATSIC to Aboriginal and Islander people at the regional level. According to Indigenous Affairs Minister, Amanda Vanstone, the review concluded that ATSIC was not connected well with Indigenous Australians and was not serving them well (*Sydney Morning Herald*, ‘Clark vows to fight as ATSIC scrapped’, 15th April, 2004).

Unrelenting media scrutiny had transformed ATSIC into a favourite target. From 2003 ATSIC Chairperson Geoff Clark had been embroiled in controversy regarding criminal charges. The media coverage was sensational. Clark was accused of participating in a series of gang rapes in the 1970s and 1980s. Some of the female complainants were cousins living within his own Aboriginal community in western Victoria. Les Malezer commented:

“Of course there were lots of ‘scandals’, but the scandals were ‘beaten up’ by elements within the media or deliberately fabricated by people who wanted to turn back the clock. Geoff Clark became the No. 1 target of the Australian press. The attacks on Geoff just kept coming. Phillip Ruddock – who was the relevant Minister – formally approved Clark’s trips, then claimed that he had not given approval, or that he had no knowledge of Clark’s whereabouts” (Malezer, 8th March, 2016, p. 3).

Former ATSIC Chairperson Lowitja O’Donoghue later expressed the view that reform of the agency would have been preferable to creation of a new agency, or the removal

of ATSIC altogether. (Pia Ackerman 'We should have kept ATSIC: Lowitja O'Donoghue', *The Australian* (News Limited), 22nd October, 2009). The elevation of Mark Latham to the position of Leader of the Opposition in Australia's Federal Parliament only served to broaden the threat to ATSIC's survival. Under Latham, Labor supported the Liberal agenda, agreeing that ATSIC had not fulfilled expectations. In March, 2004 – an election year – both parties pledged to introduce alternative arrangements in terms of the government's responsibilities in Indigenous affairs. Prime Minister John Howard announced the abolishment of ATSIC on 15th April, 2004 declaring:

“The ATSIC experiment in elected representation for Indigenous people has been a failure”.

The legislation to abolish ATSIC finally passed both Houses in 2005. The agency was formally abolished on 24th March, 2005 (*Commonwealth of Australia 7080, ATSIC Central Office*, National Archives of Australia). Les Malezer argued:

“Under John Howard, the Aboriginal Affairs bureaucracy negated Indigenous decision-making and undermined Indigenous leadership in a very systematic way. There were big problems all the way along, because Howard and his supporters needed to demonstrate that ATSIC was so bad, it had to go. In many ways, we have never recovered from the destruction of ATSIC during those years” (Malezer, 8th March, 2016).

UNDERMINING INDIGENOUS AUSTRALIA

Within Indigenous leadership in North America and New Zealand the dramatic events unfolding within the Australian political environment were viewed with dismay and concern. Professor Dalee Sambo Dorough, academic, lawyer and Alaskan Inuit representative at both the UN Working Group and Permanent Forum suggested:

“In Alaska and Canada, First Nations leaders could see ‘the shape of things to come’ or something resembling the ‘worst case scenario’ being played out in the media and in the parliaments of Australia. Just a few years earlier, many of us had been very impressed with the relationship between Aboriginal spokespeople and the Australian Government – which was when Paul Keating was Prime Minister. It was truly shocking to realize how quickly that could disappear. We

saw a situation of deliberate and destructive reaction [against the Indigenous cause] by the political leadership of Australia on the national and international stage” (Sambo Dorough, 25th April, 2016).

Malezer highlighted the calculated nature of the Howard government’s offensive against ATSIC. For him, ATSIC was the biggest and most symbolic of many conspicuous Indigenous targets.

“As early as 1998, Howard made changes to the ways Aboriginal organizations could operate outside Australia – and of course FAIRA was included. Our lawyers told us that Howard’s ‘amendments’ meant we needed to be more ‘global’ in our approach. In response, we made a big commitment to CERD [the Committee to End Racial Discrimination]. In my view, our involvement with CERD was a positive thing – and very ‘global’ in conceptual terms. The CERD Committee helped the Indigenous cause very directly. The recommendations of that Committee acutely embarrassed a succession of Australian governments and helped put us back on the front foot” (Malezer, 8th March, 2016, p. 3).

Geoff Clark also emphasized the importance of the Anti-Discrimination Committee and described CERD in the following terms:

“CERD was probably my best area of impact across the whole UN landscape over the entire period of my engagement. CERD was a big hit – a very big hit. At the same time, the slowness of everything affected people. It is a very slow process at the UN – that is the reality. We were young and naïve – or at least naïve. We should have been thinking in terms of decades – not in terms of years. The Declaration was a major project. We should have expected 20 years, because that is how long it took and that’s how long it would have taken any group of representatives. It takes a lot of patience and self-restraint on the part of anyone who decides to work within the UN system. It is the extreme slowness that breaks people in the end.” (Clark, 27th February, 2016, p. 5).

Importantly, the term ‘Working Group’ was not well understood outside the UN system. Working groups were mechanisms created under the authority of the UN Commission on Human Rights – one of the six commissions established by ECOSOC

(Economic and Social Council) in 1946 in the early months of the UN. The Commission on Human Rights was defined as a *governmental organ* and incorporated representatives of a large number of member States (53) selected by ECOSOC for a three-year term. The Human Rights Commission met in Geneva for six weeks during March–April every year [Roulet 1999, p. 33]. In structural terms, the WGIP was located directly below the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

THE COMMISSION ON HUMAN RIGHTS

The Commission on Human Rights had two distinct roles. The first was the *promotion* of human rights and the second, the *protection* of human rights. There was understandable confusion with regard to the demarcation between these roles. The *promotion* of human rights included identifying problems, establishing that violations had occurred, finding inadequacies or inconsistencies in national legislation and proposing solutions. The majority of allocated UN staff worked on preparation of studies, research and reports and formulation of international standards. The *protective* role included investigation and evaluation to ensure States respected human rights as defined in international instruments. This role also entailed the imposition and monitoring of sanctions and other punishments in cases where violations were proven [Roulet 1999, p. 33].

Within the Commission on Human Rights, specific working groups studied and researched human rights issues that were considered particularly troubling. In most cases, working groups were the responsibility of a team of individuals – generally five experts (one from each geographical region worldwide). An alternative option was to appoint a single individual. In such cases, this person was generally referred to as an *Expert* or *Special Rapporteur* (Roulet 1999, p. 34). The Working Group Indigenous Populations was formed with a specific purpose in mind. International standards were a pressing priority. Thus elaboration and implementation of international standards soon became a core responsibility of the WGIP.

Some commentators have argued that the fundamental concept underpinning the initiative was a protective one. Protection of First Nations cultural heritage, economic

resources and educational and political aspirations was an explicit and shared imperative. Sponsors of the venture sought to address Indigenous communities threatened by the ambitions of corporations and undermined by the neglect and inconsistency of government. Protection against further territorial incursions and the genocidal practices of States and transnational corporations (Watson in Garkawe, Kelly & Fisher 2001, p. 23) was a priority for many, but not all Indigenous participants. Members of some Indigenous communities – particularly in Central and South America – remained preoccupied with the struggle against genocide. By contrast, in Australia, Canada and New Zealand, economic, cultural and spiritual erosion, substance abuse, malnutrition, educational underperformance and youth suicide occupied positions of greater importance.

JOSE MARTINEZ COBO AND THE COBO LEGACY

In the 1971 Jose Martinez Cobo became UN Special Rapporteur for the study of the problem of discrimination against Indigenous populations. In 1970 the Sub-Commission on Human Rights had recommended that a ‘comprehensive study’ be made of this ongoing and apparently widespread problem. The formal recommendation passed the Commission and was taken up by the Economic and Social Council (ECOSOC). The Council adopted Resolution 1589 (L) of 21 May, 1971, authorizing the preparation of such a study (Daes 1994 in *The United Nations and Indigenous Peoples from 1969 to 1994 in Publication Series: Centre for Sami Studies*, Universitet Tromso 2016, p. 1). The study continued for over a decade and was finally completed in 1984. Jose Martinez Cobo was purposeful and meticulous in his pursuit of the hidden realities of Indigenous disadvantage. Assembling and presenting a wealth of material, Cobo argued convincingly that the social conditions in which most Indigenous people lived were favourable to the rise and spread of discrimination. In response, the Cobo Study presented a great number and variety of proposals and recommendations (Daes 1994 in *Publication Series: Centre for Sami Studies* 2016, p. 1).

The Cobo study laid the foundations for later UN engagement with Indigenous peoples and prepared the ground for the advent and acceptance of the Working Group in the early 1980s. Cobo adopted a broad and comprehensive approach in which identity,

culture, legal systems, health and medical care, housing, education and language all received considerable attention. While maintaining an appropriate and consistent level of detachment, the study demonstrated the willingness of elements within the UN to engage with – and at times accommodate – the views and aspirations of Indigenous activists. This close and intense engagement contributed to the slowness of both the investigation and report submission. Although this delay irritated many participants and supporters, it also created useful space and underpinned demands for additional initiatives.

Acting on calls for meaningful follow-up action, the Sub-Committee on Prevention of Discrimination and Protection of Minorities proposed the establishment of a ‘Working Group on Indigenous Populations’ in 1981 (Daes 1994 in *Publication Series: Centre for Sami Studies*, 2016, pp. 1, 2). Consistent with UN Human Rights Commission practice, it was decided that the Working Group would be composed of five members – one from each major geographical region of the world. Members would be chosen from within the Sub-commission and would serve as ‘independent experts’ in a personal capacity. The first two meetings in 1982 and 1983 were under the chairmanship of experienced and highly-regarded Norwegian diplomat and legal scholar Asbjorn Eide. In 1984 Eide was replaced by Erica-Irene Daes, who was elected Chairperson/Rapporteur for an indefinite term (Daes 1994, 2016, p. 2).

LEVELLING THE PLAYING FIELD

A number of commentators (see Thornberry, 2002; Watson, 2001; Dodson, 2016; Clark, 2016; Borrows, 2016) have demonstrated an appreciation of the significance of the Working Group in relation to the political and ideological evolution of the United Nations. Some have also displayed an awareness of the importance of the WGIP to Indigenous communities and individuals. The Working Group broke new ground and transformed the *balance of influence*, in what was an inherently closed and inward-looking environment, namely, the UN system. Since the early twentieth century, Indigenous organizations had been perceived by both European and colonial elites as collections of ‘unknowable natives’ who were trapped on the ‘outside’ of the modern world. These cultural remnants were thought to be ‘looking on’ at the transformation of urban industrial society, with no capacity to shape or influence political or social

realities of any description. Indigenous observers realized that the international diplomatic arena was normally a place reserved for non-Indigenous players.

First Nations leaders came to know exclusion and understood their rejection was neither random nor accidental. In the minds of most western analysts rejection of Indigenous presence and disregard for Indigenous consciousness were understood to be the way of the world. In any comparison with States, Indigenous groups operated from a position of pronounced disadvantage. First Nations representatives and groups were positioned awkwardly and afforded little by way of protection (Thornberry 2002, p. 9). Though a positive and meaningful initiative, the Working Group fell short of providing Indigenous activists and their organizations with a platform approximating those available to member States or even major non-government organizations [NGOs]. While Indigenous Australians appreciated the weaknesses and failings of the Working Group, they also understood its potential as a vehicle for First Nations resurgence and global co-operation. As Malezer asserted:

“The Indigenous Australian commitment to the Declaration was consistently strong. At the same time, distance and isolation were problems for us. It was not easy to have good people in Geneva at all the stages when we needed them to be there. We took a leading role when we thought more needed to be done to keep the project alive and moving forward. I am inclined to agree that we Indigenous Australians had a presence beyond what our numbers would suggest. In the years immediately before Adoption in 2007 – when relationships and strategies were starting to unravel – we could see things were falling apart. We probably had more input at that stage because we needed to” (Malezer, 8th March, 2016, p. 5).

SOCIAL ENGAGEMENT AND PERSUASION

Yet this was not the whole story. At a less visible level, many Indigenes were well-suited to a situation of structural disadvantage. In general, First Nations representatives were persuasive and resourceful advocates, with exceptional networking skills. Indigenous leaders were often at their best in environments far from home, where they were beyond the reach of political adversaries and negative

domestic media, and insulated from the demands of family and community. In the month and a half available to them each year, Indigenous representatives capitalized on the social and intellectual opportunities that came with working in close proximity to the Geneva diplomatic circuit. Over time, First Nations people formed their own ‘circuits’. Particular hotels, cafés, bars and even sporting facilities became their ‘haunts’. Geoff Clark recalled his hours of social engagement and ‘persuasion’ at the *Pickwick Hotel*, just four blocks behind the League of Nations complex.

“In Geneva we Australian blackfellas had a different perspective. We had a stronger political base because amongst ourselves we are similar kinds of people, with similar cultural backgrounds and similar mindsets. We pushed a hard line and that appealed to representatives from the rest of the Indigenous world. We also had a ‘global perspective’ – many others did not have that kind of perspective. For example, the Maori were not global at all. They used to tell others that they [Maori] were above everyone else because they have their ‘*Tiriti*’ – the Treaty of Waitangi – and no one else has a treaty like that. We were wasting our energy on them. We realized we needed to focus on members of the other delegations – especially in the hours after work . . .” (Clark, 27th February, 2016, p. 3).

Despite the picture-postcard scenery that surrounded delegates in Geneva, the pressing political realities proved inescapable for many Indigenes. From the late 1980s the unfinished and untested Indigenous Declaration hovered near the top of an informal agenda that remained consistent, but appeared no closer to resolution than in previous decades.

A RENEWED COMMITMENT TO SELF-DETERMINATION

A popular view amongst delegates and activists was that a Statement of Indigenous Rights would clarify the inherent prerogatives of Indigenous communities. Such a statement would strengthen the position of Indigenous peoples in relation to imposed legal and political structures. The drafting and adoption of an Indigenous Declaration was one way to address the issue of First Nations exclusion from decision making. A Declaration would be an expression of renewed commitment to self-determination at

local and regional levels. In Indigenous circles, many argued that a more proactive orientation was central to the evolution of self-determination as a moral and legal imperative. Control was an ongoing preoccupation. Increased Indigenous control reinforced demands for self-determination. Conversely, obstacles and delays in granting or accommodating Indigenous interests also reinforced demands for self-determination. In response to continuing intransigence, some Indigenous communities re-examined their relations with the 'mainstream'. Many reluctantly realized they could not match the 'whitefella' system in critical areas.

In some cases, this realization strengthened the determination to critically evaluate and directly influence interactions with the non-Indigenous world (Thornberry, 2002, p. 9). There was interest in making a case for increasing the level and range of interactions between First Nations communities, governments and the corporate sector. The underlying concept was described as resembling a coronary bypass. "When the main lines are hopelessly blocked, the way forward is to create alternative lines – otherwise the patient will die on the table" (from a statement by Jack Beetson during a staff briefing at Tranby Aboriginal College, winter 1991). Still, this option was rarely canvassed in non-Indigenous circles, as ongoing fear of a 'mainstream backlash', on the part of politicians and bureaucrats, was a major and disturbing stumbling block.

Yet outside government, there was significant support for change. In the universities and in the media, interest in the concept of a more balanced relationship became apparent. There was scope for joint programmes featuring governments and their under-resourced agencies with highly-motivated Indigenous communities, acting independently or in regional coalitions. In practice, little significant change took place. Politicians and bureaucrats rapidly lost their appetite for reform, realizing that the voters were unlikely to endorse a social justice agenda. In Australia, Canada and New Zealand, the electorate continued to display a marked and deep-seated reluctance to accept any substantive changes to the status quo.

THE 'COLOURFUL' AND 'THEATRICAL' WORKING GROUP

In the early 1990s the UN was subjected to an Indigenous upsurge. There was widespread acceptance of the need for a visible and embedded initiative along the

lines of the Working Group. At the same time, some commentators targeted 'colourful' or 'theatrical' aspects of the WGIP. The popular press and even 'serious' publications ran with descriptions of the Working Group as "politics, performance and social drama" (I Sjorslev, Politics and performance: Reflections on the UN Working Group on Indigenous Populations in *Indigenous Affairs*, 3 (94): pp. 38–42). A significant segment of conservative opinion was nonplussed by the unprecedented Indigenous presence (A Gray, UN Working Group – where the sublime meets the ridiculous in *IWGIA Newsletter* 4 (92): pp. 23–27 in Thornberry 2002, p. 23). One writer suggested the well-attended meetings of the Working Group were places where international lawyers preened themselves, resplendent in popular theories of self-determination, while clutching copies of the latest tomes on human rights (Thornberry, 2002, p. 23).

While some commentators found the operation of the Working Group problematic on the basis of excessive 'theatricality', this was not a view shared by all. Many Indigenous observers responded with enthusiasm, finding the highly-charged and dramatic interactions reassuring and even cathartic. UN debates and presentations were often formal and even formulaic. For many Indigenous participants and observers, the willingness to accept the 'trappings' of Indigenous costume, music and dance was something positive – an expression of genuine interest in the Indigenous world. The UN engagement with Indigenous peoples was indicative of a desire to address fundamental issues in a manner that demonstrated acceptance of the seriousness of the issues under examination, and was also consistent with the expectations and traditions of community members.

Governance in many Indigenous communities entails colourful and dramatic elements that provide links with the wellsprings of culture. By contrast, the minimalist and detached bureaucratic style of non-Indigenous debate was seen as de-humanizing, superficial and even disingenuous. It is hardly surprising that the more spontaneous and colourful presentations at WGIP sessions proved a significant drawcard for Indigenous leaders. Overall, the First Nations response was positive. Indigenous Australian communities heard a story of direct access to significant people and opportunities to tell the Big Gubbas what was happening back home. There was also

rising interest in opportunities for networking with other First Nations representatives and in building connections with members of the international media.

RISE OF THE WORKING GROUP

The Working Group met in Geneva every year (except 1986). Proceedings were open to a wide range of organizations and individuals. In addition to States, a large number of organizations featured on the approved list. Intergovernmental and non-governmental organizations, Indigenous organizations and even 'recognized individuals' – Indigenous or otherwise – were eligible to attend (Thornberry 2002, p. 23). Financial support for Indigenous representatives was sometimes available. In 1985 the General Assembly established a Voluntary Fund to cover fares, accommodation and associated expenses, enabling a much larger number and broader cross-section of Indigenous to make the journey. At the first session in 1982, attendance was modest. According to the International Indian Treaty Council (International Indian Treaty Council: World Council of Indigenous Peoples, Indian Law Resource Centre: Report of the 1st Session, para. 7 [a]) in Thornberry, 2002, p. 23), just twelve States (plus an observer from the Palestine Liberation Organization) and only three Indigenous organizations (with ECOSOC status) sent representatives.

In 2000, by contrast, forty-five member States were represented, together with 248 Indigenous and other NGOs. Records indicate a total of 1,027 persons attended the session (UN Document E/CN.4/Sub.2/ 2000 /24, para. 6 in Thornberry 2002, p. 23). There can be little doubt that as the new millennium dawned, the Working Group was a major Indigenous destination – a 'Mecca' for representatives and activists of many kinds. From the outset, the Working Group was concerned with 'standard setting', but by 2000 the focus of attention – and of lobbying and 'deal making' – was the *Draft Declaration on the Rights of Indigenous Peoples*. Watson has suggested that a realization developed that Part 1 of the Draft would be fundamental to the shaping of the final Declaration, and would define its standing – and support – amongst Indigenous communities, including those in Australia. (Watson 2001 in Garkawe, Kelly & Fisher 2001, p. 25).

DEFINING INDIGENOUS POPULATIONS

There has been considerable interest in the evolving UN approach to the issue of defining an Indigenous population (and an Indigenous individual) – a problematic issue in many parts of the world then and now. Watson has suggested that the WGIP experienced difficulties arriving at a consensus in this area. UN Special Rapporteur Miguel Martinez became closely associated with the school of thought that rejected the concept of ‘imposed’ or ‘arbitrary’ definitions. Martinez insisted that the lack of an agreed formal definition of ‘Indigenous people’ should not be seen as a deterrent to the adoption of a *Draft Declaration* (Watson 2001 in Garkawe, Kelly & Fisher 2001, p. 24). Martinez emphasized that agreed formal definitions had not been considered pre-requisites in terms of the adoption of the *Declaration on the Granting of Independence to Colonial Countries* in 1960 or the more recent *Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities* in 1992 (Watson 2001 in Garkawe, Kelly & Fisher, 2001, p. 24). Geoff Clark noted:

“Rapporteur [Chairperson] Miguel Alfonso Martinez from Cuba was great because he refused to be bullied or coerced. He did not care what the United States or CANZUS had to say about anything. He just worried about the interests of his own mob and the global Indigenous movement. So it is clear that just one individual can make a difference – especially when it is someone who is strongly independent and committed to the cause . . .” (Clark, 27th February, 2016, p. 4).

This orientation was consistent with an approach that emphasized acceptance by the local community. In Australia, this took the form of a national network of legally-constituted community organizations with elected office bearers, formal meetings and official seals. Thornberry has emphasized the sophistication and complexity of the discussion and the willingness of Working Group members to be guided by the principles elaborated in earlier documents including Article 34 of International Labour Organization (ILO) Convention No. 169 *Concerning Indigenous and Tribal Peoples in Independent Countries* (Thornberry 2002, p. 58). Many Indigenous Australians had heard of the International Labour Organization or ILO. Land councils and trade unions with substantial Indigenous membership did what they could to keep the ILO connection alive. The ILO had conceptual and procedural links to the Working Group

and the Working Group was the main Indigenous conduit to the larger United Nations system.

THE WORKING GROUP IN PERSPECTIVE

The UN Working Group Indigenous Populations began well and had the benefit of appropriate and sometimes outstanding leadership. Significant contributions by exceptionally capable organizations and individuals enabled the WGIP to maintain momentum and retain the support of key States, NGOs and Indigenous delegates and spokespeople. The engagement and support of hundreds of Indigenous organizations and thousands of First Nations individuals were key factors underpinning the success of the WGIP. At the same time, the enthusiastic and often generous assistance of States – and especially the generous support of the Scandinavian nations and a collection of other member States – were vital to the success of the WGIP and the completion and adoption of the Declaration.

Unfortunately, many saw the Adoption of the Declaration in September, 2007 as a demonstration that the WGIP had achieved its purpose and outlived its usefulness. By the end of the year, the Working Group had passed into history – but not without leaving a widely dispersed collection of Indigenous supporters united in their rejection of its removal. In British Columbia, Professor John Borrows has been an outstanding critic of what many consider the hasty and ill-considered termination of the WGIP. Borrows expressed a view that continues to resonate with Indigenous participants and observers in many places:

“I am not a fan of the decision to concentrate Indigenous activity and Indigenous lobbying in New York. The move to New York can be seen as a sidelining issue. Being in Geneva and in Switzerland in the heart of Europe has been good for Indigenous representatives and for the Indigenous cause. Being in Switzerland is not like being in the continental USA. In the United States, domestic issues take precedence and that affects how much can be achieved. When people gather in a place that is explicitly neutral, it has a big impact on the people and on the result. I believe it is good for North American First Nations to leave these shores. Being

transported to the heart of Europe means many things – most of them positive” (Borrows, 20th April, 2016, p. 1).

It is appropriate to emphasize that the United Nations remains at its core a venue for the expression and evolution of the views and policies of *States*. The early 2000s saw an upsurge in the anxieties and ambitions of States and a corresponding erosion of support for the Indigenous cause. While NGOs retained their presence and influence and Indigenous representatives continued to advocate and lobby on behalf of their constituents, much of the enthusiasm and momentum of the early 1990s had been lost. First Nations participants and commentators – in many cases representing the First Generation of university-educated Indigenous – continue to display a reluctance to abandon their role as the vanguard of global resurgence. The Working Group had shown itself to be a ‘Trojan Horse’ that enabled Indigenous to enter the ‘walled city’ of the UN. Once inside, many were determined to remain embedded.

In Australia, Professor Mick Dodson expressed a similar view:

“I was not happy about what happened to the Working Group. Like a lot of Indigenous people, I thought they should have kept the Working Group going. The Working Group had become the main vehicle for Indigenous Rights. Many of us thought we were heading in the right direction – towards a more formal situation . . . UN declarations are not enforceable, but that is not like saying they have no value . . . A number of us always thought there should be an international convention or covenant – that would be enforceable in international law. We thought there should be specific instruments for the protection of the rights of children, women and elders. Those groups receive special attention in the Declaration [UNDRIP], but the Declaration is not enforceable” (Dodson, 25th February, 2016, p. 3).

Demonstrating striking congruence of interpretation and orientation, Geoff Clark also defended the right of the Working Group to continue to exist beyond the adoption of the Declaration in late 2007.

“I was not happy with the passing of the Working Group. This was an important development. I was not pleased with the scrapping of the Working Group . . .

There was no good reason to scrap the WGIP. The two were quite different. The Working Group was for the grassroots people and the Permanent forum was not. The Permanent Forum was set up to be much more within the UN system and much more easily controlled. The Permanent Forum is now *only* present in New York and that is far more significant than people realize. This is because Indigenous peoples are far weaker in North America. All our major UN allies are located in Europe. Our main support is in Europe. The sympathetic and reliable countries are in Europe and that is where we need to be – in order to draw on that support . . . (Clark, 27th February, 2016, p. 3).

While the European connection has not always been visible or well understood, representatives of key western States have continued to play significant roles at the UN – sometimes at locations remote from continental Europe. The rights of minorities and refugees, children and women, as well as those of Indigenous peoples, have remained areas of concern for the governments of a cluster of relatively generous and ‘friendly’ States, many but not all of them located in Europe. Societies with well-educated and productive workforces and traditions of intellectual ferment and achievement have tended to share an interest in the cultures and circumstances of Indigenous peoples. Many have also shared a commitment to the United Nations on both practical and philosophical grounds. Consistent with this approach, the drafting and eventual adoption of the UN Declaration were largely seen as welcome and necessary developments in such countries.

CONCLUSION

The Working Group Indigenous Populations (WGIP) represented something rare and authentic within the UN system. The WGIP was a diplomatic ‘perfect storm’ in the history of global Indigenous resurgence in the late twentieth century. The right people at the appropriate time and in the right place achieved a result that would have been inconceivable during the early decades of the United Nations. Though important, key individuals were just part of the equation. Larger political and social currents had changed course, creating new and unprecedented opportunities. An Indigenous/UN connection emerged in the heart of Europe and reached out to some of the most distant corners of the planet. The alignment of community-based Indigenous activism

and a powerful UN human rights agenda lent substance and relevance to both. This was a dynamic response to the decline of moral capital and political capacity of the former settler States. While harnessing elements of the value system that underpinned contemporary human rights, the Working Group also drew on the time-honoured heritage of Indigenous knowledge and Indigenous law. The WGIP reflected some of the most fundamental aspects of an array of Indigenous worldviews, combining them in a pattern that was consistent, realistic and ultimately acceptable.

CHAPTER 4 - INDIGENOUS PEOPLES AND THE 1993 VIENNA HUMAN RIGHTS CONFERENCE

INTRODUCTION

A 'common sense' view has emerged with regard to the relationship between the 1993 UN World Conference on Human Rights and the evolution of the Draft Declaration on the Rights of Indigenous Peoples (UNDRIP). According to this view, the Vienna Conference was the first occasion in which Indigenous delegates with an identifiable global Indigenous agenda successfully united on a number of explicit and agreed priorities. In this interpretation, Vienna was the venue where Indigenous activists and their supporters strove to install the Decade of the World's Indigenous People and the Declaration on the Rights of Indigenous Peoples as major, high profile UN initiatives. There is an element of truth in this interpretation. The Austrian capital was the scene of considerable Indigenous activity in the summer of 1993. Yet much of the background work in the form of discussion, liaison, alliance-building and priority-setting had already been done. Closer examination reveals that Indigenous delegates, States representatives and NGO staffers arrived in Vienna with plans, agreements and agendas already developed, organized and discussed in detail.

During the previous decade – and especially the two or three years immediately prior to the 'summer of solidarity' – relationships between key spokespeople and organizations had been forged, embedded and tested. Over the same timeframe, networks were expanded and consolidated and agendas discussed, refined and reinforced. All of this had a direct and overwhelming influence once the Conference got underway. In a nutshell, the 'main event' was *not* the main event. Instead, pivotal and far-reaching changes had already occurred. The main event was an ongoing and largely hidden *sequence* of hundreds, perhaps thousands of interactions at local, regional and international levels. A diverse array of organizations and individuals collaborated, shared ideas and resources and put aside longstanding differences in a conscious effort to further the Indigenous cause. For these people, Vienna was important, but it was not the beginning.

While many of the documents that constitute the written record of those times are dated June, 1993, the 'UN theatre in the city of palaces' should be seen as the tip of the iceberg. Other developments which predated Vienna have received relatively superficial attention. The three regional conferences in Tunisia, Thailand and Costa Rica each contributed something of consequence. At a fundamental level, each added greatly to Indigenous momentum. For First Nations peoples, momentum was a political and cultural necessity. Momentum had been maintained and increased and would remain an essential ingredient. The 1970s had witnessed the beginnings of the Indigenous resurgence, but the 1980s had seen the building of a grassroots groundswell and associated forging of an Indigenous–media relationship. The groundswell of interest and activism was not confined to Indigenous communities and their supporters. The new global Indigenous worldview and associated concerns with human rights, women's rights and the circumstances of minorities were raising questions and shifting the political balance. These changes infiltrated mainstream contexts, eventually reaching the upper echelons of government. Some Indigenous activists, including Kevin Cook and Jack Beeton at Tranby Aboriginal College, expressed the view that consistent momentum (i.e. a co-ordinated and focussed approach) was essential, but necessarily elusive. The extraordinary breadth and diversity of views and attitudes within Indigenous organizations inside and across regions ensured that the achievement of fundamental consensus was an ongoing and often debilitating challenge.

OVERLAPPING VIEWS OF COMMENTATORS

James Anaya has argued that the late 1980s saw an upsurge of interest in the economic circumstances and political dynamics of Indigenous populations on the part of those who congregated in the corridors of power in Europe and North America. The slow but at times accelerating evolution of the Indigenous agenda was evident. Confusion and disappointment characterized the responses of a significant proportion of States representatives and NGO staffers. This pattern of response was not confined to bureaucrats and technical specialists within the ILO and UN. In 1989 the European Parliament passed a Resolution "on the position of the world's Indians" expressing concern over the conditions faced by Indigenous peoples, calling on governments to

secure Indigenous land rights and enter consultations with Indigenous groups to develop specific measures to protect First Nations rights (Anaya 2004, p. 68). Three years later in 1992, the European Conference on Security and Cooperation adopted the Helsinki document entitled 'The Challenge of Change' which included a provision based on the concept that Indigenous persons, acting as members of Indigenous populations, may face special problems in exercising their rights (Anaya 2004, p. 68).

Indigenous rights were in the news as a distinct subject with a sizable potential audience. In June, 1993 the UN hosted the second World Human Rights Conference in Vienna, Austria. The Conference represented a high profile though temporary global platform for Indigenous issues – and Indigenous demands. Many activists hoped the Vienna Conference would constitute a 'milestone' or benchmark in the evolution of international human rights, for minorities of various kinds – including Indigenous populations. The early 1990s is remembered today as a time when an extraordinary convergence of activism and agitation took hold and became entrenched. Kelly Shannon has suggested that the stage was set for the revitalization of international human rights law. Freed from the confines of the Cold War, the United Nations could pursue the protection of human rights with renewed purpose (Shannon in Iriye, Goedde & Hitchcock 2012, p. 286). For some, including Shannon, this was the golden age of global feminism.

Shannon has argued that the formal recognition that women's rights *are* necessarily human rights and the drafting of documents that enshrined that principle was the most momentous development in human rights for a generation (Shannon in Iriye, Goedde & Hitchcock 2012, p. 286). According to one source, the women's campaign targeted the Vienna Conference because some of the women's leadership believed that a 'powerful document' generated by the UN on the subject of women's human rights would help 'legitimize' the next step of the global women's initiative (Black 2012, in Iriye, Goedde & Hitchcock 2012, p. 148). The organizers had prepared so well that even the world-weary press described the women at Vienna and their promotion of women's human rights as 'the strongest and most effective lobby in attendance' (Black 2012, p. 148). The Vienna Declaration and Programme of Action provide proof of their overwhelming impact. The 'powerful document' addressed women's rights

and domestic violence in significant detail. Of equal importance, it specifically linked women's rights to Human Rights, declaring:

The human rights of women and of the girl-child are an inalienable, integral and indivisible part of universal Human Rights. The full and equal participation of women in political, civil, economic and cultural life at the national, regional and international levels, and the eradication of all forms of discrimination on grounds of sex are priority objectives of the international community (Black 2012, p. 149).

Indigenous leaders realized they could not hope to match the span and scale of the women's campaign or the applicability of statements regarding women and girls. Almost all communities and outposts of humanity contained females, but only a minority of communities were Indigenous or contained Indigenous persons. Every inhabitant of the planet was surely conscious of the existence of women and girls. Most males probably engage with women and girls on a daily basis. The same could not be said of Indigenous people. It was possible for a resident of Beijing, Tokyo, Edinburgh or Canberra to lead a 'normal life' without ever meeting or engaging with an Indigenous person. This was a post-colonial reality that did not lend itself to easy correction. Indigenous activists realized they needed to 'bridge the gap' that separated non-Indigene from Indigene. Some activists thought there were lessons to be learned from the women's movement. Others believed closer liaison and engagement with Indigenous brothers and sisters elsewhere would provide the necessary insights. Indigenous women were in some ways strategically positioned. A significant proportion of the world's female population were also members of minorities or First Nations daughters, sisters and mothers. Many female Indigenous activists were mindful – even envious – of the achievements of the international women's movement. Indigenous delegates at Vienna were conscious of the expertise and resources of the women's movement. The arrival of the women's 'juggernaut' underlined the need to define and defend a separate Indigenous 'space' in the public imagination. Anaya and others have explored the Indigenous dimension at Vienna, recognizing that it remained distinct and largely self-directed. Anaya has contended that the Indigenous path was a longer, narrower and less direct one than the wide road along which the women's movement marched. While there were meaningful

connections between the two causes, the Indigenous movement was fundamentally distinct and gender inclusive. Each was logically, politically and culturally connected to the global trajectory of human rights as shaped and articulated at the UN. By 1993 Indigenous peoples' rights had come to be perceived as derivative of previously accepted and generally applicable human rights principles (Anaya 2004, pp. 68-69 – See *Infra* Chs. 3 & 4). For Anaya, the discussion of the specific circumstances of Indigenous peoples and their rights within international institutions has been a significant factor. He argues that Indigenous demands helped build a common understanding of the content of Indigenous Peoples rights. He also asserts that Indigenous agitation has reinforced expectations that such rights should and will be upheld. Yet Anaya has neglected to mention the large scale and often intensive interaction and engagement between Indigenous individuals and organizations that underpinned the international Indigenous enterprise.

THE NEW POLITICS OF HUMAN RIGHTS

It is important to develop an appreciation of the relationship between Indigenous activism and the inner workings of the UN on the ground in Geneva and elsewhere. Prior to intensive engagement in the early 1990s, Indigenous representatives were unaccustomed to the workplace culture and diplomatic heritage of the world body. At the same time, few UN professionals had firsthand knowledge or academic connections with Indigenous communities in their own country of origin, or anywhere else. It is likely that curiosity and puzzlement characterized thinking on both sides. Most Indigenous delegates came to Vienna with experience of the dominant political system 'back home'. Most had been forced to engage with numerous and overwhelming expressions of the underlying colonial mentality at local provincial and federal levels. They brought with them to Vienna largely negative memories of their dealings with politicians and bureaucrats. This meant that the emerging long-term interaction between UN professionals and Indigenous representatives was a 'whole new ball game'. Mc Grew (1998) has offered an interesting perspective that accommodates Indigenous activism and lobbying within the larger framework of UN political evolution. For him the well-orchestrated though sometimes 'frantic' timing and impressive scale of the Indigenous initiative ensured sufficient impact would be

achieved. At a deeper level, he has suggested that the 'real world' or 'grassroots' orientation of Indigenous delegates contrasted dramatically with the detached and even arcane mindset of UN professionals, frequently preoccupied with maintaining institutional consensus and agreement. While UN staffers often saw the advancement of rights in terms of procedural and structural reform (Mc Grew in Evans 1998, p. 198), Indigenous activists were dancing to a very different tune. In company with members and supporters of other social and political causes, First Nations spokespeople were part of the new politics of human rights. They were energized by the activities and concerns of a dynamic array of social movements, determined to make States more accountable for their actions (McGrew in Evans 1998, p. 198). Mc Grew has argued that by 1993 social movements and NGOs had become increasingly significant factors in global politics. Rather than simply running onto a pre-existing playing field and playing the game according to the old rules, the new generation of activists sought to re-define the international politics of human rights (McGrew in Evans 1998, p. 199). Boyle (1995) has claimed that a new and significantly different political landscape was fully revealed in Vienna. Boyle focusses on what he terms 'A depth of common understanding regarding values, goals and policies on the part of NGO activists' (Boyle in Evans 1998, p. 199). In Boyle's view, this 'commonality' demonstrated that significant changes of personnel and orientation had become a reality in the context of UN human rights. An alternative explanation might accommodate the changes in accordance with a less dramatic scenario. Instead of embracing and perhaps exaggerating the concept of underlying transformation at the UN, the evolution of the Indigenous agenda and the history of UN responses make sense in pragmatic terms. First Nations representatives understood that they needed to cultivate and build a presence at the UN – a visible and permanent presence. States' representatives, NGO staffers, media observers and others recognized that Indigenous people were central to the unfolding politics of human rights and were also integral to the new global political landscape.

The emerging politics of human rights also recast the diplomacy of human rights. Diplomacy was no longer the preserve of States. Instead, promotion and protection of rights had become a shared activity and Indigenous activists were eager to test and

refine their diplomatic skills. McGrew has cautioned that despite the energy, enthusiasm and reforming zeal of many participants, the new politics of human rights that emerged at Vienna was far from benign. At a deeper level, it was a zone of ongoing and sometimes unmanageable conflict between competing value systems and cultures (McGrew in Evans 1998, pp. 200-201). Burke (2010) has identified the doctrine of 'cultural relativism' as the underlying issue, seeing it as the central stumbling block that threatened to derail the long-awaited Vienna Program of Action (p. 142). Burke has argued that highly visible, anti-Western and anti-democratic aspects of the cultural relativist agenda helped make it the 'ideology of choice' for many Asian and African diplomats and their political masters. By 1993 this agenda had become a shared policy platform, with especially strong support from Iran, China and Singapore (Burke 2010, pp. 141-142). The cultural relativists declared that while human rights are universal in nature, they should be considered with careful reference to national and regional differences and specific historical, cultural and religious backgrounds (Burke 2010, p. 142). With its emphasis on the primacy of the local dimension, the 'negotiability' of human rights and the Western origins of 'universalism', it was not surprising many Third World dictators and leaders of militarist and repressive regimes embraced cultural relativism with considerable fervour.

Indigenous delegates at Vienna developed an appreciation of the prominence and immovability of the 'universalism versus cultural relativism' debate. In most cases, they declined to comment on such matters or identified particular elements of each orientation for succinct criticism or praise. Gradually an awareness evolved along the lines that – for all its predictability and multitude of hidden agendas – the central debate offered significant opportunities to First Nations spokespeople. To begin, the media were eager to focus on stories of more direct interest to their audiences. The David and Goliath dynamic of Indigenous stakeholders standing their ground against settler state governments and/or global corporations was a well-worn, but still winning formula. Unlike States representatives, Indigenous spokespeople were generally colourful in appearance and engaging in manner, and condescension and impatience were rare. Some Indigenous leaders even seized the opportunity to invite

members of the Press to visit them at their hotel accommodation, to join them at nightspots or high end restaurants, or to attend upcoming events in their communities 'back home'. All of this activity – however predictable or unsophisticated – assisted in the process of conveying the story of Indigenous peoples' rights to an international and largely non-Indigenous audience.

Anaya has described this unfolding dynamic as providing evidence and experience of 'subjectivities of obligation and expectation' (2004, p. 71). Put simply, the often uninspired and socially isolated members of the press were invited to share the stories and ingest the worldviews of their Indigenous hosts to advance the process of seeing the world and its problems through Indigenous eyes. In the view of one Indigenous Australian leader, 'To appreciate Aboriginal rights, a non-Indigenous person must develop an appreciation of Aboriginal people and our circumstances and issues . . . which means engaging with someone sitting right there, sounding intelligent and interesting' (Kevin Cook, Tranby, late 1992). This was an important part of the story of Vienna. For their part, many journalists were sceptical of the orientations and intentions of professional politicians – particularly those from their own corner of the world. Over time, on the basis of direct and agreeable engagement, it was easy to develop an appreciation of grassroots community credentials and unswerving commitment of many First Nations spokespeople. Aboriginal peoples were fighting to preserve their cultures and their communities, and striving to secure social, educational, economic and political advantages that would better position their children and grandchildren in the increasingly globalized environment of the early twenty-first century. Indigenous consensus held that it was time for First Nations leaders to walk out of the shadows and into the light. Only the world stage in the form of the UN could offer the scale and scope for joint action and change that was needed. It was agreed that a handful of activists would not be sufficient in Vienna. Large numbers, colourful costumes, music, dance and showmanship would be required to capture the sympathetic attention of the world media. In June 1993 almost every rural and remote Indigenous community and urban neighbourhood sent at least one representative to the Vienna Conference.

A SUMMER WITH A DIFFERENCE IN VIENNA

For the first time at a United Nations World Conference, hundreds of Indigenous activists (Keal 2003, p. 116) were present in a major European city, often in full view of the international press, other delegates and the urban workforce of Vienna. In addition to interacting with one another and reporters and film crews, First Nations representatives were heavily engaged in the process of writing and re-writing the Draft Declaration. For some activists, “Almost every day in Vienna was a day spent huddled together with other delegates immersed in the Draft Declaration” (From a statement by Jack Beetson at Tranby, Aboriginal College, Glebe, Sydney in late 1993). The Draft Declaration was important because it was a powerful statement of the distinct and separate character of Indigenous societies. At the same time, the Draft Declaration was overflowing with ‘issues’. It was an Indigenous document derived from Indigenous experience and intensive recent collaboration. There were significant differences of opinion amongst the contributors regarding the relationship between human rights and Indigenous rights. It was generally understood by participants that within the UN system, Indigenous rights had evolved as an expression and extension of universal human rights (Keal 2003, p. 136). The conceptual framework within which Indigenous rights were being clarified was a zone of apparent, but superficial simplicity. Differences of emphasis and orientation were numerous, but rarely discussed at length in the public domain. The general view amongst UN practitioners was that all UN human rights documents and doctrines applied (with equal force) to Indigenous peoples throughout the world (Perkins 1999, in Keal 2003, p. 137).

INDIVIDUAL AND COLLECTIVE RIGHTS

The key distinction was between individual and collective rights. The consensus view amongst scholars was that human rights are held by individuals, while Indigenous rights are the rights held or claimed by groups or peoples (Keal 2003, p. 137). This is a convenient but problematic simplification and one that does not sit well with some notable Indigenous Australian activists including Irene Watson, Geoff Clark and Michael Mansell. The evolving pattern of response on the part of Indigenous activists has been one of ‘considered opportunism’. In other words, a significant proportion of

Indigenous representatives have seized on legal approaches and mechanisms that have appeared to offer the greatest opportunity for enhanced leverage and direct engagement with higher authority. Approaching issues and questions of ownership and control on the basis of human rights has become standard procedure. While this has not created a perfect or unquestioned alignment between Indigenous aspirations and the international legal framework, it has proven to be a relatively safe and acceptable option. Indigenous communities and their representatives have become familiar with the concept of Indigenous rights as a category or domain within the larger sphere of human rights. More than any other approach or orientation, human rights have come to be seen by First Nations peoples as successful in transforming behaviour – especially at government level (Keal 2003, p. 137). Robert Williams has argued that moral persuasion, shame and the capacity to appeal to an internationally recognized standard for human rights have served to undermine the legitimacy of State-sanctioned practices that consistently deny human rights (Williams in *Encounters* p. 670 as discussed in Keal 2003, p. 137).

SELF-DETERMINATION, UNIVERSALITY AND THE DALAI LAMA

All of these elements are also characteristic of First Nations communities – particularly Indigenous Australian communities. Political posturing in the form of attempted *moral suasion*, public ‘shaming’ and reference to international standards or conventions are prominent features of the political landscape across Indigenous Australia. It is not surprising that Indigenous participants felt at home in a mainstream environment that contained versions of approaches and responses resembling those within their own communities. They were also receptive to the idea that self-determination was fundamental to the equation. On the second day of the Conference, His Holiness, the XIV Dalai Lama of Tibet addressed delegates as a keynote speaker from the NGO sector. His presentation was titled ‘Human Rights and Universal Responsibility’. Losing little time on preliminaries, the Dalai Lama took up the cause of universalism, insisting that ‘The acceptance of universally binding standards of Human Rights as laid down in the Universal Declaration of Human Rights and in International Covenants of Human Rights is essential in today’s shrinking world’ (Dalai Lama 1993, p. 1). He continued, ‘We must insist on a global consensus, not only

on the need to respect Human Rights worldwide, but more importantly, on the definition of these rights' (Dalai Lama 1993, p. 20).

The Dalai Lama also seized on the opportunity to confront governments that had chosen political expediency before moral responsibility and had climbed aboard the 'cultural relativist bandwagon'. Many regimes in this category were located in Asia. Some contained substantial numbers of Buddhists. In a number of cases, including Thailand, Burma/Myanmar and Cambodia, the highest levels of politics, the learned professions and commerce were Buddhist dominated. In his presentation, the Dalai Lama noted that "Some Asian countries have contended that the standards of Human Rights laid down in the 1948 Universal Declaration of Human Rights are those advocated by the West and cannot be applied to Asia and other parts of the Third World because of differences in culture and differences in social and economic development. I do not share this view . . . I am convinced that the majority of Asian people do not support this view either" (Dalai Lama 1993, p. 2). To drive the point home, the Dalai Lama suggested: 'It is mainly authoritarian and totalitarian regimes who are opposed to the universality of human rights . . . Such regimes must be made to respect and conform to the universally accepted principles in the larger and long-term interests of their own people' (Dalai Lama 1993, p. 2). In outlining his interpretation of the prevailing socio-political context, The Dalai Lama struck a chord with many Indigenous and minority representatives declaring that:

"We are witnessing a tremendous popular movement for the advancement of Human Rights and democratic freedom in the world . . . This Conference is an opportunity for all of us to reaffirm our commitment to this goal" (1993, p. 3).

On the following day (16th June, 1993), President of the Philippines, Cory Aquino adopted a similar approach, noting that many governments had lost sight of the importance and value of the individual citizen:

"It has become convenient for some states to invoke national sovereignty when their human rights records are criticized . . . [It is important to recognize that] the sovereignty of the individual person is by definition without geographical

boundaries. For any nation to invoke its sovereignty while depriving its citizens of theirs would be the worst (form of) inhumanity” (1993, p. 4).

When Senator Gareth Evans, Australia’s Minister for Foreign Affairs addressed the Conference on the previous day (15th June, 1993), he urged that rising aspirations to self-determination would be best met by stricter observance of human rights. This was achievable through establishing guarantees of individual and minority rights and building democratic institutions and processes such that *minority groups* might pursue their interests in a peaceful way (Evans 1993, p. 3). Evans was not alone in associating the global Indigenous cause with the emerging movement in support of ethnic, cultural and religious minorities, spearheaded by the Minority Rights Group (MRG) at the UN. Evans went on to declare that the interaction of Aboriginal and Torres Strait Islander Australians with the rest of the community continued to pose Human Rights challenges (1993, p. 3). He adopted a hard line with regard to non-compliant states and focussed on the need for the Working Group to finalize the Draft Declaration and to continue to function as an effective forum for Indigenous peoples (Evans 1993, p. 4). He could not have anticipated that just a few years later, with the election of the Howard Liberal-National Government, Australia would become a bastion of institutional racism and the least co-operative of the Anglo settler states – especially in relation to the adoption of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

RISE OF THE MINORITIES

In addition to Indigenous delegates, hundreds of representatives of minorities were also present at Vienna. Often closely engaged with their Indigenous counterparts, minority activists were sometimes linked and confused with them. Human rights issues were also issues for members of minorities and in some cases, minority enclaves were at the same time, arguably, Indigenous communities. In mainland China (People’s Republic of China or PRC) for example, many State designated *minorities* were able to assert and demonstrate cultural distinctiveness in relation to language, dress and ‘folkways’ in combination with unbroken occupation of their specific territory for tens of thousands of years, prior to ‘conquest’ by the majority Han Chinese. For a range of cultural, political and legal reasons, the PRC Government has

insisted that non-Han populations are resident ‘minorities’ – but are not ‘Indigenous’. By contrast, in Taiwan (Republic of China), recent national governments have proclaimed that recognized minorities consist of ‘Aboriginal peoples’ with specific and permanent territories that predate the arrival of Chinese ‘settlers, traders and officials’ in the modern era, and the Japanese invasion and occupation (1895–1945). (This information is drawn from the author’s direct engagement with Indigenous communities, the university sector, church leaders and government ministers in the Republic of China in 1998 and 1999 and with Hong Kong Government representatives in 1999.)

MINORITY PEOPLES AND INDIGENOUS PEOPLES

It is important to realize that in 1993 being a member of an Indigenous community and an Indigenous person were not necessarily simple or straightforward matters. At the UN, Norwegian expert member Asbjorn Eide undertook a major study of the circumstances of minority populations, commencing in 1990. The study was entitled *Possible Ways and Means of Facilitating the Peaceful and Constructive Solution of Problems Involving Minorities* (Minorities and the UN 2015, p. 1). In early 1993 Eide led a major seminar convened by the Geneva UN Centre on Human Rights in which the MRG played a significant role. Eide’s study involved a survey of the policies and practices of governments in relation to recognized minorities. Interestingly, Eide invited a large number of non-government organizations to contribute both evidence and expert advice. The MRG also organized a follow-up event in Geneva at which experts from various parts of the world contributed their views (Minorities and the UN I Cultural Survival 2015, p. 1). A large body of material was amassed including ‘a comprehensive and valuable set of recommendations concerning the promotion of minority rights and inter-community cooperation’ (Minorities and the UN I Cultural Survival 2015, p. 1). Speaking at the Vienna Conference, Eide called upon the Commission on Human Rights to examine ways and means to effectively promote and protect minority rights (Minorities and the UN I Cultural Survival 2015, p. 2). It can be argued that minority rights are even more controversial and fragile than Indigenous rights.

One key difference is the absence of an established or at least notional geographical territory. In general, minority members are unable to claim or even describe a meaningful connection to a given expanse of land or sea. They often lack religious or spiritual links to a specific environment and are unlikely to possess a fully-fledged, continuous and separate cultural tradition that includes law, visual arts, music and performance. Minority spokespeople have argued that an acceptance of mobility and adaptability have enabled minority communities to survive, and to contribute at many levels to the economic, political and social life of the larger society. In most cases, minority activists understood that they could not build a sustainable case on the concept of prior occupation or prior ownership. Instead, many organized and ran their campaigns on the basis of the desirability of diversity and the benefits of multiculturalism. By the early 1990s resurgent ethnic nationalism, religious fundamentalism and politically useful xenophobia had combined to make the minority space an increasingly dangerous and problematic one. In Vienna Asbjorn Eide contended that the rights of minorities were not well understood. Article 27 of the UN Covenant on Civil and Political Rights states that:

In those states in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right . . . to enjoy their own culture, to profess and practice their own religion, or to use their own language (Minorities and the UN I Cultural Survival 2015, p. 5).

ASBJORN EIDE AND INCLUSIVITY

Eide provided a theoretical and practical framework for the development of principles specific to the rights of members of minority groups. Eide understood that the ways of achieving group rights for minorities were complex. He began by recognizing the importance of *identity*, which he saw as the cardinal principle of minority rights (Cultural Survival 2015, p. 5). He emphasized that the protection of minority rights does not have to occur to the detriment of community or individual rights. Eide also understood that minority rights are necessarily controversial and potentially divisive in multi-ethnic and multicultural societies. The pre-existing and often state-sponsored concepts referred to as equal opportunity and level playing field are both at odds with the minority rights agenda, which seeks to maintain and enhance the internal fabric

and external profile of a given minority in neutral, negative, and even hostile regional and national contexts. Asbjorn Eide's answer was to explore and reinforce pluralism by developing and promoting 'Pluralism in Togetherness'. Within this framework, participation, power-sharing and the devolution of state power and authority (Cultural Survival 2015, p. 6) became key elements of a radical rebuilding of the secure, inclusive and benevolent nation. It would appear that 1993 was a time of promise and optimism. The Vienna Conference was a statement of the ideas and attitudes of the time. Such concepts were already established and accepted in many quarters and were seen by some as the re-discovery of the benchmark Declaration of Human Rights, or the re-awakening of the 'Spirit of '48'. The efforts of minorities representatives were instrumental in achieving the recognition reflected by the inclusion of three minority-specific recommendations (Nos. 25, 26 and 27) in the Programme of Action. Recommendation 25 is the longest and forms the foundation for the other two Recommendations:

The WCHR calls on the Commission on Human Rights to examine ways and means to promote and protect effectively the rights of persons belonging to minorities as set out in the Declaration on the Rights of Persons belonging to National or Ethnic, Religious and Linguistic Minorities. In this context, the WCHR calls upon the Centre for Human Rights to provide, at the request of governments concerned and as part of its programme of advisory services and technical assistance, qualified expertise on minority issues and Human Rights as well as on the prevention and resolution of disputes (UN – WCHR – Vienna Declaration in *Human Rights Law Journal*, 1993, p. 359).

So while it would appear that the minorities lobby enjoyed a lesser profile and more modest media signature than the Indigenous movement, it is clear that by 1993 they had already secured a UN Declaration specific to their rights. It is likely that states representatives were less troubled by the possibility of a Minorities Declaration as members of minorities (unless also members of Indigenous communities) have not been in the habit of claiming 'traditional' or native title to the lands and seas that constitute their 'homelands'. On the contrary, some wealthy post-industrial societies have seized the opportunity, offered by the minorities initiative, to portray themselves as champions of 'persons and communities of difference', particularly when those 'differences' are perceived as culturally and economically unthreatening.

Recommendation 26 concerns the responsibility of member States to nurture and reinforce the rights and endorse the acceptance of persons who are members of minorities.

The WCHR urges states and the international community to promote and protect the rights of persons belonging to national or ethnic, religious and linguistic minorities in accordance with the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (UN – WCHR – Vienna Declaration in *Human Rights Law Journal*, 1993, p. 359).

Recommendation 27 concerns funding and administrative support for Minority members and their communities and outlines the commitment to greater inclusion and engagement.

Measures to be taken, where appropriate should include facilitation of their participation in all aspects of the political, economic, social, religious and cultural life of society and in the economic progress and development in their country (UN – WCHR – Vienna Declaration in *Human Rights Law Journal*, p. 359).

Taken as a whole, the minorities Recommendations constitute a call for more comprehensive inclusion and greater participation on the part of members of minorities. The Recommendations regarding minorities are more straightforward and less problematic than those concerning Indigenous peoples. The fundamental difference is that although they have suffered centuries or even millennia of mistreatment, minorities – at least in the modern era – have not seen their lands and livelihoods seized, occupied and/or undermined by colonists and their post-colonial descendants.

OBSERVATIONS OF A BRAZILIAN DIPLOMAT

Brazilian diplomat Jose Lindgren Alves who was present at the Vienna Conference in June 1993 has observed that:

The most meaningful . . . step toward the formal universalization of the 1948 Declaration was taken in June 1993 at the World Conference on Human Rights in Vienna - the largest international gathering ever convened on the theme of Human Rights. At the end of June, the Vienna Declaration and Programme of

Action was adopted by consensus, without a vote or reservations – although with some interpretive statements (Alves 2000, p. 482).

Having identified significant developments in the area of human rights, Alves has outlined them in considerable detail. Alves revisits what he considers the most significant paragraph of the Vienna Declaration, which, though failing to placate more militant critics, emphasized and clarified the pre-eminence of human rights. Article 5 of the Vienna Declaration states:

While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms (Alves 2000, p. 483).

Alves was mindful of the continuing presence and influence of the cultural relativists, but argued that Vienna represented a successful ‘holding operation’ – safeguarding the fundamental values of the 1948 Declaration, while acknowledging the reality of a broad and dynamic range of value positions in the new multipolar world. Apparently overwhelmed by the complexity of philosophical and political complexity that confronted him, Alves sought refuge in postmodern theory, at the expense of thoroughgoing analysis underpinned by more precise and functional approaches. By contrast, the majority of delegates present at the World Indigenous Peoples Conference (Education) on the main campus of the University of Wollongong, 11 to 17 December, 1993, were looking for new approaches to longstanding and overwhelming social and political issues. Many were committed to the concept of ‘Indigenous-based solutions to Indigenous problems’ – a phrase popularised by Palawan/Indigenous Tasmanian spokesman Dr Japanangka Errol West (1947–2001). West was a member of the organizing committee and panel chair at the Wollongong Conference. ‘Woolly West’ (a reference to his extraordinary head of hair) or ‘Big Errol’ (probably the tallest and heaviest man present at the Conference) was also a staunch supporter of the global Indigenous initiative and a United Nations enthusiast.

INDIGENOUS DELEGATES 'TALKING THE TALK'

On 12th June, two days before the Conference was due to commence, Carmen Alicia Fernandez interviewed Indigenous delegates and informed her readers that:

Representatives of Asian and American Indigenous peoples have come to Vienna armed with the hope that the World Conference on Human Rights will make other residents of the planet sensitive to their problems (Fernandez 1993, p. 172).

Euclides Ferreira of the Indigenous Council of Roraima informed Fernandez that close engagement with fellow Indigenes was a thought-provoking experience. He explained: "Meeting my brothers from Latin America, North America and Asia has [triggered] a painful recollection of abuses at the hands of so-called 'civilized men'" (in Fernandez 1993, p. 172). Ferreira suggested that in almost every corner of the world, Indigenous people faced the same problems in varying degrees and were prepared to struggle to resolve them using the 'weapons' provided by 'civilization'. Not military weapons, he added, but 'paper and words', preparing global and regional documents to be presented at the Conference, on a 'special day' devoted to the International Year of Indigenous Peoples and Aboriginal communities. Ferreira emphasized that for him the fundamental issue was the right to life of Aboriginal communities. He explained: "These are communities of people who need their land and their traditions to live" (in Fernandez 1993, p. 172). Jesus Bello, an associate of Ferreira and representative of the Apostolic Vicarate of Puerto Ayacucho in Venezuela, declared that for him the priority was "Real recognition by the international community of the terrible living conditions Indigenous people face throughout the world. Indigenous people are the most marginalized of the marginalized", Jesus insisted (in Fernandez 1993, p. 172).

Since the late '80s non-government organizations (NGOs) had become heavily involved – particularly in south Asia and the Americas. Starting from a position of limited knowledge, the NGOs had quickly constructed an appreciation of the Indigenous/non-Indigenous nexus which revealed that many governments had initiated 'structural adjustment' programmes at the behest of global (often mining-based) corporations and even the IMF and World Bank (Fernandez 1993, p. 172). In a

prepared statement entitled 'Development Aggression', a community-based consortium under the banner 'Indigenous Peoples of East Asia' demanded the adoption of an 'inclusive' mindset, insisting that Indigenous peoples are an integral part of the national and international political scene, and should therefore not be perceived as separate from the political and economic life of the nation. Fernandez noted that the sometimes quaint and generally colourful costumes of the participants were not indicative of a lack of international experience or 'street wisdom' on their part. A number of her respondents demonstrated that past and painful engagement with state and corporate interests had made them wary and calculating in orientation. Pedro Rodriguez of Costa Rica was especially forthcoming, explaining: "In June 1992, during the Earth Summit in Rio, we (Indigenous delegates) were treated like stars. The role of native peoples as the guardians of nature was exalted – yet no declaration was produced on our behalf! We refuse to be used like that again. . . We need the support of all NGOs present, to exert strong pressure on the system" (Fernandez 1993, p. 172).

Many Indigenous respondents emphasized the utility and value of global Indigenous heritage, explaining that Aboriginal technologies and traditions remain relevant in today's high-tech world. For example, pharmaceuticals derived from plants and other sources known to First Nations communities have been adopted and harnessed by Western science and commerce, contributing to many of the medical 'breakthroughs' of the late twentieth century. According to Fernandez, the estimated annual market value of medicines and other products derived from Indigenous-based technologies exceeded 43 billion dollars (in 1993 US Dollars) – representing a major and growing aspect of world scientific and commercial production (Fernandez, 1993, p. 173). In addition to outlining the continuing relevance of Indigenous peoples and Indigenous knowledge, activists interviewed by Carmen Fernandez seized the opportunity to urge that the Year of the World's Indigenous People be extended to become an Indigenous decade. They also sought to focus attention on the Draft Declaration, calling for an accelerated process to carry the project forward to a successful conclusion (Fernandez 1993, p. 173). There can be little doubt that June 1993 was a time of solidarity and optimism for many First Nations representatives.

Surrounded by thousands of other participants and an overwhelming array of issues and agendas, they clung to their mission and shared their new knowledge, gaining insights and strength from one another. It is likely many struggled with the scale, formality and complexity of the UN system as it unfolded at the Austria Centre – principal venue for the Conference. Unfortunately, few of the Indigenous Australians present in Geneva and/or Vienna in the early 1990s have provided written testimony or commentary regarding their involvement. Professor Irene Watson of the University of South Australia is one who has done so. Watson paints a picture of a politicized Working Group [WGIP], wracked by internal disputes and cajoled by other UN elements to bring the writing of the Draft Declaration to a successful conclusion (Watson 2001 in Garkawe, Kelly & Fisher 2001, p. 26). Watson argues that the onset of 1993 and the Vienna Conference in June were critical points in the life histories of both the WGIP and the Draft Declaration. With the proclamation of 1993 as the UN Year of Indigenous People, the WGIP found itself subjected to renewed calls from the General Assembly for the Draft to be finalized. Later, when the Conference got underway in Vienna, the WGIP received further demands from the General Assembly for completion of the Draft (Watson 2001 in Garkawe, Kelly & Fisher 2001, p. 26). Watson notes that the ending of the central role of the WGIP in the Indigenous Declaration drafting process in the aftermath of Vienna was significant. It seems that for some it marked a critical point in the history of Indigenous activism at the UN. Watson contends that the decision to ‘dump’ the WGIP was made without a formal mandate, or the full support of Indigenous participants in the WGIP (Watson 2001 in Garkawe, Kelly & Fisher 2001, p. 26).

In an Overview prepared at the request of the *Human Rights Law Journal* (HRLJ) by the UN Centre for Human Rights in Geneva (*Human Rights Law Journal*, Vol. 14, Nos 9 – 10, 1993 p. 346), the implementation of the formal programme of the Conference is described.

World Conference on Human Rights official Programme, 14–25 June, 1993

The General Debate in the Plenary represented the core of the official Vienna programme and spanned the entire eleven days (HRLJ 1993, p. 346). Representatives of States, liberation movements, specialized agencies, intergovernmental

organizations, treaty-based bodies, national and international human rights institutions and non-government organizations (NGOs) were scheduled to address the Conference (For the Agenda of the Vienna Conference see document A/CONF.1571)(HRLJ 1993, pp. 346-347). The General Debate served as an ongoing forum where in the first instance, Heads of Government or Heads of Mission or their representatives articulated the views of their respective States. The views that were enunciated concerned human rights and fundamental freedoms, but were not limited to those themes. Non-state spokespeople expressed the revised positions of their organizations and took the opportunity to present the achievements of their group in a favourable light. A number of commentators have described a *rich diversity* of views across a broad spectrum of States and NGOs (HRLJ 1993, p. 347). Not surprisingly, statements by representatives of the major powers and regional blocs received considerable attention. Warren Christopher, US Secretary of State outlined an 'Action Plan' for human rights which incorporated a renewed emphasis on 'preventive diplomacy' and allocation of additional resources to the Centre for Human Rights and the establishment of the position of High Commissioner for Human Rights. He was later supported on both points by N T Mbu, Nigerian Minister for Foreign Affairs and Niels Helvig Petersen, Danish Minister for Foreign Affairs and spokesperson for the European community. Yasser Arafat, Chairman of the Palestine Liberation Organization (PLO) spoke in support of the universalist position and emphasized the continuing need to uphold human rights and fundamental freedoms. There were scores of other presentations in parallel meetings, and often longer and more detailed presentations by 'independent experts' responsible for development of special procedures for the protection of human rights (HRLJ 1993, p. 347).

The Conference Plenary included the 'permanent presence' of over 3,700 representatives of 841 registered NGOs, in addition to less numerous States' representatives, and local and international media and their equipment. On the first day of the General Debate (14th June) Manfred Nowak, General Rapporteur for NGOs (now Professor of International Law at the University of Vienna and a person I am hoping to bring onboard' the Big Gubba project), presented the results and overview of the earlier NGO gathering entitled 'All Human Rights for All' which had taken place

at the Austria Centre earlier in June (HRLJ 1993, p. 347). In the interests of efficient management, joint statements by NGOs were encouraged. A total of sixty-nine joint NGO statements were presented during the eleven days (14–25 June). The Plenary was also the venue for the official commemoration of the Year of the World's Indigenous Peoples on the Theme Day for First Nations Peoples. On that day Erica-Irene Daes, Chairman and Rapporteur of the Working Group on Indigenous Populations, argued that the use of the word 'people' instead of 'peoples' in the final document should not be legitimized (HRLJ 1993, p. 348).

ARRIVAL OF THE 'INDIGENOUS PEOPLE' OR 'INDIGENOUS PEOPLES'. . .

This went on to become the so-called 'S' debate. Continuing for some time after the Vienna Conference, the debate focussed on rejection of the term 'Indigenous people' in favour of the alternative form 'Indigenous peoples'. A number of scholars have devoted time and space to discussion of this matter, identifying it as a means by which to engage with longstanding and divisive issues that emerged within the UN and across the larger global political arena. Paul Keal begins his discussion by referring to the right of 'peoples' to self-determination, inscribed in Article 1 of both the ICCPR and ICESCR. Keal argues that neither was written with Indigenous peoples in mind (Keal 2003, p. 141). While the mid-twentieth century concept of 'peoples' was generally understood to mean societies overrun and overpowered by European empires since Columbus, States representatives have been consistent in their efforts to adopt positions calculated to pre-empt Indigenous claims to self-determination. Some States have clung to the term 'Indigenous populations', consistently resisting the alternative form 'Indigenous peoples'. From the early 1990s, government representatives within the Working Group argued that Indigenous peoples should be seen as 'minority groups within the state' (Keal 2003, p. 142), a position strongly resisted by First Nations advocates. Government spokespeople have contended that Indigenous peoples are not entitled to self-determination under international law. Instead, they have urged that decolonization and liberation from foreign occupation are irrelevant to Indigenous communities located within the territories of contemporary sovereign states. As Keal asserts – governments have preferred the term 'Indigenous populations' to 'Indigenous peoples', to avoid the implication that

Indigenous Peoples – like all other ‘peoples’ – are entitled to the right to self-determination (Irons-Magallanes, 1999 in Havemann 1999 in Keal 2003 p. 142). So, States have been comfortable with the term ‘populations’, but have preferred ‘people’ to ‘peoples’ because, as Dianne Otto has argued – this practice collapses Indigenous groups into a single broad category, devoid of specific or distinct geographical or cultural meaning. . . It is a form of ‘Orientalism’, reflecting the continuing power (and utility) of the colonialist discourse (Otto 1995 in Keal 2003, p. 142). Importantly, this approach disowns the profound differences between groups or ‘nations’ of Indigenes, refusing to accept the separate existence and unique cultural heritage of each. This issue was raised and pursued, but not resolved at the Vienna Conference. Observers were forced to confront attention to detail and intellectual rigour of the participants and to see Indigenous representatives in a new light.

No longer handicapped by markedly inferior educational backgrounds and skill sets at odds with the demands of the modern world, Indigenous representatives had become daunting and effective adversaries. Perhaps the greatest challenge was to seize and defend the necessary ‘air time’ in the international media. Power posturing, the long-anticipated showdown between cultural relativists and universalists, the demands of the international women’s movement, and incidents and atrocities in nearby Balkan war zones represented overwhelming competition in the global media village. Yet Indigenous activists and their supporters remained newsworthy throughout the Conference and for the remainder of 1993. The Year and (eventually) Decade of the World’s Indigenous Peoples provided the necessary underpinning to Indigenous media visibility and political viability. In concrete terms, the emerging Draft Declaration on the Rights of Indigenous Peoples constituted the ‘unfinished business’ that was needed. The struggle to complete and refine the Draft Declaration paralleled the struggles that characterized the Indigenous movement as a whole. In both cases, Indigenous representatives needed to work closely and patiently as members of organizations and communities before taking their case to the non-Indigenous majority that dominated the system as a whole. In both cases, commitment, solidarity and good humour would be decisive.

THE VIENNA DECLARATION AND PROGRAMME OF ACTION

The Vienna Conference produced the Vienna Declaration and Programme of Action containing a total of 100 Recommendations. Recommendations 25, 26 and 27 concern *Persons belonging to national or ethnic, religious and linguistic minorities*. The next set of Recommendations (28, 29, 30, 31 and 32) relate to *Indigenous people*. The set devoted to *Migrant workers* consists of Recommendations 33, 34 and 35, followed by the set of Recommendations with the heading *The equal status and human rights of women*. The women's section contains Recommendations 36, 37, 38, 39, 40, 41, 42, 43 and 44. Next follows the Recommendations devoted to children under the heading *The rights of the child*. The children's section contains Recommendations 45, 46, 47, 48, 49, 50, 51, 52 and 53 (HRLJ 1993, p. 359). It is appropriate to examine the section *Indigenous people* more closely.

INDIGENOUS PEOPLE IN THE VIENNA DECLARATION AND PROGRAMME OF ACTION

The section opens with Recommendation 28, which is entirely concerned with the drafting of a Declaration on the Rights of Indigenous people, to be completed at the eleventh session of the Working Group on Indigenous Populations (HRLJ 1993, p. 359). It seems that as well as having become a preoccupation of many Indigenous activists at the Conference, the Declaration was considered essential to the progress of the Indigenous agenda at the UN. Recommendation 29 concerns the Commission on Human Rights, recommending that it consider the renewal and updating of the mandate of the Working Group on Indigenous Populations upon completion of the drafting of a Declaration on the Rights of Indigenous People (HRLJ 1993, p. 359). This recommendation indicates that there was an appreciation of the importance of the Working Group and that significant elements were eager to retain and even expand the roles and responsibilities of the WGIP. Recommendation 30 addresses the issue of logistic and financial support to States in relation to Indigenous peoples. It recommends that advisory services and technical assistance within the UN system respond positively to requests by States for assistance, which could be of direct benefit to Indigenous people. There is also a recommendation that adequate human and financial resources be made available to the Centre for Human Rights with a view

to strengthening the Centre's activities (HRLJ 1993, p. 359). This is a practical and realistic recommendation that demonstrates an awareness of the importance of funding and co-ordination within and between UN elements.

Recommendation 31, one of the shortest in the entire document, shows signs of direct Indigenous influence. It reads as follows: The WCHR urges states to ensure the full and free participation of Indigenous people in all aspects of society, in particular, in matters of concern to them (HRLJ 1993, p. 359). It is likely this recommendation would have been well received by Indigenous people present on the day and that some had a hand in making it happen. The last Recommendation, specifically relating to Indigenous people, is Recommendation 32, which has two parts. The first part concerns the recommendation to proclaim an International Decade of the World's Indigenous People from January 1994, including action-orientated programmes, to be decided upon in partnership with Indigenous people. Demonstrating a practical focus, there is also a recommendation that an appropriate voluntary trust fund be set up for this purpose. In one sentence (at the end of the paragraph) is mention of a permanent forum. The sentence reads: In the framework of such a decade, the establishment of a permanent forum for Indigenous people in the United Nations system should be considered (HRLJ 1993, p. 359). This last sentence proved to be of significance as the Permanent Forum went on to become a centre of Indigenous political and cultural activity in following decades.

CONCLUSION

Many commentators and analysts, including McGrew (1998), Keal (2003), Anaya (2004), De Costa (2006) and Burke (2010), have devoted considerable attention to the 1993 UN Human Rights Conference in Vienna. A majority view has emerged that eleven consecutive days in the summer of 1993 (14 – 25 June) constituted a 'wake-up call' for a fragmented and discordant United Nations and changed the course of history for the world's Indigenous peoples. It is argued that without Vienna, the UN Decade of the World's Indigenous Peoples might not have occurred, or may have been conducted at a lower level of intensity. It is also suggested that without the impetus and formal endorsement of Vienna, progress on the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) may have stalled or become a permanent 'battleground'

of opposing regional factions and fragile temporary coalitions. Where the evolution of UNDRIP is concerned, most authors provide little by way of explanation. With the increasing importance of differences between North and South and the emergence of the international women's movement as the 'main force', circumstances were less than ideal for Indigenous delegates. At the same time, the existence and 'pulling power' of larger issues helped to create 'spaces' for Indigenous activists and their supporters.

From late 1993, the Draft Declaration continued on its long and winding journey through the UN system, culminating in eventual adoption by the General Assembly in 2007. A majority of authors contend that Vienna was the 'watershed' for Indigenous peoples as actors on the world stage. This interpretation misses much of the political drama and hidden complexity of the Indigenous campaign which commenced in earnest well before the first delegates arrived in Vienna. At the time, attention focussed on the Year and subsequent Decade of the World's Indigenous People(s). The Draft Declaration was new, unfinished and persistently controversial. The UNDRIP initiative gained support and some protection from its connection with the 'Year' and 'Decade' initiatives, but by mid-1993 UNDRIP had already created a role and a political domain of its own.

CHAPTER 5 - DRAFTING THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

INTRODUCTION

The drafting of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) was a protracted process that spanned almost four decades. While commentators have chosen a number of different starting points, the process began – in small and quiet ways – during the 1970s. Professor of Law and Alaskan Inuit spokesperson Dalee Sambo Dorough was a young woman on the fringes of preliminary discussions concerning a ‘universal declaration of Indigenous rights’ in the mid-1970s. Professor Sambo Dorough recalled the atmosphere of excitement and expectation that prevailed at the time:

“We all shared a sense that this new initiative was special – something that would make a difference to our lives and to the lives of Inuit everywhere. I also felt – as young people often do when a new cause presents itself – that this was going to be something of consequence and that would be significant for me as an individual . . .” (Sambo Dorough, Anchorage, 25th April, 2016, p. 1).

As a long-term participant and central character in the story of the making of the Indigenous Declaration, Sambo Dorough experienced the highs and lows of life as an Indigenous person on the world stage:

“Looking back, I can say that my involvement with UNDRIP has come at a high price on a personal level. . . The whole process has certainly taken its toll. I really threw myself into it and stayed with the project to the end – even after the formal adoption in 2007. The truth is, I have been involved with UNDRIP for most of my life. More recently, I have maintained a connection through my engagement with the UN Permanent Forum on Indigenous issues” (Sambo Dorough, Anchorage, 26th April, 2016, p. 1).

It is generally assumed that the process of drafting the Declaration was one small but distinctive chapter in the history of the United Nations. Instead, the drafting process consisted of a sequence of chapters or episodes – each shaped by circumstances and people at the time. The drafting can be divided into six distinct phases. The 1970s saw the rise of the concept of an ‘Indigenous Declaration’. The 1980s included the first large-scale First Nations meetings and negotiations concerning the Declaration. The establishment of the Working Group Indigenous Populations (WGIP), with specific responsibility for the creation of a Draft Declaration in 1981, was a watershed and ‘game-changer’ for both Indigenous peoples and the United Nations. Throughout the late 1980s consultation with Indigenous individuals and organizations continued in earnest, especially after Erica-Irene Daes was appointed Chairperson of the Working Group.

Geoff Clark, former Chairperson of the Aboriginal and Torres Strait Islander Commission (ATSIC), recently expressed the views of many Indigenous UN delegates declaring:

“Working Group Chairperson Madam Erica Daes from Greece was outstanding and very much on our side. She was a tough lady. She was very hard, but very fair. . . . So many times she would say, ‘This is not a complaints forum. We are not here for that purpose. If you have a complaint that you must express, by all means, take it somewhere else.’ That was her style . . .” (Geoff Clark, near Warrnambool, Victoria, 27th February 2016, p. 4).

The Draft Declaration was repeatedly ‘refined’ during the 1990s – which represented the third phase. At the same time, the UN re-focussed its attention on Human Rights, convening the second UN World Conference on Human Rights at Vienna in June 1993. The UN also increased its engagement with Indigenous Peoples, proclaiming the UN Year for the World’s Indigenous People (1993) and the UN Decade of Indigenous Peoples – later extended to two decades (1993–2013). Consultations with Indigenous organizations and individuals continued in earnest. The fourth phase was the stalemate of the late 1990s and early 2000s, when the ‘march’ towards Adoption of the Declaration slowed to a crawl.

Entrenched obstruction from a small number of resistant States – led by the CANZUS group (Canada, Australia, New Zealand and the United States) – combined with indigenous disunity and disillusionment to undermine the drafting process and jeopardize the chances of eventual adoption by the UN General Assembly. The explicit and sustained support of a number of States ensured the survival of the enterprise. The well-timed and carefully co-ordinated decision by the Scandinavian governments to declare themselves ‘Friends of the Declaration’ proved decisive and the Declaration continued along its pre-determined path.

The years 2004, 2005 and 2006 represented the fifth and most dangerous phase. The dramatic unfolding and sudden collapse of the UN Indigenous Hunger Strike in November 2004 set the tone for the next two years. Disengagement and departure of a significant proportion of Indigenous delegates and activists from North America, Mexico, South America, Asia and especially New Zealand occurred during 2005 and 2006. Finally, 2007 represented the sixth and climactic phase. Advocates and critics of the Declaration were on the front foot as intrigue, de-stabilization, re-alignment and deal-making reached new heights. Political and diplomatic manoeuvring continued all the way through to the moment of the final vote on the floor of the UN General Assembly in New York on the morning of 13th September, 2007.

‘GROWING’ THE DOCUMENT

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was constructed and re-constructed phrase-by-phrase and word-by-word through the last two decades of the twentieth century and the first decade of the twenty-first century. The process of composition commenced in the early 1980s and culminated in the adoption of the Declaration in 2007. The ‘drafting’ of the Declaration was a complex process. The sequence of development was a combination of interconnected processes – each one dynamic, but also problematic and fragile. The processes can be described as rewriting, consulting, lobbying and above all – negotiating. Multi-level and intensive negotiating characterizes the Geneva version of the UN system. As the home of UN human rights, Geneva is a place where the traditions of European diplomacy combine with the moral imperatives of twenty-first century western cultural reinvention.

The drafting of UNDRIP took place in and around the *Palais des Nations* in Geneva and later at the UN precinct in New York. With a few notable exceptions, participants changed over time. The expectations and aspirations of the world's Indigenous peoples also evolved during three decades of protest, organization and collaboration. Commentators have been divided in their handling of the Story of the Declaration. Some including Watson (2001), Niezen (2003), Stewart-Harawira (2009) and Beier (2009) have emphasized the importance of UN structure and culture. Others including Pulitano (2012), Dodson (2016), Clark (2016) and Malezer (2016) have focussed on the influence of non-government organizations and individuals – many of them Indigenous. Each commentator has approached and observed the operations of the UN from a different angle, focussing on those aspects closest to his or her own experience.

DIFFERING INTERPRETATIONS OF THE DRAFTING EXPERIENCE

Indigenous Australian academic and lawyer Irene Watson has contended that in 1993 the General Assembly imposed a 'deadline' on the Working Group in an effort to ensure the completion of the Draft Declaration. Watson explained:

In 1993 the Working Group Indigenous Peoples (WGIP) came under pressure from the General Assembly to complete the *Draft Declaration*. At this time, the UN was proclaiming the Year of the World's Indigenous Peoples. This request was repeated at the UN World Conference on Human Rights at Vienna in June of the same year (Watson in Garkawe, Kelly & Fisher 2001, p. 26).

There is evidence that elements within the General Assembly were anxious to secure the completion of the Draft Declaration. Yet this was not necessarily the view of the General Assembly as a whole. Many States' representatives were more concerned about the contents of the Declaration than about the pace of production. Those acting on behalf of supportive States were hopeful that the document would encapsulate the views and aspirations of Indigenous communities in every hemisphere. On the other hand, representatives of resistant States were determined to prevent the creation and adoption of a Declaration that might undermine their economic

interests, or compromise the territorial integrity of member States, individually or collectively.

A third category of States – in most cases lacking sizable Indigenous populations of their own – were less interested in the process and largely unconcerned about the possible outcomes. The majority of ‘uncommitted’ States were positioned somewhere in the middle. From 2004 the drafting of the Declaration ‘stalled’ and many First Nations representatives and organizations supporting them were becoming increasingly anxious. Amongst the Indigenous Australians, Geoff Clark, Chairperson of the Aboriginal and Torres Strait Island Commission (ATSIC) was one of the first to realize that things were not looking good:

“In 2004, 2005 and especially 2006, things looked bad – very bad. The Declaration was not up and running. It was just in limbo. A lot of people and their supporters back home were losing patience. Our representatives were losing the will to fight. People needed something tangible to show the mob. They also needed to convince themselves that it had all been worth the effort; that it had been worth all the sacrifices they had made in terms of their families and their personal lives” (Geoff Clark, near Warrnambool, 27th February, 2016).

While many First Nations spokespeople were approaching crisis point, diplomats and staffers representing the resistant States were also feeling the strain. Representatives of the CANZUS States – Canada, Australia, New Zealand and the United States – were reminded of their countries’ determination to resist Indigenous demands at every opportunity. Non-Indigenous diplomats and functionaries could see that First Nations representation was becoming ‘patchy’, and noticed that staff were being replaced more frequently and sometimes without warning. Even to an outside observer, there were signs that the Indigenous were entering a troubled time. Les Malezer recalls:

“It was not easy to maintain a presence in Geneva. Still, some groups made adjustments and even shared facilities and resources. The Sami and Inuit delegates worked closely together, demonstrating a willingness to share and support one another through those years. The Sami and Inuit were very

collaborative and others tried to learn from their example” (Malezer, Woolloongabba, 8th March, 2016, pp. 5–6).

WORKING GROUP OR WORKING GROUPS?

Irene Watson has declared that the decision to terminate the role of the Working Group in the drafting process was made in 1993. Watson has argued that the decision to sever the connection between the WGIP and the ongoing *Drafting* operation occurred without a ‘mandate’ or the full support of Indigenous participants in the Working Group (Watson in Garkawe, Kelly & Fisher 2001, p. 26). While it appears there was no formal ‘mandate,’ it is likely that the initiative would have enjoyed a measure of support. Many Indigenous participants were feeling the strain of years of networking, lobbying and compromise. At the same time, some were willing to continue to pursue their community and personal goals regardless of modifications to UN structures or procedures. Still, outwardly inconsequential adjustments often represented significant changes at deeper levels within the UN organization. Watson explained:

“At the 1994 WGIP session, presentations were made by Indigenous representatives both *for* and *against* transfer of the drafting of the Declaration from the WGIP to the Sub-Commission. It was argued by a number of speakers that the move was premature. Many claimed that the rules on participation of the Commission on Human Rights would disadvantage Indigenous peoples (Watson in Garkawe et al. 2001, p. 26).

The rules strongly favoured States’ representatives, allowed some scope for NGO representation, and were very restrictive in relation to Indigenous participation. Watson described the situation in detail:

“The rules of the Commission allowed for the participation of State representatives, and even NGO representatives (though with a limited right to participate – providing they were recognized by their respective States). This rule excluded Indigenous delegates from the process – unless they were ‘mandated’ through an NGO or supported by their respective State. It was made clear that Indigenous advocates who disagreed with the views of their national government

– a sizable proportion – would not be endorsed by the representatives of their government. This situation guaranteed a monopoly of States’ influence“ (Watson in Garkawe et al. 2001, p. 26).

GLOBAL INDIGENOUS COLLABORATION

At the same time, First Nations advocates were not without significant human resources and their own highly-developed and tight-knit alliance systems. The Indigenous network was sometimes called the ‘iceberg network’ because what was visible – in terms of alliances and initiatives – on any particular occasion was only a small percentage of what was actually there. Moreover the ‘big ideas’ were thought to drift down from the frozen North and could appear on the horizon without warning. By the early 2000s, Indigenes were a significant presence at the UN and were the frequent beneficiaries of media and NGO attention. Many UN insiders had come to accept the colourful and occasionally disruptive First Nations presence and the high public profile of the ‘UN expert system’. Les Malezer described the development of the underlying Indigenous /UN relationship:

“A strong relationship had evolved between Indigenous peoples and the UN, based on the UN ‘Expert’ system. The relationship had become increasingly formalized over time. The rising sophistication of Indigenous peoples transformed the relationship. By this stage [the early 2000s] we also had our own *Experts*. At the core of all this stood the co-operation that had developed between different groups of Indigenous people. In fact, the process of drafting the Declaration was a major factor in the creation of global Indigenous collaboration . . . (Malezer, Woolloongabba, 8th March, 2016, p. 6).

At the same time, the slow progress on the Declaration and increasingly strained relations between North American, Central and South American, Asian, Pacific (including Australian) and African delegates were cause for concern. In southern Alberta, Canada, Chief Reg Crowshoe of the Pi’ikani Nation – a survivor of the notorious Canadian Residential School system – heard rumours about changes within the UN Indigenous domain:

“We heard people talking about moving the United Nations Indigenous operation to New York. . . And then it happened. Suddenly the Permanent Forum was in New York and that made travel easier for us here in Alberta and for our brothers and sisters in the United States, but lines of communication became weaker and less important. When Indigenous activists and representatives moved their focus to New York, the foundations started to shift. I was elected chief when the full impact of all this started to hit home.” (Crowshoe, 20th April 2016, p. 4).

American Indian academic James Anaya has emphasized the consistency and continuity of the UN approach to the Draft Declaration. Anaya has stated that the Working Group completed its ‘final revision’ of the Draft Declaration in 1993, and that the revised document was then submitted to its parent bodies for further consideration (Anaya 2004, p. 63). The year 1994 also saw the establishment of a new ad hoc ‘working group’ (formalized in March 1995) to continue the process of refining the *Draft Declaration* (Anaya 2004, p. 63). Anaya has demonstrated the willingness of the UN Commission on Human Rights to accommodate the input of ‘Indigenous individuals and groups’ (Anaya 2004, p. 84). By this stage, elements within the UN realized that UN-sponsored Indigenous initiatives needed both inclusivity and momentum. First Nations spokespeople and delegates needed ongoing access to each other and to UN personnel. Any visible demonstration of exclusion would be interpreted as a ‘breach of faith’ and might trigger a negative and embarrassing reaction.

The Commission on Human Rights, by its resolution 1995/32 of 3rd March 1995 decided:

To establish, as a matter of priority and from within existing overall United Nations resources, an ‘*open-ended inter-sessional working group*’ of the Commission on Human Rights with the sole purpose of elaborating a draft declaration, considering the draft contained in the annex to resolution 1994/45 of 26 August 1994 of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, entitled draft ‘United Nations Declaration on the rights of Indigenous peoples’ for consideration and adoption by the General Assembly

within the International Decade of the World's Indigenous People" (Anaya 2004, pp. 84–85).

ACCEPTABLE TO A GREAT VARIETY OF STATES

This Resolution reveals the ongoing UN commitment to maintaining the Indigenous connection and determination to carry the UNDRIP project through to a conclusion. The document would need to be in a form acceptable to States. With newly elected or recently re-elected conservative governments in power in each of the CANZUS States and even in some European nations, the task of 'neutralizing' resistant States became an overwhelming challenge. Many Indigenous delegates had developed an exaggerated sense of security in Geneva, where they had almost become a 'part of the furniture'. Few would ever feel as comfortable in the more highly-charged and much less accommodating UN New York context.

For at least a decade, unprecedented access was enjoyed by Indigenous delegates at Geneva. The Sub-Commission's Working Group had established a new benchmark in relation to access and inclusiveness. Throughout the 1990s and into the early 2000s, the UN opened its doors to First Nations representatives – regardless of their organizational status or access to government or NGO sponsorship. Eventually there was a call for a return to *more limited access*. A compromise emerged along the following lines:

"An annex to the Commission's resolution 1995/32 establishes a procedure for 'organizations of Indigenous people' to be accredited to participate in the Commission's drafting working group. Although the procedure is designed to provide for greater participation by organizations and groups than that ordinarily allowed in the Commission's proceedings, it will likely result in a lower level of access to the drafting process than that which Indigenous peoples have enjoyed in the Sub-Commission's working group. The latter working group has allowed virtually any person who attends its meetings to participate in its deliberations, without prior accreditation . . ." (Anaya 2004, pp. 84–85).

At least two working groups were given responsibility for the writing and revision of the *Draft Declaration*. First, the well-known Working Group Indigenous Populations

(WGIP) and second, the successor working group — the less visible Human Rights Commission's 'drafting working group'. The second drafting body was less 'democratic' and less accessible to 'grassroots' Indigenes. Like Anaya, other commentators including Niezen (2003), Beier (2009), Dodson (2016), Clark (2016) and Malezer (2016) have indicated that the situation was highly-politicized. Only Anaya has identified two distinct 'working groups'.

ACCEPTING CIRCUMSTANCES AS THEY ARE

American anthropologist Ronald Niezen (2003) has contended that while the legal and bureaucratic processes of the United Nations represented a new and challenging environment for Indigenous representatives, the UN context did not displace Indigenes' traditional ways of knowing and doing. In Indigenous politics and negotiation there are few sudden beginnings or endings. The events of 1993–94 should be seen as 're-alignment' of an ongoing and complex pattern, rather than as reaching a point where the central approach changed in response to new circumstances. Niezen acknowledged:

The power of bureaucracy and law to transform societies cannot be denied. It is important to recognize that Indigenous peoples do not control these powers [but] are (also) subject to them. Bureaucracy and law have become much like climate and geography – facts of life in the environment of all societies. Indigenes set themselves apart by – among other things – their ability to accept such circumstances as they are, and to closely read the conditions in which they find themselves and to build their strategies for survival around them . . . (Niezen 2003, p. 144).

The approach and responses of 95 First Nations delegates in Geneva and Vienna in 1993 were consistent with the social and cultural realities described by Niezen. Indigenes apprehended their new circumstances with a view to securing any available advantage and maintaining the momentum of their 'long march' towards completion and eventual acceptance of the Draft Declaration. Structural and administrative changes at the UN were frequently a source of irritation. Many Indigenes hoped such changes would prove inconsequential in the larger scheme of things.

New Zealand Maori sociologist and feminist Makere Stewart-Harawira (Stewart-Harawira in Beier 2009) has described the nature and ramifications of the situation in the following terms:

The political spaces in which diplomacy, mediation and negotiation with States and other interested parties occur are not those constructed or originally practiced by Indigenous peoples. They are spaces that are constructed and bestowed by an imposed political regime . . . They are spaces within which diplomacy . . . is conceived as occupying a separate and distinct space from that of the Indigenous cosmological and philosophical world (Stewart-Harawira in Beier 2009, p. 210).

The core of Stewart-Harawira's argument is that Indigenous spokespeople, particularly First Nations representatives in international fora including the United Nations, have been strangers in an alien and threatening landscape. Those entrusted with the task of drafting the UN Declaration clung to their specific cultural traditions. They soon came to understand the magnitude of their mission. The creation and acceptance of a document that reflected the views and aspirations of the world's Indigenous peoples would not come easily. Still, creating such a document would prove to be the more achievable task. Ensuring that the document was 'acceptable' to governments would be the big test. Any Draft Declaration that contained elements deemed 'excessive' or 'unacceptable' would fall short of the numbers required.

Securing the acceptance of a Draft Declaration was a problematic endeavour, because the UN was designed to be a forum for States. Only with the support of a majority of States would the *Draft Declaration* have any hope of adoption by the General Assembly. And yet, securing that support risked losing the confidence and goodwill of a sizable proportion of First Nations communities, families and individuals. The 'balancing act' that emerged exacerbated frictions and deepened divisions that have continued to evolve. The words and concepts of the *Declaration* were only a small part of the problem for Indigenous delegates and their supporters.

THE DRAFT DECLARATION – A LONG, SLOW ROAD

A great number of commentators have identified and described the lengthy timeframe which began with the emergence of the concept of a global or ‘universal’ Indigenous declaration in the 1970s and ended with the adoption of UNDRIP on the floor of the General Assembly in New York on 13th September 2007. Many have attributed the ‘glacial speed’ of the evolution of the Declaration to the ‘box-ticking culture’ and ‘bureaucratic inertia’ of the UN. Others have portrayed the three decade long ‘marathon’ as a result of the ‘clash of attitudes and values’ that arose between Indigenous delegates and States’ representatives within the distinctive UN environment. Another approach has been to focus on the importance of ‘external factors’. Both Indigenous and States’ representatives were accountable to ‘people back home’ and other players. Community-based organizations and coalitions, NGOs of many kinds and extended family networks were all significant factors. For States’ representatives, national and provincial political authorities ensured that ‘accountability’ and a ‘results focus’ remained paramount. The drafting exercise became a ‘many cornered contest’ in which all the major forces and themes of the post-colonial Indigenous/government relationship were revealed. The slowness of the UNDRIP drafting process was a result of the impact of numerous and diverse influences both inside and outside the UN. In the words of veteran American Indian commentator Antonio Gonzales:

“Too many people, too many problems, too many agendas – and too much at stake. No one should have expected a quick result . . .” (Antonio Gonzales, American Indian Movement (West) Director, UN Liaison. Statement made at the Permanent Forum Indigenous Issues, UN Precinct, New York 10th May, 2016).

Ravi de Costa has devoted considerable attention to the slow progress of the Draft Declaration, explaining:

“Only two of the 45 Articles of the Draft Declaration were provisionally adopted during the first ten annual sessions of the IWG [WGIP]. In 2003 irritation at the lack of progress prompted a motion from Norway calling for a vote to adopt a broad tranche of Articles. This failed due to division among the States. During

the 2004 session the full extent of despondency and frustration amongst Indigenous representatives and their supporters was revealed” (De Costa 2006, p. 163).

HUNGER STRIKE AT *PALAIS DES NATIONS* – 29TH NOVEMBER TO 3RD DECEMBER 2004

Responding to the remarkable lack of progress, six Indigenous delegates commenced a *hunger strike* inside the *Palais des Nations*. The alleged ‘trigger’ for the hunger strike was the Chairperson’s decision to begin discussions on a text separate and distinct from the Draft Declaration that had already emerged from the WGIP.

A significant aspect of the issue was the late engagement of so-called ‘African bloc’, described by Mick Dodson in the following terms:

“The Africans came late to the Declaration process. In effect, the Africans wanted everyone else to go back to square one so they could have their say. We (Indigenous Australians) did not want to go down that road. By then, every single word that was in the draft document had been debated many times over. Our view was that we needed to keep going with what we had . . .” (Mick Dodson, Melbourne, 25th February, 2016, p. 4).

The six Indigenous delegates who participated in the hunger strike inside the UN complex in Geneva were:

Adelard Blackman of Buffalo River Dene Nation, Alberta (Canada)

Andrea Carmen of Yaqui Nation, Arizona (United States)

Alexis Tiouka of Kalina (French Guyana)

Charmaine White Face of Oglala Tetuwan, Sioux Nation Territory, North America (United States)

Danny Billie of Traditional Independent Seminole Nation of Florida (United States)

Saul Vicente of Zapoteca, (Mexico).

<http://www.reehawaii.org/indigenous.html> 8/31/2016 p. 1

Of those who embarked on the hunger strike, three were from the United States, with one each from Canada, French Guyana and Mexico. Two (Andrea and Charmaine) were women. On 29th November 2004 they issued a statement in English, Spanish and French in which they outlined the reasons for their “Hunger strike and spiritual fast inside the United Nations *Palais des Nations* in Geneva during this third week of the 10th session of the Intersessional Working Group on the United Nations Draft Declaration for the Rights on Indigenous Peoples.”

The statement is strong on specifics and details the immediate issues that had incensed the six hardline delegates. It also listed “organizations, nations, tribal governments and communities that had signed on in support of this action and of the position we [the hunger strikers] present”. The list contains the names of 122 Indigenous organizations throughout the world. Just one Australian organization is named – Sovereign Union of Aboriginal Nations and Peoples of Australia. Two Indigenous organizations in New Zealand are listed – Aotearoa Indigenous Rights Trust and Te Rau Aroha. Six Canadian First Nations organizations are also listed:

Buffalo River Dene Nation

Confederacy of Treaty 6 First Nations

Ermineskin Cree Nation

Indigenous Organization of Indigenous Resource Development (IOIRD)

Innu Council of Nitassinan

Union of British Columbia Indian Chiefs.

The listing for the United States contains the names of twelve organizations:

Abya Yala Nexus

Cactus Valley/Red Willow Springs Sovereign Community, Big Mountain, Arizona

Centro Mundo Maya

El Colectivo de Contacto Ancestral

Indigenous Environmental Network

Pitt River Tribe, California

Seminole Sovereignty Protection Initiative, Oklahoma

Teton Sioux Nation Treaty Council

Traditional Independent Seminole Nation of Florida

Wanblee Wakpesh Oyate Pine Ridge Reservation, South Dakota

White Clay Society, Fort Belknap Reservation Montana

Yoemem Tekia Foundation, Pascua Yaqui Reservation, Arizona.

The Nation of Hawaii (Hawaii) is listed under the Pacific region category rather than under 'United States'.

Mexico has the largest number of supporting organizations, with sixty-four listed.

(<http://www.reehawaii.org/indigenous.html> 8/31/2016 p. 1).

STATEMENT BY THE UN HUNGER STRIKERS

Clearly, the six UN hunger strikers enjoyed the support of an impressive number and wide range of Indigenous organizations. Their formal statement issued at 1100 on 29th November 2004, contains just seven short but revealing paragraphs:

We, Indigenous peoples' delegates from different countries undertake this action with the support and solidarity of Indigenous Peoples and organizations around the world to call the world's attention to the continued attempts by some States, as well as this UN process itself, to weaken and undermine the Draft Declaration developed in the UN Working Group on Indigenous Populations and adopted by the UN Sub Commission for the Prevention of Discrimination and Protection of Minorities in 1994.

The Sub Commission text has also been endorsed and supported by hundreds of Indigenous Peoples and organizations around the world as the minimum standard required for the recognition and protection of Indigenous Peoples' rights internationally.

We delegates who will undertake the hunger strike, along with the undersigned Indigenous Peoples' organizations, tribal governments, Nations, communities and Networks, call for the Sub Commission text of the Declaration to be sent back to the UN Commission on Human Rights with the message that in 10 years, proposals by States to weaken or amend the text have not gained the consensus of the Working Group participants, which include both States and Indigenous Peoples.

Mr Luis Chavez, the Chairman Rapporteur of the Working Group should report this reality and not present a 'consolidated text' as if it was 'close to consensus.' The Commission on Human Rights must establish a process that does not provide a handful of States an opportunity to weaken the human rights of Indigenous Peoples. The process must also take into account the voices of the great numbers of Indigenous Peoples from all parts of the world.

We will not allow our rights to be negotiated, compromised or diminished in this UN process, which was initiated more than 20 years ago by Indigenous Peoples. The United Nations itself says that human rights are inherent and inalienable, and must be applied to all Peoples without discrimination.

We request that the Secretariat of this session immediately inform the Office of the High Commissioner herself of this action. We also request that the Secretariat arrange for the hunger strikers to be able to remain in the UN during the entire week of the session.

<http://www..org/indigenous.html> 8/31/2016 p. 1).

REVISITING THE HUNGER STRIKERS' STATEMENT

The statement is a consciously political one intended to attract significant media attention. It undoubtedly achieved that aim, despite attempts to 'suppress' the incident. It is also a reflection of the prevailing mood and attitude amongst First Nations 'hardliners' in Geneva. While participant numbers were modest, the hunger strike struck a chord with Indigenes and their supporters. The authors specifically targeted:

“The continued attempts by some States [and the UN process itself] to weaken and undermine the Draft Declaration” (para. 2).

The strikers attested to the broad support enjoyed by the Sub-Commission text and emphasized that the Declaration was intended to represent a ‘minimum standard’ (para. 3). The statement also includes the demand that:

“The Sub-Commission text be sent back to the Commission on Human Rights with the ‘message’ that in [the previous] ten years proposals by States to weaken the text had failed to achieve consensus” and been rejected by both States’ and Indigenous representatives (para. 4).

Luis Chavez, the Chairman Rapporteur of the Working Group was singled out for special attention. The authors inferred that Chavez had misrepresented the situation and deliberately understated the level of support for the pre-existing text. They also rejected the option of a ‘consolidated text’ (presumably one that would include new elements devised and championed by States’ representatives). The hunger strikers condemned the actions of a ‘handful’ of States – the CANZUS States – and demanded a ‘process’ that would remove the ‘opportunity’ to weaken Indigenous human rights (para. 5).

References to ‘Human Rights’ feature prominently and the authors claim (correctly) that the UN process (drafting of the Declaration) was initiated more than twenty years earlier by Indigenous peoples (para. 6). The authors also request that the Office of the High Commissioner of Human Rights be informed of their actions and that the hunger strikers be permitted to remain within the *Palais des Nations* during the entire week of the session (para. 7). The hunger strikers’ statement is both a call to arms and a wakeup call, written and disseminated at a time of confrontation and impasse. By the end of 2004, Indigenes had lost considerable momentum. Divisions had emerged between different blocs and factions and States’ representatives appeared to be in the ascendant.

Responding to the hunger strike, the Indigenous People’s Caucus (commonly known as the ‘Indigenous Caucus’ and containing a significant number of Indigenous Australians) issued a statement that there was already substantial agreement on a

large number of Articles and that this (and only this) should constitute the basis for further discussions. Then, within two days of the Caucus response, the political landscape was radically transformed.

THE SUDDEN END OF THE UN HUNGER STRIKE

On the morning of Thursday, 2nd December 2004 it ended. After just four days, the UN Hunger Strike was over ('Hunger Strike by Indigenous Peoples – End of the Indigenous Hunger Strike' – Update 03 12 2004 (<http://ogiek.org/indepth/break-hunger-strike.htm> p. 1)).

In De Costa's account, the Chairman Rapporteur persuaded the hunger strikers to abandon their project, promising that their protest would be acknowledged in the Annual Report of the Commission of Human Rights (2006, pp. 111 & 163). Later the Australian Government representative acted to ensure that the hunger strike 'incident' was not included in the final version of the 2004 Annual Report (De Costa, 2006, pp. 111, 163).

The statement 'Successful Conclusion of the Hunger Strike' issued by the hunger strikers and their supporters on 2nd December was nearly double the length of the original statement and contained entirely new elements. The hunger strikers announced they had participated in a traditional Lakota ceremony to end their hunger strike and spiritual fast ('Hunger Strike by Indigenous Peoples – End of the Indigenous Hunger Strike', p. 1). This suggests that Charmaine White Face (an Oglala Tetuwan Sioux woman) and members of the Lakota community in New York City were 'sponsors' or 'stage managers' of the UN Hunger Strike.

In paragraph 5 of the 'Successful Conclusion Statement', the authors outlined their version of a key UN commitment:

"The UN High Commissioner on Human Rights (or representative) and Vice-President of the UN Commission on Human Rights will continue to work with us to insure [sic] that *no document different from the Sub Commission* text will be adopted by the HRC if it is not produced by a consensus of the Indigenous Peoples . . . ('Hunger Strike by Indigenous Peoples – End of the Indigenous Hunger Strike', p. 1).

In addition, the hunger strikers and their supporters declared:

“We will continue to call for the adoption of the Sub Commission text which has been approved by two UN bodies and has been endorsed and supported by hundreds of Indigenous Peoples and organizations” (‘Hunger Strike by Indigenous Peoples – End of the Indigenous Hunger Strike’, pp. 1-2).

The hunger strikers personally thanked Mr Dzidek Kedzia, representative of the Office of the High Commissioner for Human Rights and Ambassador Gordan Markotic, Vice-President of the Office of the Commission on Human Rights. They praised the hundreds of Indigenous peoples and organizations, friends and supporters. They acknowledged and thanked:

“Our brother Marcelino Diaz de Jesus . . . in his community in Mexico”.

Members of a local Indigenous support organization received a special mention:

“We sincerely thank the members of ‘Indigeneve’ for their hard work and generous assistance”.

The consciousness state of mind that prevailed at Geneva in late 2004 is revealed in the final paragraph (15) of the statement:

“Brothers and sisters, we are in this great house, but it is not our house. We are in a palace where documents are written for Peoples, but not for our Indigenous Peoples. They open doors for us to enter, but they close their ears and hearts. What can we do? We can do many things – even a hunger strike. But there is one thing we should never do – we should never, never give up our rights . . . (‘Hunger Strike by Indigenous Peoples – End of the Indigenous Hunger Strike’, p. 2).

After more than two decades of Indigenous presence at the UN in Geneva, some Indigenes still felt the pain of exclusion and rejection. While local doormen, porters and waiters extended Swiss hospitality to Indigenous delegates, representatives of some of the former colonial powers and their successors – the CANZUS States – continued to resist Indigenous demands. At the time of the Hunger Strike, the United States was feeling the full force of the post 9/11 Bush Administration. Canada, Australia and New Zealand were also in conservative hands. The post-9/11 response

across the Western – and especially English-speaking – world was inward-looking, xenophobic and risk averse. Chief Bill Means of the Lakota Sioux nation from Pine Ridge, South Dakota has painted a vivid picture:

“The years leading up to the adoption of the Declaration were tough years. It was a difficult time. It was not a great time to be Indigenous . . . But we were well set up in Geneva which was also the focus of our activities. In Geneva we had the Committee to End Racial Discrimination (CERD) which turned out to be very effective – particularly under the presidency of Pancho Francisco Calle of Guatemala. We also had Rigoberta Menchu Tum from Guatemala. When Rigoberta won the Nobel Peace Prize – that was a big win for us. Then in 2006, the year before the Declaration was finally adopted, we lost some significant Indigenous representatives – especially from New Zealand” (Chief Bill Means, New York, 10th May, 2016, p. 5).

The 2004 hunger strike was a short-lived, but a significant episode in the history of the drafting of the Declaration. The hunger strikers were supported by over one hundred organizations, but just one organization from Australia and one from New Zealand. While there was only one Mexican hunger striker at the UN (Saul Vicente), support from Indigenous organizations in that country was overwhelming. At least one person – Marcelino Diaz de Jesus – commenced his own local hunger strike in support of the UN hunger strikers and as a demonstration of respect for Saul Vicente (‘Hunger Strike by Indigenous Peoples’ <http://www.ogiek/indepth/break-hunger-strike.htm> p 1).

MEANINGFUL DIFFERENCES

The years 2004 to 2006 were a time of division and disagreement amongst Indigenous delegates and also on the States side of the equation. Mick Dodson observed the performance of Indigenous delegates and also studied the machinations of the CANZUS group, noting:

“There were some meaningful differences between the Indigenous delegations . . . But it needs to be recognized that there were far deeper divisions *within* and *between* the national governments. In a word, the governments were *disparate* much of the time. There were occasions when they did not know what they were

doing. They lurched from one extreme to another. As governments changed, the approach and the personnel also changed – sometimes very dramatically” (Mick Dodson, 25th February, 2016, p. 5).

Mick Dodson realized that the stakes were rising steeply for Declaration delegates coming into the ‘home straight’. Indigenous representatives saw signs that enthusiasm was waning back home. Patience was wearing thin and funding for UNDRIP-related travel was becoming more difficult to justify. On the CANZUS side, a focus on the sovereignty and territorial integrity of States was attracting attention. At this point, the CANZUS coalition enlisted support from China and Indonesia.

China and Indonesia – both home to significant Indigenous populations – supported the CANZUS demand for a ‘new language’ that would distinguish between a ‘right’ to self-determination and the pre-existing concept of ‘self-determination’ as defined in international law (De Costa 2006, p. 164). In response, incensed Indigenous peoples targeted what they termed linguistic ‘sleight of hand’ and condemned the ‘scare campaign’ that was gaining traction. They emphasized the social and economic reality of ongoing Indigenous-settler inter-dependence. (De Costa 2006, p. 164). In newspapers, radio and TV, First Nations spokespeople argued that ‘disintegration’ or ‘partition’ of Nation States was not what Indigenous peoples had in mind.

Irene Watson and Sharon Venne interrogated the transfer of UNDRIP negotiations from Geneva to New York:

“In 2006 drafting of the *Declaration* shifted from Geneva to New York. With drafting activity transferred to New York, Indigenous personnel who were ‘close’ to governments (including the CANZUS governments) participated in the final drafting. At this stage, UNDRIP was ‘gutted’ of articles which referred to the UN Charter and Rights to Self Determination” (Watson & Venne 2012 in Pulitano 2012, p. 90).

INDIGENOUS PEOPLES – OBJECTS OR ADVOCATES OF HUMAN RIGHTS?

Watson and Venne distanced themselves from many Indigenous activists including Dodson (2016), Malezer (2016) and Sambo Dorough (2016) by insisting:

“References to international standards were made redundant and the focus shifted from the rights of [Indigenous] peoples to self-determination under international law, to Indigenous peoples [as a problematic category] within their respective colonial States . . . (In 2006) rather than retaining the rights of peoples as enshrined in the UN Charter, Indigenous peoples became objects of human rights at the local level” (Watson & Venne 2012 in Pulitano 2012, p. 90).

Native American (Navajo) academic Lloyd Lee has presented a different view. Lee has argued that the Declaration was designed to help sustain and protect the fundamental rights of Indigenous peoples (Lee ‘The Navajo Nation and the Rights of Indigenous Peoples’ in Lee (ed) 2014, p. 170). There is ample evidence that Indigenous input and influence during the drafting decades often focussed on ‘fundamental rights’ as perceived by Indigenous representatives. While a broad array of rights is central to the thrust of the Declaration, the ‘balance’ between them has met with a mixed response. Lee provided his own, largely positive account of the overall orientation of the document:

“The Declaration includes the rights of Indigenous peoples to their original lands and resources; their rights to give their free, prior and informed consent before Nation States take actions that might negatively affect them; their right to be free from genocide and forced relocation; and their rights to their languages, cultures and spiritual beliefs. The Declaration also addresses individual and collective rights; cultural rights and identity; and rights to education, health, employment and language . . . “(Lee in Lee 2014, p. 170).

Lee has suggested that – in general terms – the Declaration aligns with the thinking of members of the Navajo community. This claim is not based on convenient assumptions. Lee emphasized:

“The Navajo Nation was heavily involved in the discussion and drafting of the UN Declaration and has indicated a renewed commitment to holding the United States (Government) accountable” (Lee in Lee 2014, p. 171).

Interestingly, Lee is eager to hold *both* the United States Government *and* local Navajo tribal administration accountable for their respective (and joint) policies and

programmes. Tribal government has shouldered some of the responsibilities and accepted many of the privileges of government at the local or community level. Striving to 'make the Declaration relevant' across the American South West, Lee explored the implications of self-determination for Dine [Indigenous] peoples in the community context, adopting an unusually long term view:

"The Navajo Nation has exercised self-determination since time immemorial. While challenges to the Navajo Nation's self-determination have occurred throughout its history, today in the 21st century, the Navajo Nation operates its own government, has its own rules and regulations, has developed its own enterprises and has created a distinct nationhood. The Navajo Nation is imperfect, but its growth and [ascent toward] maturity continue" (Lee in Lee 2014, p. 171).

Lloyd Lee and many other First Nations commentators have come to accept the Declaration (UNDRIP) in the form that secured adoption on the floor of the General Assembly in New York in 2007. In the decade since, they have learned to live with the Declaration and have become increasingly familiar with its strengths and weaknesses. They have quoted passages and phrases in many contexts, and included references to its articles in their presentations to governments and submissions to international tribunals of various kinds. UNDRIP has proven 'useful', yet elements of the more trenchant and less conciliatory Draft Declaration may have proven even more empowering.

The Draft Declaration was a significantly different document that showed numerous signs of its protracted European gestation. The human rights underpinnings and lofty philosophical aspirations that emerged from decades of Indigenous engagement were writ large in the Geneva-generated document. Irene Watson and Sharon Venne identified some key differences between the 'Declaration that might have been' and the Declaration that eventually became UNDRIP in 2007.

For example, Watson and Venne identified a close connection between the transfer of responsibility for the Drafting of the Declaration from Geneva to New York and the transformation of the Draft Declaration from an Indigenous-inspired and

transformative document to a document acceptable to the vast majority of States. Their analysis of events is consistent with those of many hardline First Nations participants:

“With the dismantling of both the Commission on Human Rights and the Inter-Sessional Working Group, a new UN body – the Human Rights Council – decided to move the drafting project from Geneva to the General Assembly in New York. At the time, no presentation was made describing the historical process and how the Declaration had evolved. The historical context of the Indigenous struggle for self-determination was not given the appropriate context” (Watson & Venne in Pulitano 2012, p. 91).

Like Watson and Venne, Indigenous Australian activist Geoff Clark expressed frustration and disappointment in relation to the New York relocation:

“New York has always been a problem for us because Indigenous peoples are far weaker in North America. All our major allies are in Europe. Our main support is in Europe and that is where we need to be in order to draw on that support” (Geoff Clark, Warrnambool, 2016, p. 3).

In addition to identifying negative aspects of the move across the Atlantic, Watson and Venne demonstrated an appreciation of the mood of impatience that prevailed at the UN in New York, suggesting:

“It seems that Indigenous and other people who participated in the final process in New York saw their work as simply a way of getting the Declaration through – and were not concerned with the detail. There should have been a further critical analysis of the final content (Watson & Venne in Pulitano, 2012, p. 91).

Watson and Venne have also taken issue with specific elements of the final version of the Draft Declaration, suggesting that it was a mere ‘shadow’ of the document that had been developed by the UN Working Group in Geneva during the 1990s (Watson & Venne in Pulitano, 2012, p. 89).

2006–2007 AND THE PREAMBLE TO THE DRAFT DECLARATION

The Preamble to the Declaration on the Rights of Indigenous Peoples (UNDRIP) is considered particularly significant by many commentators. Watson and Venne have targeted changes to the Preamble made in relation to individual and collective rights (Watson & Venne in Pulitano 2012, p. 93). The emphasis on *individual* as opposed to *collective* rights is a key focus. While presenting Article 1, in its entirety without error, Watson and Venne have only reproduced one of the twenty-six paragraphs of the Preamble to UNDRIP (Watson & Venne in Pulitano 2012, p. 93 & UNDRIP 2007, pp. 1–8).

The paragraph that Watson and Venne present as part of the Draft, but which they infer was not included in UNDRIP, is in fact Paragraph 24 of the Preamble to UNDRIP, and concerns the individual *and* collective rights of Indigenous peoples:

“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 that are indispensable for their existence, well-being and integral development as peoples (UNDRIP 2009, p. 7).

The early days of drafting were the 1970s and 1980s. At that time, according to Native American Professor Greg Cajete, of the University of New Mexico, Indigenous activists in the South West of the United States were concerned with both collective *and* individual rights:

“Collective rights are fundamental in terms of our lands and the use of our lands, but individual rights have also been important. Our people have struggled in the areas of artistic expression, contemporary application of traditional and modern techniques and approaches, intellectual property and copyright law. For many years we have appreciated the importance of the individual within the white man’s system and white man’s law. We have understood the need to defend our people’s rights as individuals as well as the rights of the tribe and the community . . .” (Greg Cajete, Albuquerque, 12th May, 2016, p. 7).

In Australia, Aboriginal artists and musicians also struggled to defend their intellectual property rights – as individuals. As an example, Harold Thomas (born in Alice Springs,

1947) an Aboriginal artist and the designer of the Aboriginal flag (designed 1971) has taken out copyright on the Aboriginal Flag on the basis of the decision of the Federal Court in *Thomas v Brown and Tennant* (1997) 215, FCA (9th April, 1997) in which Thomas was declared to be the owner of copyright in the design of the Australian Aboriginal flag. Mr Thomas sought legal recognition of his ownership and compensation following the 1995 proclamation by the Australian Government of the design as ‘the official flag of the Aboriginal people of Australia’. Mr Thomas’ actions should be seen as those of a person concerned with individual human rights. His commitment to such rights appears to date back to the 1960s (‘Federal Court declares Aboriginal artist owner of copyright in Aboriginal flag’ (article from Copyright World) www.copyright.org.au accessed 10 Sep 2016).

UNDRIP AND THE LANGUAGE OF INDIGENOUS RIGHTS

The relationship between individual and collective rights proved highly problematic during the drafting of the Declaration. While some commentators, including Watson and Venne (2012) and Beier (2009), have emphasized the primacy of collective rights, Indigenous academics, such as Prof Dalee Sambo Dorough and Prof Greg Cajete, and activists, including Chief Bill Means and Australia’s Harold Thomas, have argued in favour of a balance between the two. Consistent with this pattern of disagreement, the Declaration drafting process was punctuated by differences of opinion and impacted by underlying misalignments in value systems both *between* and *within* the two ‘opposing camps’ – States and Indigenes. Multi-lingual researcher and academic Isabelle Schulte-Tenckhoff has analysed the language of Indigenous rights with reference to the differences that have occurred across the major relevant UN languages – French, Spanish and English. Schulte-Tenckhoff has devoted considerable attention to the importance of Treaties in the evolution of the underlying historical and legal relationships between Indigenes and European colonizers (Schulte-Tenckhoff 2012, ‘Treaties, Peoplehood and Self-Determination: Understanding the Language of Indigenous Rights’ in Pulitano 2012, pp. 64–65).

While self-determination is widely recognized as a central stumbling block in the drafting of the Declaration, Treaties and concepts concerning treaty rights were never far from the action. In most parts of the New World – with the exception of Australia,

Central and South America and much of Africa – there are longstanding Treaty relationships between Indigenous peoples and State parties – including the colonial powers and their recent and present-day successors. The importance of Treaties is often emphasized by Indigenous peoples themselves, because Treaties represent concrete evidence of their State-to-State relationships with (imposed) government in the territories in which their ancestors lived and which they continue to inhabit (Schulte-Tenkhoff 2012 in Pulitano 2012, p. 65). Schulte-Tenkhoff also notes the frequent reference to treaties by the Crown and government authorities in Canada and New Zealand in support of the argument that original acquisition of the territory in question was lawful.

The legal existence and status of Treaties and their political impact over time exerted a considerable influence on the drafting of the Declaration. States representatives and Indigenous delegates strove to navigate and exploit the boundaries between common law and international law in the interests of their respective agendas. A particular problem for States representatives was the premise that Indigenous peoples' rights to their traditional lands and seas are not derived from the legal systems imposed upon them (without their consent) by European colonizers. From the States' point of view, it has been important – and even politically necessary – to regard relations with Aboriginal peoples as internal or 'domestic', rather than belonging within the realm of international law.

This issue relates closely to the central question of self-determination, because in international law, all peoples – including Indigenous peoples – have the right to self-determination. Importantly, while Treaties bear witness to this right, they do not create it (Schulte-Tenkhoff 2012 in Pulitano, 2012, p. 67). Thus, First Nations peoples (including Indigenous Australians) who are not party to international treaties, enjoy no lesser status as peoples and have an equal right to self-Determination. Treaty rights, self-determination and relationships between minority rights and Indigenous rights underpinned discussions during the drafting and overlaid negotiations surrounding the adoption of the Declaration. While *drafting* was perhaps the most publicized aspect of the Declaration saga, adoption was almost certainly the most delicate, problematic and highly-charged.

CONCLUSION

The drafting of the Declaration on the Rights of Indigenous Peoples was a long and complicated process. Thousands of organizations and tens of thousands of individuals were involved over nearly forty years. The drafting was a contested and politicized exercise that eventually ensured the acceptance of the document. Acceptance was limited to a majority of interested States and sufficient Indigenous organizations and individuals to keep the project alive and steady on its path to adoption. Importantly, the drafting process provided an ongoing reflection of the underlying balance of political and intellectual forces across the postcolonial world.

The process also brought a host of new people and a raft of contemporary ideas to the arena of Indigenous/UN relations at a time of resurgence, reaction and compromise. Throughout the period in question, a majority of Indigenous representatives continued to support the project because ongoing engagement offered more than the embarrassing alternative – opting out. In the words of UNM Professor Greg Cajete:

“Those of us with a wider perspective believed that UNDRIP offered a way to apprehend and legitimize changing relationships within the global political landscape. We calculated that Indigenous peoples would be better off with a Declaration than without one – even though we understood there would be parts of the Declaration that would not be to everyone’s liking . . .” (Professor Greg Cajete (Taos Pueblo) Department of Native American Studies, University of New Mexico, Albuquerque, 12th May, 2016).

CHAPTER 6 - 1993 DRAFT DECLARATION ARTICLES

INTRODUCTION

The UN Year of Indigenous People and UN Human Rights Conference in Vienna in June brought new and largely positive attention to the circumstances and aspirations of the world's Indigenous communities. An Indigenous resurgence had been building since the late 1970s. An evolving framework of relationships connected and supported First Nations leaders and activists throughout the world. The United Nations represented the underpinning of this framework, emerging as the focus of discussion and activity because Indigenous leaders had made the decision to take the Indigenous cause to a wider audience. The UN was seen by Indigenous community spokespeople as a global organization with stature, political independence and moral authority. UN *special rapporteurs* and experts were perceived as conscientious, organized and resistant to the machinations of national governments – including those with significant Indigenous populations.

In late 1992, before preparations for the Year of Indigenous People had commenced, the leaders and managers of most Aboriginal organizations across the Australia and Islander communities within Torres Strait knew of the efforts to create an 'Indigenous Declaration' under the auspices of the United Nations. The fundamental concept was the idea of a statement that would address major concerns of all Indigenous peoples, no matter where they were located and regardless of their political status. It was hoped that the overwhelming impact of colonization and its bitter legacy of oppression and subjugation would be explored and re-appraised in a detailed and authoritative document that would have currency and relevance, wherever and whenever Native peoples found themselves dispossessed and marginalized by government, corporations or other bodies.

For many years, a colourful and diverse collection of First Nations spokespeople – selected on the basis of education, training, experience and availability – had been heading to Geneva to participate in formal meetings and informal discussions around

the Draft Declaration. The Draft Declaration began its long and closely monitored life in rudimentary form as the Draft Principles (preliminary wording) of the Working Group Indigenous Populations (WGIP) in 1985 (From Standard-Setting Activities, Working Paper No. 4/Addendum 4, E/CN.4/Sub.2/AC.4/1985/WP.4/Add.4, by the Working Group on Indigenous Populations 1985 United Nations in Lightfoot 2016, Appendix 2.2, p. 216). The *Declaration of Principles* was a two-page document containing twenty Principles in the form of twenty numbered paragraphs.

DECLARATION OF PRINCIPLES 1985

The *Declaration of Principles* was sponsored and created by a combination (or Special Assembly) of Indigenous NGOs from Brazil, Canada, Chile, Ecuador, India, Mexico, Norway, Peru, the United States and Australia. The lead organizations were the Indian Law Resource Center, Four Directions Council, National Indian Youth Council (USA) and International Indian Treaty Council (USA and Canada). The Inuit peoples of Alaska, Canada, Greenland and northern Russia were represented by the Inuit Circumpolar Conference (ICC) who laid the groundwork for the Indigenous/UN relationship, with their northern neighbours the Sami/Saami of Norway, Sweden, Finland and Russia, in the mid- 1970s. Australia's Indigenous peoples were represented by the National Aboriginal and Islander Legal Service (NAILS) and by delegates from a number of other organizations (Lightfoot 2016, p. 217). The meeting was held at the *Palais des Nations*, Geneva from 22nd to 26th July 1985.

The central topic of discussion and formal debate was the development of a 'UN Declaration on the Rights of Indigenous People' – or 'Indigenous Declaration'. It was eventually decided that creation of an Indigenous Declaration required 'focussed activity' and leadership on the part of the Working Group (WGIP). The Special Assembly reviewed the Draft Principles prepared by a number of Indigenous organizations and invited a small drafting group to incorporate participants' comments into a revised text. The Special Assembly amended and adopted the *revised text* by consensus on 26th July and gave notice that it would be tabled with the Working Group and submitted for consideration as a possible working text. It was

also agreed that English and Spanish language versions of the Draft Principles would be deemed to have equal authority (Lightfoot 2016, p. 217).

The subject matter of the twenty abovementioned Principles was as follows:

1. Freedom from oppression, discrimination and aggression.
2. The right to self-determination.
3. The right to reject imposed State jurisdiction.
4. Permanent Indigenous control of ancestral-historical territories.
5. Acceptance of land rights specified in valid treaties or agreements.
6. Rejection of Doctrines of Discovery, Conquest, Settlement or *Terra Nullius* as the bases for State possession of Indigenous lands.
7. The right to restitution, including compensation for the loss of land, without extinction of original title.
8. States must refrain from participating in the involuntary displacement of Indigenous populations.
9. Laws and customs of Indigenous peoples must be recognized by States and in cases of conflict with State laws, shall take precedence.
10. The right of Indigenous peoples to participate in the life of the State.
11. Indigenous peoples retain the right to own and control their material culture and to the repatriation of the remains of their ancestors.
12. Indigenous peoples have the right to be educated and conduct business in their own languages and to establish their own educational institutions.
13. Scientific investigations shall only take place on the basis of prior authorization and continuing ownership and control on the part of the traditional owners.
14. The religious practices of Indigenous peoples shall be protected by the laws of States and international law and Indigenous peoples shall enjoy unrestricted access to their sacred sites.
15. Indigenous peoples will be accepted as subjects of international law.

16. Treaties and other agreements freely made with Indigenous peoples shall be recognized and applied in the same manner as treaties and agreements entered into with other States.
17. Disputes regarding the jurisdiction, territories and institutions of an Indigenous people are a proper concern of international law and must be resolved by mutual agreement or valid treaty.
18. Indigenous peoples may engage in self-defence against State actions that impede the exercise of the right to self-determination.
19. Indigenous peoples have the right to travel and maintain relations with each other across State borders.
20. Indigenous peoples are entitled to the enjoyment of all human rights and fundamental freedoms described in the International Bill of Rights and other United Nations instruments.

(From Standard-Setting Activities. Working Paper No. 4/Addendum 4, E/CN.4/Sub.2/AC.4/ 1985/WP.4/Add.4. by the Working Group on Indigenous Populations, 1985, United Nations in Lightfoot 2016, pp 217-218).

AN EXPRESSION OF INDIGENOUS RADICALISM AND RESURGENCE

Even brief engagement with the Draft Principles (preliminary wording) confirms that this document was an expression of Indigenous political activism during the 1980s. The 'fingerprints' of representatives of dozens of grassroots organizations are to be seen on almost every line. The chosen topic areas were shaped by the overwhelmingly negative political circumstances of the late twentieth century. The Draft Principles are indicative of the deep-seated frustration and growing militancy of First Nations communities and spokespeople – especially in Canada, the United States, Australia, Aotearoa/New Zealand and parts of northern Europe. Draft Principles 1 – 4 represent demands for self-determination and acceptance of Indigenous populations as *Peoples* – even as *Sovereign Peoples*. Taken together, Draft Principles 5 – 9 constitute a demand for acceptance of First Peoples as 'nations in being', despite centuries of subjugation and displacement by settler colonialism. Draft Principles 10 – 15 demonstrate that Indigenous leaders and their advisors were increasingly mindful of the relevance of international law. These Principles also reveal strong acceptance

of the concept of recourse to law as a necessary, even central strategy for Indigenous re-awakening and resurgence. Draft Principles 16 – 20 include far-reaching and ‘radical’ demands, entirely consistent with prevailing First Nations attitudes and values. Indigenous peoples were determined to reject concepts of the ‘Native tribes’ as passive and dependent and of Indigenous individuals as unsophisticated, naïve and accepting of inferior status and treatment. The tone of the document is in keeping with the confrontational *Politics of Protest* that arose in the late 1960s and 1970s and permeated urban, rural and remote Indigenous communities – and their representative organizations – in following years.

TWO PARALLEL DOCUMENTS

Interestingly, the Draft Principles of the Working Group on Indigenous Populations 1985 (also known as the *Indigenous Organizations Draft*) was not directly transformed into the Draft Declaration of 1993. Instead, throughout the mid-1980s there were *two* separate but similar documents in process of development and elaboration within the UN system. In addition to the Draft Declaration of Principles/ Indigenous Organizations Draft (above), there was the World Council of Indigenous Peoples (or WCIP) Declaration of Principles adopted by the World Council of Indigenous Peoples in Panama in September 1984, conveniently known as the ‘Panama Declaration’ (Lightfoot 2016, p. 47). In both texts, self-determination takes pride of place. While the differences were largely stylistic, some were also meaningful and problematic – especially in the English language version.

Lightfoot argues that differences between the two documents were largely the result of the WCIP Draft being firmly rooted in Indigenous activism, whereas the Organizations Draft was characterized by a more restrained and *legal* tone, as a consequence of input from professionals with UN expertise and experience (Lightfoot 2016, p. 48). While there may be some merit in this claim, a number of other factors contributed to these differences. In particular, the Panama conference occurred in an atmosphere of enthusiasm and solidarity. Organizers and delegates were warmly received by the national government and Indigenous youth were strongly represented. Delegate participation was impressive and conference statements and media releases were consistently emphatic and purposeful.

Central and South American First Peoples were highly visible, frequently filling the streets of Panama City. The Conference enjoyed largely favourable local press coverage and Spanish was the dominant language of the Conference. Some commentators – fluent in English and Spanish – have noted the ‘more generous’ meanings of phrases and terms in Spanish ‘legalese’ compared to English legal writing (see interview with Antonio Gonzales, American Indian Movement West, Director of UN Liaison at United Nations NYC, May 2016). It is likely the atmosphere and ambience of Panama were also more supportive of the Indigenous cause, and of the aspirations and discourse of activist youth.

MANY VOICES/MANY DIFFERENCES

Throughout the late 1980s, disagreement and division prevailed on all sides and consensus appeared an increasingly remote possibility. Most Indigenous representatives were supportive of elements of both major texts. Some anticipated that failure to agree on one central document might lead to the creation of other additional texts – together with further complexity, debate and stalemate. In 1987, ahead of the meeting of the Working Group in Geneva, the Indigenous Caucus merged the Panama Text and the Organizations’ Draft Principles. The combined document – the 1987 Declaration of Principles was tabled at the WGIP meeting. In response to continuing division, members of the Working Group requested that the Chair/Rapporteur Erica-Irene Daes of Greece prepare a full draft text for tabling and discussion at the 1988 meeting of the WGIP (Lightfoot 2016, p. 50). In 1988 despite widespread respect for Chairperson Daes, support for her ‘restrained and unthreatening’ text proved insufficient. Commencing in 1990, the three drafting groups were organized and began operations. They would be known as Groups I, II and III with each given specific responsibilities. Group I focussed on Land and Resources, Group II sought a means to break the self-determination deadlock, and Group III took responsibility for fine-tuning several ‘inelegant’ Articles (Lightfoot 2016, p. 51). In the following years, members of the three groups applied themselves to their respective tasks.

At the 1993 Geneva meeting of the WGIP an agreement was reached on a ‘final text’ that would be forwarded to the Sub-Commission on Prevention of Discrimination and

Protection of Minorities under the authority of Chairperson Daes (Lightfoot 2016, p. 54). The 1993 Text was given the title *Draft Declaration on the Rights of Indigenous Peoples* – a label consistent with the political aspirations of the UN Year of Indigenous People (1993). In 1994 the 1993 document was accepted by the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Resolution 1994/1995) and by virtue of that connection became known within the UN system as the ‘Sub-Commission Text’. Most Indigenous representatives and other commentators refer to the text as the “1993 Draft Declaration”, or simply the “Draft Declaration”.

THE 1993 DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The 1993/1994 Draft Declaration on the Rights of Indigenous Peoples is a lengthy and impressive document consisting of a two-page Preamble and forty-five Articles – some containing several numbered paragraphs. In many ways, the 1993 Draft Declaration more fully and accurately encapsulated the grievances, priorities and aspirations of the world’s Indigenous peoples than the eventual 2007 document (UNDRIP). In addition, it is likely the 1993 document more closely represented the views of hundreds of millions of sympathetic non-Indigenous people, and of supportive and generous NGOs and governments in many parts of the world. Without the intervention and collusion of particular States – especially the Major Powers (Russia, China, Britain, France and India) and members of the CANZUS bloc (Canada, Australia, New Zealand and the United States) and their supporters – a document resembling the 1993 Draft Declaration would almost certainly have become the adopted instrument. As a detailed and revealing expression of the worldviews and political agendas of the world’s Indigenous peoples at a climactic and pivotal point in First Nations history, the 1993 text demands sustained scrutiny. Though frequently referred to in passing, it has received little in the way of sustained or purposeful academic attention in the English-speaking world. It is hoped this close examination will help to address that shortfall.

The Draft Declaration is a collection of specific statements with clear and narrow meanings, organized according to a loose thematic framework. Each theme or ‘topic’ is addressed in a number of Articles, which are in some cases positioned consecutively.

In this scheme, each group of Articles will form a *cluster*. There are ten clusters in total, each containing between three and eight Articles. The best known, most problematic and controversial cluster was that dealing with self-determination.

CLUSTER ONE – SELF-DETERMINATION - (ARTICLES 3, 4, 8 AND 26)

Article 3

In the 1993 Draft Declaration, Article 3 represented a meaningful assertion of a basic Indigenous right:

Indigenous peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development (UN E/CN.4/SUB.2/1993/29/Annex I).

Article 3 has been at various times a litmus test of the relevance of the Declaration and a test of the validity of the drafting process. Self-determination has been a battleground. Importantly, the term has had different meanings for different groups of people. First Nations commentators, including Dodson (2016), Clark (2016), Imai (2016) and Lightfoot (2016), have argued that Indigenous thinking surrounding self-determination is fundamentally different from that of non-Indigenous professionals. In this interpretation, First Peoples are unlikely to demand formal political secession or the formation of new nation States. In general, Indigenous peoples are not committed to the formation of new First Nations-based nation States. Despite occasionally extreme rhetoric, it is likely that a majority of Indigenous communities seek a formal and ongoing version of regional autonomy – along the lines of the ‘Nunavut concept’. On 1st April, 1999 Canadian Inuit and their political allies celebrated the creation of the new Inuit-dominated federal territory of Nunavut – a development followed with considerable interest by Indigenous observers since that time.

Article 4

In the 1993 version, Article 4 represented a broad extension of Article 3. The central concept was the maintenance of cultural cohesion and community identity. At the same time, the right to engage in explicitly non-Indigenous activities and fulfil roles

within non-Indigenous organizations was defined as compatible with Indigenous ways of doing:

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 4 1993 which entails concepts of commitment, choice and participation is significant. The right to maintain and strengthen traditional ways is combined with rights to access and contribute to the life of the State by 'opting in' to State activities and processes.

Article 8

In the 1993 version, Article 8 consisted of one long sentence:

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as Indigenous and to be recognized as such (UN E/CN.4/SUB.2/1993/29/Annex I).

The concept of *maintaining and developing distinct identities and characteristics* is a far-reaching and complex one that represents the application of the principle of self-determination at the local level. *Maintain and develop* are distinct from one another, but equally problematic. Maintenance of culture of itself does not allow for cultural change and adaptation, which are central to the process of cultural renewal and reinvigoration. The term *developing* can encompass significant adaptation and is a word frequently favoured by urban Indigenes. *Distinct identities and characteristics* may include a wide range of cultural dimensions that can only be interpreted by the peoples themselves. This is normally understood to include – but is not limited to – self-identification.

Article 26

In the 1993 version, Article 26 was one of the most far-reaching and comprehensive of those addressing relationships between First Nations peoples, and their traditional lands and territories. Indigenous participants (see Dodson, Clark and Means interviews 2016) have suggested that with so much focus on the possible ramifications of Article 3, Article 26 flew ‘under the radar’ where States representatives were concerned. The Article has a ‘broad canvas’ aspect that conveys a sense of overwhelming scale:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, waters coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of, or encroachment upon these rights (UN E/ CN.4/Sub.2/1993/29/Annex I).

From an Indigenous point of view, Article 26 (1993 version) was one of the most positive and inclusive Articles of the Draft Declaration. Article 26 featured the powerful term *total environment* together with specific mention of *waters, coastal seas and sea-ice* in addition to the standard *land, flora and fauna*. Article 26 also included *full recognition of laws, traditions and customs, land tenure systems and institutions* – arguably a generous and meaningful commitment overall.

COMMENTARY

Self-determination looms large in the thinking and discourse of global Indigenous resurgence. Still, only four of the forty-five Articles of the Draft Declaration have self-determination as their core focus. Notwithstanding its high profile during the life of the Draft Declaration, *self-determination* has been an imprecise and often contested term. For Indigenous Australian lawyer and academic Larissa Behrendt:

(For Indigenous peoples) self-determination is the ability to recognize fundamental Indigenous rights in the way that Indigenous peoples want those rights to be recognized (Behrendt in Gakawe, Kelly & Fisher 2001, p. 6).

Adopting a community-based perspective, Behrendt argued:

(For First Nations) to achieve self-determination, control must first be vested in Indigenous communities (Behrendt in Garkawe, Kelly & Fisher 2001, p. 7).

In the minds of some Indigenous activists, this represents a minimalist response. By contrast, the case presented by American Indian lawyer and academic James Anaya is a model of sophistication. Anaya contended:

Self-determination is affirmed as a principle in the Charter of the United Nations and as a right of all peoples in international human rights covenants . . . In the colonial context, self-determination was understood as a right to independent statehood (or sovereignty). A premise underlying this approach is that the State represents the highest possible form of self-determination for cultural or national communities – this premise is subject to question (Anaya J, The Influence of Indigenous Peoples on the Development of International Law in Garkawe, Kelly & Fisher 2001, pp. 111-112).

Anaya is on firm ground arguing that concepts concerning the State are directly relevant to self-determination. Like Anaya, many First Nations activists envisage a dramatically different role for the declining State. In Anaya's view, the conceptual paradigm and political reality of the State should not be seen as fixed, or beyond the reach of political and social influence. For Anaya, in both theory and practice the State has entered a period of gradual but continuous decline. Anaya notes:

In response to developments over several decades, the State has diminished in importance in relation to both local and transnational spheres of community and authority (Anaya in Garkawe, Kelly & Fisher 2001, p. 112).

While many factors have contributed to the 'implosion' of the contemporary State, Anaya has highlighted the role of international Indigenous activism, emphasizing the impact of collective action.

Indigenous peoples have undermined the premise of the State as the highest and most liberating form of human association in the process of pressing their demands in the international domain (Anaya in Garkawe, Kelly & Fisher 2001, p. 112).

In the early 1990s international Indigenous political activism also served to reinforce a more assertive and purposeful mentality within First Nations communities. Indigenous leaders and spokespeople developed an awareness of the history of human rights and of the significant role of the United Nations in that history. It is not surprising that six of the forty-five articles of the 1993 Draft Declaration refer to specific UN human rights documents.

CLUSTER TWO – REFERENCES TO OTHER UN DOCUMENTS - (ARTICLES 1, 2, 41, 42, 43 AND 45)

Article 1

In the Draft Declaration 1993, Article 1 was an uncontroversial statement that referenced both the UN Charter and the Universal Declaration of Human Rights:

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law (UN E/CN.4/Sub.2/1993/29/Annex I).

The named references are quintessential and fundamental UN documents, while international human rights law has been described as the body of law designed to promote human rights at social, regional and domestic levels. In particular, the International Covenant on Economic, Social and Cultural Rights provides the international legal framework to protect human rights (see Legal Information Institute, Cornell Law School [https:// www.law.cornell.edu/ wex/ human rights](https://www.law.cornell.edu/wex/human-rights), viewed 14 Nov 2017).

Article 2

Article 2 in the 1993 Draft Declaration acted as an extension of Article 1 and served to define the rights of Indigenous peoples in relation to those of other categories –

especially Minorities. A significantly shorter document, the UN Declaration on the Rights of Minorities, had been adopted on 18th December 1992 and served as the 'pathfinder document' for the Draft Declaration on the Rights of Indigenous Peoples:

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular, that based on their Indigenous origin or identity (UN E/CN.4/Sub.2/1993/29/Annex I).

The phrase concerning discrimination – *free from any kind of adverse discrimination* – allows for the application of affirmative action policies or 'positive discrimination' to create a more level socio-political playing field.

Article 41

In the 1993 Draft Declaration, Article 41 lent additional support to Articles 1 and 2, described the 'creation' of a body at the highest level (the Working Group Indigenous Populations) and flagged *direct participation* on the part of Indigenous peoples:

The United Nations shall take the necessary steps to ensure the implementation of this Declaration, including the creation of a body at the highest level with special competence in this field and with direct participation of Indigenous peoples. All United Nations bodies shall promote respect for and full application of this Declaration (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 41, 1993 is couched in the positive and purposeful style of the Year of Indigenous People and continues the process of building the Draft Declaration into a major statement of support for the aspirations of the world's Indigenous peoples.

Article 42

In the 1993 Draft Declaration, Article 42 was built around a phrase which would gain considerable stature and prominence in the years ahead. There are different stories concerning the origins of Article 42. There is evidence that it was one of the first Articles in earlier drafts and remained unaltered for many years. It was located toward the back of the Draft to act as a follow on, adding an extra dimension to longer and more detailed Articles. By stating that the rights described in those Articles should be

understood as constituting a *minimum standard*, Article 42 introduced the concept that the Declaration should be seen as the *starting point* rather than the *finishing line* where global Indigenous rights were concerned:

The rights recognized herein constitute the **minimum standards** for the survival, dignity and wellbeing of the Indigenous peoples of the world (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 42 was frequently quoted by media commentators throughout the 1990s and was also employed – as a punchline – by First Nations peoples, mainstream politicians and academics at conferences, workshops and in radio and television interviews. In a sense Article 42 encapsulated the spirit of the 1993/1994 Draft Declaration.

Article 43

The Draft Declaration of 1993 featured a brief Article addressing the issue of equal rights for women and girls:

All the rights and freedoms recognized herein are equally guaranteed to male and female Indigenous individuals (UN E/CN.4/Sub. 2/1993/29/Annex I).

Some commentators have noted the location of this Article toward the back of the Draft Declaration and interpreted that as an indication of the low priority afforded to women's rights by the Indigenous rights movement. Instead, like Article 42, this Article acted as an addendum to the *rights and freedoms* already presented.

Article 45

In the Draft Declaration of 1993, Article 45 was a 'problem Article' for many First Nations representatives and commentators. Dodson, Clark and Sambo Dorough have suggested that Article 45 was 'a device' to placate States representatives and their governments by proclaiming State sovereignty at the expense of Indigenous self-determination. Sambo Dorough has also asserted that Article 45 was largely the work of Canadian, Australian and New Zealand government representatives, with the New Zealanders adding the word *group* in an effort to include 'Maori and/or Pacific Islander extremists':

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations (UN E/CN.4/Sub.2/1993/29/Annex I).

CLUSTER THREE – NATION STATE ENTITLEMENTS - (ARTICLES 5, 6, 10, 36, 37, 38 AND 39)

Article 5

In the 1993 Draft Declaration, Article 5 consisted of just one fundamental concept – the right of an Indigenous person to a nationality:

Every Indigenous individual has the right to a nationality (UN E/CN.4/Sub.2/1993/29/annex I).

While this Article may appear irrelevant to the circumstances of a majority of First Nations peoples, nationality has been a pressing concern for many Indigenous. In many parts of the world, entire communities have been deprived of nationality when their cultures and social structures have been displaced by those of the colonists. Throughout the Indigenous world control of legal entitlements – including citizenship – was a key element of the colonization process. In general, citizenship was not conferred on foreigners or native peoples. Concepts of nation and nation-building were based on the notion of European ethnicity as a prerequisite for access to the values and entitlements of civilization. At best, native peoples were considered reluctant supporters of the nation-building agenda, at worst as obstacles in the path of the national project.

The right to a nationality is a fundamental human right and should be permanent and ongoing. This right should be protected from the vagaries of political change and administrative reform. Granted at birth, nationality should remain the possession of the Indigenous individual. Nationality should not be withdrawn or suspended at the whim of elected leaders or officers of the State. First Nations activists have frequently alleged that the governments of Argentina, Brazil, Guatemala, El Salvador, the United States and Australia have used Indigenous access to nationality as a ‘bargaining chip’

in negotiations with ‘troublesome’ individuals and communities (see Dodson, Clark, Crowshoe and Means interviews 2016).

Article 6

From the late 1980s Article 6 (1993) addressed some of the more disturbing and extreme aspects of the Indigenous/State relationship – including child removal and genocide:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide, or any other act of violence, including the removal of Indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person (UN E/CN.4/Sub.2/1993/29/Annex I).

The term *collective right* in line 1 may be the first application of that term – as opposed to individual rights of various kinds – within the Draft Declaration. It was also the only case in which the word *genocide* was chosen as the focus of an Article. The expression *as distinct peoples* is significant. This term has received considerable attention within First Nations communities and there is little consensus concerning the emphasis that ‘distinctiveness’ should receive. At the same time, perspectives vary regarding the ways in which Indigenous peoples may effectively demonstrate their distinctiveness (see Borrows, Sambo Dorough and Means interviews 2016). On a different note, though overwhelmingly positive, the terms *freedom*, *peace* and *security* are stubbornly imprecise. For an Indigenous person, the concept of *freedom* may be understood to include release from the obligations and responsibilities of Indigenous communal and family life – not something to be necessarily endorsed without reservation. *Under any pretext* is a powerful phrase and should be interpreted as including the child removals that have occurred in recent times in Canada and Australia – often under the guise of protecting children from sexual abuse and/or domestic violence.

Article 10

Article 10 was one of the stronger and more direct Articles of the Draft Declaration of 1993:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the Indigenous people concerned and after agreement on just and fair compensation and, where possible, with the option of return (UN E/CN.4/Sub.2/1993/29/Annex I).

By 1993 Article 10 included responses to the forcible removal of First Nations peoples and featured the resonant phrase *free and informed consent*. The emphasis on seeking and securing Indigenous participation in decision making achieved acceptance in Indigenous communities in the early 1990s and has maintained considerable prominence since that time, in combination with the phrase *just and fair compensation* (see Imai and Lee interviews 2016).

Article 36

In the Draft Declaration of the early 1990s, Article 36 was highly unusual by virtue of its direct reference to pre-existing treaties. Maori, western Canadian First Nations and some Native American delegates lobbied for an Article of this kind throughout the 1980s. Had they succeeded at that time, Article 36 may have become one of the first ten – or ‘fundamental’ Articles. Article 36, 1993 was considered a ‘powerful and necessary’ Article by many Indigenous activists and embodied the direct and assertive tone of the Year of Indigenous people:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes that cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned (UN E/CN.4/SUB.2/1993/29/ANNEX I).

Article 36, 1993 was an exceptionally concrete and consistent one. The sequence *recognition, observance and enforcement* represents an ascending continuum, with enforcement well beyond the range of the first two terms. *States or their successors* include statutory corporations, quasi government authorities and other contemporary or future arrangements that may augment or even replace the organs of the State. The phrase *according to their original spirit or intent* serves to uphold the provisions of earlier agreements, while acting to limit or even preclude any expansion of Indigenous claims or demands.

Article 37

In 1993 Article 37 was an overarching statement concerning the ongoing obligation of States to enshrine the provisions of the Declaration in their own legislation. Article 37 had special relevance to Aotearoa/New Zealand and Canada – particularly in terms of the evolution of New Zealand and Canadian Indigenous rights legislation. Indigenous Australians also stood to gain, given the paucity of national legislation in support of the aspirations of Australia’s First Peoples. Article 37 in the Draft Declaration of 1993 was a meaningful demand for States to see the Declaration as a starting point rather than as the last word:

States shall take effective and appropriate measures, in consultation with the Indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that Indigenous peoples can avail themselves of such rights in practice (UN E/CN.4/Sub.2/1993/29/Annex I).

Effective and appropriate measures would normally be determined by officers of the State. In addition, consultation with the relevant Indigenous peoples or their representatives would be organized and directed by the State. In a typical scenario, First Nations leaders would be selected and monitored by State officers acting on behalf of the political leadership. Any new legislation would be unlikely to give *full effect* to the provisions of the Declaration, because at least some of those provisions would likely exceed the self-imposed limits of goodwill and generosity on the part of most States.

Article 38

In the Draft Declaration of 1993, the early iteration of Article 38 was framed as an expression of the ‘practical generosity’ of friendly States – especially the Scandinavians led by Sweden – and supported by other ‘internationalist’ nations of western Europe, central and South America and the Caribbean. Indigenous Australian and Canadian First Nations delegates perceived this Article as an expression of the supportive mentality that characterized the ‘friendly States’. Indigenous participants (see Clark, Dodson, Sambo Dorough and Means interviews 2016) have described the financial and technical support Indigenous and other NGOs received in relation to airfares and accommodation in Geneva. Technical assistance was also provided – particularly in the areas of communication and security. Not surprisingly, Article 38, 1993 is direct and consistent in its emphasis:

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international co-operation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration (UN E/CN/.4/Sub.2/1993/ Annex I).

Article 39

In the Draft Declaration of 1993, Article 39 concerned the resolution of conflicts and disputes between First Nations and States:

Indigenous peoples have the right to have access to and prompt decision through mutually acceptable and fair procedures for the resolution of conflicts and disputes with States, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall take into consideration the customs, traditions, rules and legal systems of the Indigenous peoples concerned (UN E/CN.4/Sub.2/1993/29/Annex I).

CLUSTER FOUR – RIGHTS OF CHILDREN, ELDERS AND WOMEN - (ARTICLES 7, 22 AND 44)

Of the forty-five Articles of the Draft Declaration, only three were exclusively concerned with the rights of children, women or elders. All three categories occupy positions of privilege within Indigenous communities, and they are central to the spiritual and social life of remote, rural and urban First Nations peoples. Some Indigenous leaders argued that children, women and elders were ‘covered’ by dozens of more general Articles and that there was no need for comprehensive Articles specific to their needs. Others insisted that the opportunity to ‘nail down’ a number of family-specific Articles should be embraced. Supporters of such Articles contended that the CANZUS bloc and other resistant States were not unsettled by attempts to enshrine Indigenous family and community values and that entrenching ‘community values’ would have a positive flow on effect in other areas (see Clark, Sambo Dorough and Means interviews 2016).

Article 7

Article 7, 1993 covered a wide range of issues and employed a consistent and effective structure:

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including prevention of and redress for:

- (a) Any action which has the aim or effect of depriving them of their identity 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 population transfer which has the aim or effect of violating or undermining any of these rights;*
- (d) Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; and*

(e) Any form of propaganda directed against them (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 7 was a model of clarity. The language was oriented toward communities as a whole, and the words *children*, *women* and *elders* do not feature. Article 7 evolved by a process of addition rather than modification, with further elements being added over time. Issues that emerged during discussions around aspects of Article 7 were combined to create Article 22 – sometimes referred to as the ‘special measures’ Article.

Article 22

Much of the value and relevance of Article 22 in 1993 was dependent upon the nature of the ‘special measures’ chosen in relation to the application of the Article. Similarly, interpretation of the words *immediate* and *effective* represented a further problem. Still, other aspects were valuable because the language was specific and practical –

Indigenous peoples have the right to special measures for the immediate, effective, and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention should be paid to the rights and special needs of Indigenous elders, women, youth, children and disabled persons (UN E/CN.4/Sub.2/1993/29/Annex I).

Immediate, effective and continuing improvement is a powerful statement in relation to economic and social conditions. This Article was strongly resisted by States seeking to endorse a less demanding agenda regarding First Nations community development.

Article 44

In the 1993 Draft Declaration, Article 44 was a non-controversial and well-supported Article. It was also an Article with special relevance – and resonance – for those Canadian First Nations communities included under one of the ‘numbered treaties’ and for Aotearoa/New Zealand Maori deemed to be covered by the 1840 Treaty of Waitangi, regardless of whether their tribal ancestors were signatories, or chose not

to sign. In North America and New Zealand *Treaty Rights* remains a frequently and strongly contested domain. While many First Nations commentators insisted that Treaty rights are 'set in stone', the reality is far less straightforward. In practice, treaty rights become meaningful if courts, tribunals or other bodies charged with their interpretation, deliver judgements or make determinations that support Indigenous claims. Typically claims have concerned maintenance or re-establishment of Indigenous land use, river and ocean-based activities and educational, cultural and religious practice. For many First Nations representatives (see Dodson, Borrows, Sambo Dorough and Chartier interviews) Article 44 of the Draft Declaration appeared more encompassing than it actually was. This was because for a majority of Indigenous peoples, *existing rights* were limited, narrow and insufficient of themselves. Thus, even in cases where they were not diminished, they would remain inadequate in both their overall coverage and specific content. Still, Article 44 allowed for future rights in addition to existing ones:

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights Indigenous people may have or acquire (UN E/CN.4/Sub.2/1993/29 /Annex I).

In the 1993 Draft Declaration Articles 42 – 45 constituted Part IX of the Declaration and were sometimes described as the 'miscellaneous' or 'afterthought' Articles. The Articles concerning Women, Elders and Children were relatively short and lacking in detail. At the time, community organizations and First Nations delegates were strongly focussed on self-determination and maintenance of culture. Closely linked with self-determination, cultural heritage was a central theme. By contrast, community development and social justice at the local level were areas of low priority and limited relevance where the majority of First Nations leaders were concerned. Instead, they saw themselves as grappling with bigger issues and confronting more pressing problems within the international political arena.

CLUSTER FIVE – CULTURAL SECURITY - (ARTICLES 8, 9, 11, 34 AND 35)

Article 8

Article 8 was considered one of the ‘fundamental’ Articles of the Draft Declaration, 1993 (see Dodson and Clark interviews 2016). The ‘Identity Article’ had been strongly supported by First Nations representatives from central and South America, Canada and Australia since the early 1980s (see Dodson and Clark interviews 2016). From the early twentieth century, many States assumed the role of deciding which communities and individuals should be classified as ‘Native’ and which should be given a different designation. In many jurisdictions, classifying a population as ‘mixed race’ or ‘non-Native’ meant significantly lower levels of scrutiny in relation to outside interests and outside authorities – including the major Christian churches, Red Cross, International Labour Organisation (ILO), League of Nations and later United Nations.

Consistent with contemporary attitudes concerning the moral and political obligations of government, the *Anglosphere* States – including Australia – were reluctant to accept responsibility for their respective Native populations. In both Canada and Australia, provinces/States took the lead at the local level. Most educational and hospital engagement was provided by a diverse range of church missions within State legislative and administrative frameworks. Native populations were generally seen as ‘financial burdens’. States sought to minimize costs and often declared lower – sometimes dramatically lower – numbers of Indigenes within their jurisdictions. In remote areas, unrealistically low Indigenous population figures sometimes encouraged speculative investment and even short-sighted and inappropriate infrastructure development.

In the 1993 Draft Declaration Article 8 consisted of one sentence:

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as Indigenous and to be recognized as such (UN E/CN.4/Sub.2/1993/29/Annex I).

The concept of maintaining and developing distinct identities and characteristics is a far-reaching and complex one that represents the application of the principle of self-

determination at the local level. *Maintaining* and *developing* are distinct from one another. Maintenance of culture does not allow for cultural change and adaptation. Both are fundamental to the process of cultural renewal and reinvigoration. The term *developing* can encompass significant adaptation and is a word favoured by urban Indigenous. Distinct identities and characteristics may include a wide range of cultural dimensions that can only be assessed and interpreted by the peoples themselves. Importantly, this is understood to include, but is not limited to, self-identification (as an Indigenous person).

Article 9

In 1993 Article 9 appeared straightforward and unthreatening in relation to the ongoing and entrenched interests of States:

Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions or customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right (UN E/CN.4/Sub.2/1993/29/Annex I).

No disadvantage of any kind is a broad concept that extends well beyond formal and demonstrable discrimination on the part of government and its agencies, the corporate sector and private individuals. *Disadvantage* could be understood to include economic, educational and social disadvantage derived from or associated with Indigenous identity or self-identification. *The exercise of such a right* might occur at the local level, or in State, national or global contexts. Importantly, both Indigenous communities and First Nations individuals may exercise such a right without fear of disadvantage. The possibility of Indigenous persons belonging to more than one nation or community is not addressed. Presumably the traditions or customs of the particular community or nation would determine the acceptance or rejection of multiple Indigenous community affiliations. During the early 1990s this Article remained largely uncontested and was considered 'safe' – by most Indigenous Australian and North American First Nations participants and commentators.

Article 11

In the 1993 Draft Declaration, Article 11 was of special interest to Indigenous peoples in central and South America and in parts of Asia and the Pacific. Article 11 addressed the issue of armed conflict in areas containing Indigenous populations and was sometimes referred to as the 'Special Protection' Article. While there was detail regarding actions that States should *not* perform, there was an absence of detail concerning the *nature* of the Special Protection or the *process* according to which it might be organized. Still, the authors included situations described as *emergencies* in addition to the standard category of *armed conflicts*. In fact, many emergencies (including the Malayan Emergency of 1948 to 1962) entailed large-scale and ongoing involvement of Indigenous peoples. Interestingly, in the 1993 Draft version, *voluntary* – as opposed to *forced* – Indigenous participation was not precluded:

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit Indigenous individuals against their will into the armed forces and, in particular, for use against other Indigenous peoples;*
- (b) Recruit Indigenous children into the armed forces under any circumstances;*
- (c) Force Indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes; and*
- (d) Force Individuals to work for military purposes under any discriminatory conditions (UN E/CN.4/Sub.2/1993/29/Annex I).*

The above statement falls short of complete coverage of the contexts that might feature armed violence, civil unrest and national or regional disintegration. There is no mention of the seizure or theft of Indigenous property or resources including currency, vehicles, communication and agricultural equipment and supplies, foodstuffs and other resources. Mention of occupation or removal of Indigenous accommodation, administrative facilities or other structures is also absent. The

Fourth Geneva Convention of 1949 represented a direct legal underpinning for this Article. The 1949 Convention addressed the circumstances of civilians in localities impacted by organized violence (see International Committee of the Red Cross [CH] *Geneva Convention 1949* and additional protocols). In Central America and parts of Asia and South America, a large percentage of individuals in conflict zones are members of Indigenous communities. After centuries of often catastrophic European engagement, First Nations peoples remain on or near the frontlines of local and regional conflict.

In addition, the *special regime* for treatment of civilian internees is relevant to the circumstances of Indigenous activists in South Asia and South America. Civilian internees represent a hidden but growing category in areas where resource exploration and extraction are conducted on a meaningful scale. In such regions, the use of armed bands and ‘proxy armies’ has become widespread. This is not an unusual development. Since the 1950s, most armed conflicts have been ‘non-international’. This reality has been addressed by *additions* to the Convention. In particular, the so-called ‘Common Article 3’ has been described as a ‘breakthrough’. Common Article 3 covers the actions and activities of combatants in situations of ‘non-international’ or ‘internal’ armed conflict.

Article 34

By 1993, Article 34 was short and direct, containing little to suggest the nature or scale of the original issue and ensuing debate. The backstory is interesting. By the 1990s many States had adopted the practice of ‘selecting’ Indigenous leaders who were supportive of the aims and priorities of the government of the day. Such individuals generally supplied State authorities with intelligence concerning First Nations priorities, strategy and tactics. By the early 1990s, some States were positioning (or ‘planting’) technical specialists as their ‘eyes and ears on the inside’ of community and regional organisations and associated global networks. Close engagement with other Indigenous peoples and with States’ representatives has demonstrated the importance of solidarity and trust amongst First Nations in the face of organized and co-ordinated State resistance.

The 1993 version of Article 34 was a model of simplicity, but suffered from a lack of detail:

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities (UN E/CN.4/Sub.2/1993/29/Annex I).

In addition to determining *responsibilities*, most communities reserved the right to select, train and position community members in accordance with community priorities and consistent with political, administrative and financial demands. The term *collective right* is important because for most Indigenous communities, decisions concerning an individual's responsibilities are made by elders on a collective basis. Yet this is not always practicable or desirable. In many Indigenous Australian communities, elders remain the principal decision-makers. In most cases, elders strive to act in the interests of the broader community, but are not always elected representatives accountable to a manager or CEO. In terms of participation and representation at Geneva, many community-based organizations across Australia accepted the long term or frequent absence of key spokespeople on the basis that such individuals were representing Indigenous Australia and even the Indigenous world as a whole.

Article 35

In the 1993 Draft Declaration, Article 35 represented a clear, practical and longstanding demand:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and co-operation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 35 represented a win for tens of thousands of First Nations peoples along the Canada/USA and Mexico/USA borders. Article 35 focussed on the social, political and economic right of Indigenous peoples to maintain traditional links and relationships

across contemporary international borders. This Article was also central to the agendas of politically influential Sami in northern Scandinavia, whose reindeer (or caribou) herds criss-cross numerous international boundaries in the process of maintaining their time-honoured patterns of migration. Importantly, the 1993 version does not limit the 'border crossing right' to Indigenous communities or individuals striving to maintain longstanding traditions – in some cases dating back to pre-Christian times.

The creation and/or development of new contacts and relationships are also prescribed. Interestingly, the category *other peoples* may be understood to include non-Indigenous peoples. In many border regions of Central and South America, culturally and politically significant relationships have evolved between First Nations peoples and citizens of neighbouring States, who are often ethnically distinct and frequently non-Indigenous.

CLUSTER SIX – SPIRIT BUSINESS, LANGUAGES AND MEDICINES - (ARTICLES 12, 13, 24, 25 AND 31)

Article 12

The 1993 version of Article 12 was concerned with safeguards against the erosion of Indigenous cultural heritage – very broadly defined. In view of the ongoing renaissance of First Nations art, music and performance in many parts of the world, present and future as well as traditional manifestations of culture were all featured. It has been suggested by some North American activists that the wording of this Article owes much to collaboration between Alaskan and Canadian Inuit and Indigenous representatives from Mexico and Australia. Article 12 (1993) was a powerful and wide-ranging reference to the fundamental importance of spiritual and religious traditions and an acknowledgement of the relationship between community and *country*. At the time the emphasis on cultural sites and repatriation of human remains was particularly meaningful to many Indigenous Australians. Article 12 1993 displayed the 'fingerprints' of numerous authors:

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, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent, or in violation of their laws, traditions and customs (E/CN.4/Sub.2/1993/29/Annex I).

Article 13

In 1993, Article 13 was concerned with restoring spiritual life and also incorporated acknowledgement of the need to support effective Indigenous engagement in the areas of custom and ceremony. Taken as a whole, Article 13 was a testament to the teamwork and good sense of a diverse collection of First Nations representatives:

Indigenous peoples have the right to manifest, practise, 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 ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the Indigenous Peoples concerned, to ensure that Indigenous sacred places, including burial sites, be preserved, respected and protected (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 24

In 1993, Article 24 concerned Indigenous ownership and utilization of traditional medicines and healing practices. Even amongst First Nations members there was little awareness of the vast scale of Indigenous ‘bush medicine’ production. Southern parts of the United States, much of Central America, northern South America and northern Australia are areas in which significant traditional medicines have attracted the attention of local and global pharmaceutical companies. In some places, relations between Indigenous producers, corporations and governments date back to the 1950s and have often been problematic. In 1993 a number of Australian Aboriginal delegates commented that this Article was ‘relatively unhelpful, arguing that it was inappropriately vague and ungenerous. They explained that the ongoing shortage of

‘whitefella-educated’ Indigenous workers in remote communities was central to the problem.

Most communities were incapable of building effective relationships with outside corporations who were often assisted by State government bureaucrats and politicians. Among Indigenous Australian representatives, the 1993 version of Article 24 was considered ‘under-developed and superficial’ in its orientation. Many agreed that Indigenous communities needed direct and ongoing support if they were to effectively engage with multinational corporations and that Article 24 should eventually offer something along those lines. Others focussed on the inadequate health standards of Indigenous peoples. In the consensus view, Article 24 (1993) required additional and purposeful development in order to reflect the needs and aspirations of First Nations peoples:

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without discrimination, to all medical institutions, health services and medical care (UN E/CN.4/Sub.2/1993/29/Annex I).

Despite its inadequacies, Article 24 demonstrated Indigenous engagement and commitment to bush medicine as a provider of employment within rural and remote communities, and as a statement of ongoing First Nations cultural relevance and usefulness.

Article 25

In the 1993 Draft Declaration, Article 25 concerned the perceived need to restore traditional relationships with the environment, but offered little by way of identifying the steps that might be taken to achieve that goal. Still, Article 25 included the notion of *strengthening* traditional relationships with the environment and the equally important idea of *upholding* responsibilities to future generations – without defining or describing those responsibilities. Article 25 was concerned with *material* and

spiritual relationships with the land, but did not include mention of economic, cultural or other relationships:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 31

In the 1993 version, Article 31 was concerned with self-government at the local level, and was one of the more comprehensive and practical Articles of the Draft Declaration:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions (UN E/CN.4/Sub.2/1993/29/Annex I).

The explicit reference to *self-determination* demonstrates the prominent position and role of self-determination in the thinking and vocabulary of the time. For many, self-determination was most necessary and *authentic* at the local level and was fundamental to Indigenous community development. The financial dimension was also identified and addressed by the authors, emphasizing their awareness of grassroots community concerns regarding economic and financial stability.

CLUSTER SEVEN – RIGHTS TO EDUCATION AND INDIGENOUS MEDIA - (ARTICLES 14, 15 AND 16)

Article 14

In 1993, Article 14 addressed the issue of community control of cultural heritage and the transfer of that heritage to future generations. The list of cultural domains

specified in the 1993 draft provides insights in relation to Indigenous political agendas prevailing in the early 1990s:

Indigenous peoples have the right to revitalize, use, develop and 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.

States shall take effective measures, whenever any right of Indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political legal and administrative proceedings where necessary through the provision of interpretation or by other appropriate means (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 14 1993 was indicative and symptomatic of Indigenous cultural and political resurgence in the late twentieth century and demonstrated considerable political sophistication on the part of First Nations representatives at Geneva.

Article 15

In 1993, Article 15 was overwhelmingly educational in its coverage and emphasis. The influence of the global Indigenous language revival movement was evident in the focus on culture and language. A number of Maori and Inuit representatives were prominent supporters of this Article. It is likely the inclusion of adult learners – *all Indigenous peoples* – was an Indigenous Australian initiative. Importantly, Article 15 featured references to Indigenous control over educational systems and institutions. In many parts of the world, church missions and local government controlled schools had proven resistant to First Nations educational demands. Moreover, children separated from their communities by culture and geography also received special attention. In both cases, the authors were responding to significant lobbying on the part of community members and NGO representatives. Though narrow and selective, Article 15 1993 was a positive statement of longstanding Indigenous educational demands:

Indigenous children have the right to all levels and forms of education of the State. All Indigenous peoples have this right and 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.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 16

In the 1993 Draft Declaration, Article 16 concerned the public presentation and representation of Indigenous cultures and histories and was an expression of re-awakened pride and renewed commitment on the part of resurgent Indigenous communities:

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the Indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among Indigenous peoples and all segments of society (UN E/CN.4/Sub.2/1993/29/Annex I).

While some of the expression in the English language version of Article 16 1993 is awkward, the sentiments are clear. An awareness of the intrinsic dignity and diversity of Indigenous peoples was a powerful concept in the UN Year of Indigenous People. At the same time, across the Indigenous world and especially within urban communities, a pre-occupation with education and public information was also characteristic of the early 1990s.

CLUSTER EIGHT – EMPLOYMENT AND WORKPLACE RIGHTS - (ARTICLES 17, 18, 19, 20 AND 21)

Five Articles comprise the cluster in the 1993 Declaration that addresses Employment and Workplace Rights. The influence of the UN-supported International Labour Organization (ILO) and especially ILO Convention 169 of 1989 is apparent in relation

to Articles 18, 19 and 20. Reflecting the union-derived thinking of the ILO, the three Articles in question are devoid of references to rights to funding opportunities, and regarding access to domestic and international markets for Indigenous primary producers.

Article 17

In the 1993 Draft Declaration, Article 17 was dominated by a demand for an Indigenous media presence in all member States with First Nations populations:

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-Indigenous media.

States shall take effective measures to ensure that State-owned media duly reflect Indigenous cultural diversity (UN E/CN.4/Sub.2/1993/29/Annex I).

Media engagement was a powerful concept, but *media presence* can vary dramatically in terms of the range and depth of engagement. In Australia and Canada late twentieth century Indigenous media initiatives focussed on television broadcasting, despite onerous government regulatory protocols and the high set up and maintenance costs of colour TV transmission. Radio and print media were less attractive options for government planners, offering more limited and less spectacular vote-winning publicity opportunities.

Article 18

In the 1993 Draft Declaration version, Article 18 served to locate Indigenous rights within the domain of international labour law:

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary (UN E/CN.4/Sub.2/1993/29/Annex I).

While international labour law might be understood as relevant to the circumstances of all First Nations workers regardless of their location, there were major differences

with regard to *national* labour legislation. For Indigenous workers in federal States – including Australia, Brazil, Canada and United States – significant differences could also be expected between the legal frameworks of the various provinces and territories. In general, larger Indigenous populations frequently occur within rural or remote localities where working conditions are demanding, wages are often less generous and employment is rarely secure.

Article 19

First Nations engagement in the political processes of the State represented the focus of Article 19 within the 1993 Draft Declaration. Article 19 was intended to empower Indigenous Peoples in the key areas of representation and decision making. Rather than focussing on Indigenous leadership or acceptance of State authority, the underlying theme of Article 19 was First Peoples *participation*:

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision making in matters which may affect their rights, lives and destinies, through representatives chosen by themselves in accordance with their own procedures. As well as to maintain and develop their own Indigenous decision-making institutions (UN E/CN.4/Sub.2/1993/29/Annex I).

The phrase *in matters which may affect their rights, lives and destinies* may be interpreted as weakening the right to participate. Yet Indigenous representatives and advocates might argue that almost every kind of political and legal decision can be regarded as a potential threat to the wellbeing and cohesion of First Nations communities and individuals. In 1993 the concept of developing and maintaining Indigenous decision-making institutions was an attractive and valuable notion – particularly in terms of self-determination at local and regional levels.

Article 20

The 1993 Draft Declaration of Article 20 was unusual in that – in addition to the right to participate – the Article gave Indigenous peoples the right to *determine* procedures and to *devise* measures that might affect them:

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures (UN E/CN.4/Sub.2/1993/29/Annex I).

Presumably, *legislative or administrative measures that may affect* First Nations populations would include the complete range of government initiatives and responses that constitute the business of government. The word *fully* is significant and potentially problematic, because the concept of *full participation* shared by members of a particular First Nations territory would likely be more developed, comprehensive and ongoing than that endorsed by officers of the State, members of the legislature/parliament, or their advisers and supporters in the media.

Article 21

Article 21 revolved around economic and cultural autonomy in the 1993 Draft Declaration, aligning closely with Articles 19 and 20. Rather than breaking new ground, Article 21 confirmed contemporary concepts of economic autonomy and regional enterprise. In relation to the financial realities of Indigenous economic management, a sentence concerning rights to funding from State and/or corporate institutions might have provided a measure of reassurance for many Indigenous organizations, communities and individuals. At the same time, Article 21 was unusual in combining references to political, economic and social systems with mention of the circumstances of Indigenous peoples deprived of the *means of subsistence and development*:

Indigenous peoples have the right to maintain and develop their political, economic and social systems, 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. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation (UN E/CN.4/Sub.2/1993/29/Annex I).

Taken as a whole, Article 21 1993 was a strong statement of Indigenous peoples' rights to political and economic autonomy.

CLUSTER NINE – RIGHTS TO FAIR AND IMPARTIAL LEGAL PROCESS - (ARTICLES 27, 28, 32, 33 AND 40)

The evolution of the Draft Declaration and the emergence of UNDRIP has remained a largely hidden story. Within the UNDRIP story Articles concerning rights to fair and impartial legal processes have received less attention than other categories – particularly within Indigenous communities. Academic lawyers and political scientists have been the most visible champions of these rights. It is interesting that – even with the benefit of some high profile support (see Dodson, Clark and Borrows interviews 2016) – there were never more than three Articles in this category. It is possible that First Nations representatives were preoccupied with issues surrounding self-determination, and became complacent and overly trusting in relation to the intentions and processes of the wider international community.

Article 27

In 1993, Article 27 was one of the more ambitious and explicit Articles of the Draft Declaration. Article 27 encapsulated the aspirations of grassroots Indigenous activists – especially in more remote and resource-rich locations in Australia and North America. Not surprisingly, compensation and restitution were central concepts within Article 27:

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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 (UN E/CN.4/Sub.2/1993/29/Annex I).

This is a far-reaching and complex Article and one that incorporates some problematic elements. The phrase *where this is not possible* is interesting. The concept of *possible* is probably similar to 'politically realistic' or 'politically sustainable'. The formula for

compensation is a demanding one, intended to maximize the likelihood of positive and workable outcomes for First Nations claimants.

Article 28

The integrity of the total environment was a major issue for many First Nations representatives in the early 1990s. The 1993 version of Article 28 was concerned with maintaining or in many cases restoring the integrity of the total environment – including the exclusion of hazardous (e.g. nuclear) materials and by-products. The health of some – but not all – First Nations populations was also addressed in paragraph three:

Indigenous peoples have the right to the conservation, restoration, and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international co-operation. Military activities shall not take place in the lands and territories of Indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of Indigenous peoples.

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 (UN E/CN.4/Sub.2/1993/29/Annex I).

The 1993 version of Article 28 was directly relevant to the circumstances of Aboriginal peoples in remote northern and Western Australia, some Alaskan Inuit, northern Canadian First peoples and Indigenous Taiwanese on the ‘nuclear island’ of Lan Yu. In all of these examples, Indigenous land had become the location of military facilities of various kinds – many of them highly-classified. In the context of 1993 the reference to the health of First Nations peoples was a long-term response to the damaging effects of defence-related activities conducted by States and their agencies – rather

than a demand for a broader and more proactive regional or national Indigenous health policy.

Article 32

Though relatively short and apparently straightforward, Article 32 in the 1993 version of the Draft Declaration was an interesting Article from cultural and political points of view. Article 32 concerns 'citizenship', but not State citizenship. Instead, citizenship in the form of individual membership of an Indigenous or 'tribal' nation is the primary focus of the Article. The concept of 'collective rights' is associated with the responsibility of Indigenous communities to maintain their own definitions and systems of citizenship. First Nations are encouraged to oversee the application of processes and the development of local institutions to provide stability and continuity over time:

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own structures (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 33

In the 1993 Draft Declaration, Article 33 was a wide-ranging statement that addressed a number of Indigenous cultural domains including institutional structures, customary law and other longstanding procedures and ways of doing:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards (UN E/CN.4/Sub.2/1993/29/Annex I).

The chosen sequence indicates that in the early 1990s promotion and development of institutional structures were considered priorities. Many First Nations leaders realized

that culturally appropriate promotion and development were needed to successfully engage with youth. In addition, a visible and distinctive 'profile' required evidence of ongoing cultural production including artwork, music, traditional ceremony, language and sports. *Distinctive juridical customs, traditions, procedures and practices* were also central, but in most parts of Australia, remain largely secret.

Article 40

In 1993 the Draft Declaration version of Article 33 was essentially practical in its orientation. The Article includes reference to financial co-operation and technical assistance. Such concepts were almost entirely absent from the Draft Declaration. By contrast, Indigenous participation featured in many Draft Declaration Articles. Importantly, Article 40 positioned the UN at the centre of the Indigenous global agenda:

*The organs and specialized agencies of the United Nations system and other inter-governmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, **inter alia**, of financial co-operation and technical assistance. Ways and means of ensuring participation of Indigenous peoples on issues affecting them shall be established (UN E/CN.4/Sub.2/1993/29/Annex I).*

The term *other inter-governmental organizations* should be understood as representing government and non-government organizations of many kinds – including those created by First Nations communities and individuals for the purpose of consolidating the global Indigenous renaissance. The phrase *organizations shall contribute* offers little in terms of identifying what resources might be contributed. In addition, there are no clear or direct connections to First Nations demands and aspirations expressed elsewhere in the Draft Declaration.

CLUSTER TEN – ENVIRONMENTAL AND DEVELOPMENT RIGHTS - (ARTICLES 23, 29 AND 30)

In the months prior to the adoption of UNDRIP in September 2007, a handful of Indigenous activists and mainstream commentators noted the minimal coverage of environmental and development rights in the almost delivered Declaration. Still,

while only four Articles focussed entirely on environmental or development rights, at least a dozen contained references to development and/or the environment. During the late 1970s and 1980s human rights were a major preoccupation of a large proportion of political activists, commentators, theorists and Indigenous spokespeople. The Draft Declaration was a product of those years and of the drive to create and orchestrate political change. Kevin Cook, United Nations enthusiast and Principal at Tranby Aboriginal College in Sydney captured the 'vibe' shared by thousands of grassroots Indigenous Australians when he declared: "This is our chance to put things right for our people. This is the time to make change happen in this country and across the world . . ."

Article 23

In 1993, the Draft Declaration version of Article 23 was a revealing combination of elements concerning economic and community development. Health is prominent and combines with housing and economic and social programmes:

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 determine and develop all health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions (UN E CN.4/Sub.2/1993/29/Annex I).

Overall, this Article was a consistent and balanced statement. The phrase *the right to determine and develop all programmes affecting them* was perhaps the most positive and empowering. In the 1990s this constituted an ambitious agenda. A handful of States agreed to a measure of power sharing (see Dominion of Canada and creation of Nunavut Territory 1999). Yet few indicated a willingness to allow First Nations representatives to *determine* programmes or policy settings.

Article 29

Intellectual property was a prominent and increasingly relevant issue in the Indigenous world of the late twentieth century. Disputes and debates concerning intellectual property had become commonplace. Article 29 in the Draft Declaration

version of 1993 was intended to address the concerns of First Nations communities and individuals. In keeping with the thinking of the time, Article 29 was wide-ranging and ambitious:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs and visual and performing arts (UN E/CN.4/Sub.2/1993/29/Annex I).

Recognition of Indigenous ownership, control and protection of First Nations cultural and intellectual property was a well-supported and achievable demand. Yet it was unclear what form such recognition might take. *Special measures* were also mentioned, but no detail was provided regarding the nature and scope of such measures.

Article 30

In 1993, Article 30 of the Draft Declaration was a contested and controversial Article. This Article was enthusiastically supported by representatives of many First Nations communities in Australia, North America and New Zealand, but earnestly resisted by States closely aligned with global corporations and entrenched, extractive industries. Article 30 was an Article in which the phrase *free, prior and informed consent* came to be recognized by Indigenous participants and observers as a notable and decisive element:

*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their **free and informed consent prior** to the approval of any project affecting their lands territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the Indigenous peoples concerned, just and fair compensation shall be provided for*

any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 30 (1993) contains no direct reference to the use of rivers, lakes, seas or marine resources. The term *other resources* might have been intended to include all of the above. In addition, mineral, water or other resources might have been generally understood to include oil and gas, but these may have been excluded in particular jurisdictions. It was envisaged that compensation to cover the cost of activities and measures undertaken in an effort to mitigate *adverse impacts* of many kinds would be provided by States. In addition to the advocacy of First Nations delegates, representatives of friendly States and NGOs lent their support to the strengthening and acceptance of Article 30 during the summer of 1993 (see Dodson, Clark and Sambo Dorough interviews 2016).

CONCLUSION

Close examination reveals that the 1993 Draft Declaration is a lengthy and comprehensive document that displays its complex origins at almost every turn. The Draft Declaration is also disjointed and ‘haphazard’ in both structure and sequence, with little consistency in style or approach. The document is clearly the work of large numbers of contributors from culturally and linguistically diverse backgrounds and can be described as ‘eclectic’ and ‘emphatic’, rather than ‘inspiring’. Perhaps the greatest strength of the Draft Declaration is its *authenticity*. As the handiwork of representatives of thousands of First Nations, discussed, written, debated and re-written across two decades of the late twentieth century, the document is a highly detailed reflection of the values, orientations and aspirations of its unnamed and largely unknown authors. While the influence of States’ representatives and NGO delegates is apparent at various points, the Draft Declaration is above all a monument to the patience, dedication, teamwork and moral compass of Indigenous humanity.

CHAPTER 7 - 2007 ARTICLES OF THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

Introduction

The forty-six Articles of the final Declaration on the Rights of Indigenous Peoples [UNDRIP] 2007 were not drafted and rewritten one at a time. They were created and reviewed in groups or *clusters*. From the outset, each cluster contained Articles addressing related issues and themes (see Dodson, Clark, Borrows, Sambo Dorough, Chartier and Malezer interviews, 2016, and Clark 2017). In the years prior to 1993 and particularly within the timeframe 1994–2007, while less problematic Articles sat ‘dormant’ and were rarely discussed, the more contentious Articles were revisited on an annual basis during the meetings of the Working Group Indigenous Peoples [WGIP].

Detailed and tightly argued submissions of both Indigenous spokespersons and States’ representatives normally focussed on the problematic or ‘unresolved’ Articles in each cluster (see Clark, Sambo Dorough and Means interviews, 2016). Some clusters were more politically and tactically important to specific Indigenous organizations and individuals than others. At the same time, States’ representatives were directed to oppose specific words or phrases within draft Articles with more vigour where the interests of their nation – or those of major corporations supportive of the regime or ruling elite – were seen to be threatened. Meanwhile, in the Scandinavian nations, some western European, central and South American States – often described as the ‘friendly’ States or ‘friendlies’ – support for First Nations demands required equivalent attention to detail. The so-called ‘friendly’ States were numerous, but they did not enjoy the level of co-ordination that characterized the operation of the most resistant States – Canada, Australia, New Zealand and the United States, the coalition which came to be known as ‘the CANZUS bloc’. Still, friendly representatives liaised closely, productively, and worked effectively and often quickly with NGO and First Nations delegates.

Planned and co-ordinated responses were needed for the purpose of assisting and progressing the Indigenous agenda. To enable a clearer and stronger ‘plan of attack’,

the Articles were generally dealt with in thematic clusters. Self-determination represented a key focus and soon developed a cluster of its own. Notably, self-determination was a theme of over-riding importance which had emerged in the early 1980s. By 1993 it represented a salient rallying point for Indigenous delegates and a ‘matador’s red cape’ (in the words of a Mexican diplomat) for the CANZUS states and their supporters. In First Nations communities across North America, and in Australia and Aotearoa/New Zealand, the progress of Article 3 was monitored by activists eager to see evidence of the relevance and ‘authenticity’ of UNDRIP. The evolution of Self-Determination Articles (Articles 3,4, 8 and 26) was also studied by those determined to identify grounds for criticism and rejection of the Declaration, and by persons sceptical of the validity and value of the underlying Indigenous/UN relationship.

CLUSTER ONE – SELF-DETERMINATION - (ARTICLES 3, 4, 8 AND 26)

Article 3 is the primary Article for self-determination and probably the best known and most controversial of the entire forty-six Articles. Articles 4 and 26 also concern self-determination and demand further analysis.

Article 3

In 1993 the Draft Declaration on the Rights of Indigenous Peoples included the following version of Article 3:

*Indigenous peoples have the right **of** self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development [UN E/CN.4/Sub.2/1993/29/annex I].*

By 2007 in the final draft version of UNDRIP adopted by the General Assembly on 13th September, one word in Article 3 had been replaced:

*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 (UNDRIP, 2007, p. 11).*

According to Sheryl Lightfoot (2016) in the English language version of the Draft Declaration (not the Spanish version) **of** was replaced by **to** within hours of formal adoption on the floor of the General Assembly. In the view of prominent Maori lawyer

and activist Moana Jackson, this late change significantly weakened the rights of Indigenous peoples by making self-determination more aspirational and less 'inherent' or 'automatic' than it is for other peoples (Lightfoot 2016, p. 63). Since September 2007 Jackson has spoken repeatedly and with considerable impact on this issue:

“That prepositional change was deliberately engineered by the UN and by the States. In a deeply legal sense and a philosophical sense, it changes and diminishes self-determination. This fundamental right is not accorded to Indigenous peoples as it is accorded to other peoples” (Jackson in Lightfoot 2016, p. 63).

By contrast, Les Malezer (see interview 2016) has argued that Article 3 has remained 'virtually unchanged' and that Indigenous spokespeople are divided over the importance and ramifications of the distinction between *of* and *to*.

A number of commentators (including Lightfoot (2016), Imai (2015), Dodson (2016) and Clark (2016)) have argued that Indigenous thinking concerning self-determination is fundamentally distinct from that of western-trained professionals – including non-Indigenous commentators and academics. In this interpretation, Indigenous peoples are not desirous of formal political secession and formation of new nation States. Despite at times extreme rhetoric, many First Nations communities seek a developed and ongoing form of regional autonomy, similar to that achieved by the Inuit in northern Canada, with the creation of the federal territory of Nunavut in April 1999.

Article 4

In the early 1990s, Article 4 represented a broad extension of Article 3. The central concept was the maintenance of cultural cohesion and community identity. At the same time, the right to engage in non-Indigenous activities and organizations was defined as compatible with Indigenous ways of doing on the grounds that:

Indigenous peoples have the right to maintain and strengthen their distinct political, economic, social and cultural characteristics, as well as their legal systems, while retaining their rights to participate fully, if they so choose, in the political, economic, social and cultural life of the State (UN E/CN.4/SUB.2/1993/29/Annex I).

By 2007, connections with Article 3 and emphasis on local autonomy had been significantly strengthened:

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 (UNDRIP 2007, p. 13).

Many States' representatives endorsed the emphasis on internal and local affairs (see Clark, Sambo Dorough and Means interviews, 2016). Moreover, according to a number of participants (see Clark and Dodson 2016), the addition of a right to funding for autonomous functions sat well with a majority of First Nations delegates. Borrows, Sambo Dorough and Means (see 2016 interviews) have noted that the changes made to Article 4 during re-drafting and review (1993–2007) reflect concerns on the part of States – particularly the CANZUS bloc – with Article 3 and concepts concerning self-determination.

Article 8

In the 1993 Draft Declaration version, Article 8 consisted of one sentence:

Indigenous peoples have the collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as Indigenous and to be recognized as such (UN E/CN.4/SUB.2/1993/29/Annex I).

The concept of *maintaining and developing distinct identities and characteristics* is a far-reaching and complex one that represents the application of the principle of self-determination at the local level. The concepts of *maintaining* and *developing* are dissimilar. Maintenance of culture does not allow for cultural change and adaptation, which are fundamental to the process of cultural renewal and reinvigoration. The word *developing* can encompass significant adaptation and is frequently favoured by urban Indigenous. *Distinct identities and characteristics* may include a wide range of cultural dimensions that can only be effectively assessed and interpreted by the peoples themselves. Importantly, this is understood to include, but is not limited to, self-identification. Not surprisingly, in the early 1990s this was considered by leading

Indigenous Australian activists to be one of the ‘fundamental’ Articles of the Declaration (see Dodson and Clark interviews, 2016).

The ‘Identity Article’ had been strongly supported by First Nations representatives from Central and South America, Canada and Australia since the early 1980s (see Dodson and Clark interviews, 2016). From the early twentieth century, many States assumed the role of deciding which communities and individuals should be classified as ‘Native’ and which should be given a different designation. In many jurisdictions, classifying a population or an individual as ‘mixed race, or ‘non-Native’ meant significantly lower levels of scrutiny on the part of outside interests and outside authorities – including the major Christian churches, Red Cross, International Labour Organization (ILO), League of Nations and later the United Nations.

At the level of national government, the anglosphere settler States – including Australia – were reluctant to accept responsibility for their Native populations. In both Canada and Australia, federation failed to displace provincial/State control at the local level. Yet, this did not mean provinces/States provided all fundamental services and resources. Most educational and health care engagement was provided by a diverse range of church missions within State legislative and administrative frameworks. Native populations were seen as ‘financial burdens’ completely lacking the potential for self-sufficiency. States sought to minimize their costs and often declared lower – sometimes dramatically lower – numbers of Indigenes within their jurisdictions. In many remote areas, unrealistically low -but politically convenient - Indigenous population figures encouraged investment and even infrastructure development. At the same time, First Nations communities heavily impacted by church missions and government were often more agreeable and co-operative than their urban counterparts. Indigenous communities in isolated or mountainous terrain or in coastal areas where States struggled to prevent or control interactions with the wider world were often exceptions to this pattern.

Article 26

Between 1993 and 2007 the re-drafting of Article 8 became a priority for many First Nations representatives. By 2007, Article 8 had grown considerably and contained two distinct sections and five sub-paragraphs:

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 dispossessing them of their lands, territories or resources;*
 - [d] *Any form of forced assimilation or integration; and*
 - [e] *Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them (UNDRIP 2007, p. 21).*

While the final 2007 version of Article 8 appears robust and comprehensive, it is not. In particular, the first line of section two is problematic. As discussed in earlier sections, the effectiveness of any mechanisms would not normally be determined by Indigenous peoples or the representatives. Nor would effectiveness be established by any independent or external body or authority. Instead, effectiveness would be assessed and determined by States or States' representatives. States would also decide when *integrity as distinct peoples* was under threat, or if Indigenous were being deprived of their *cultural values or ethnic identities*. Such impacts are necessarily difficult to identify and monitor, particularly in urban and multicultural environments.

The process of dispossessing Indigenous peoples of their lands, territories and resources can be difficult to identify. This is because dispossession can occur beyond the reach of the media, and distant from relevant and supportive First Nations hubs. Forced population transfer can be disguised as an 'education policy' or an 'employment initiative'. Such responses might appear to be addressing entrenched Indigenous disadvantage, but can be seen as designed to weaken Indigenous connections with traditional environments and ways of life. *Forced assimilation or integration* may seem voluntary or accidental – especially when it proceeds slowly and quietly and where the most visible influences are economic, rather than administrative or political.

In terms of propaganda, the word 'designed' represents a key concept. If it can be established that the *intention* to incite racial or ethnic discrimination was absent, the communication might be deemed acceptable. It would also need to be established that Indigenous peoples – rather than persons of any other category or description – had been deliberately targeted. At the same time, *any form* of propaganda is an appropriately broad coverage and would include posts within social media, radio transmissions and visual as well as literary or textual forms.

Article 26

In 1993, Article 26 was one of the most far-reaching and comprehensive of those addressing relationships between First Nations peoples and their traditional lands and territories. Indigenous participants (see Dodson, Clark and Means interviews, 2016) have suggested that Article 26 flew 'under the radar' where States representatives were concerned. The Article reads:

Indigenous peoples have the right to own, develop, control and use the lands and territories, including the total environment of the lands, waters, coastal seas, sea-ice, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures

by States to prevent any interference with, alienation of, or encroachment upon these rights (UN E/CN.4/Sub.2/1993/29/Annex I).

This Article was one of the most positive and inclusive and featured the term *total environment* and mention of waters, coastal seas and sea-ice as well as land, flora and fauna. It also incorporated full recognition of laws, traditions and customs, land tenure systems and institutions.

By 2007, Article 26 had been significantly modified, including being divided into three separate paragraphs as listed:

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* (UNDRIP 2007, p. 57).

Article 26 has been narrowed and weakened in the 2007 version. *Full recognition of laws, traditions and customs*, has been replaced by recognition with *due respect* to customs, traditions and land tenure systems. The concern with water, coastlines and sea-ice has gone. The anxiety and insecurity that characterized States' responses to Articles 3 and 4 carried over to Article 26, ensuring the final revised version would fall short, both in terms of the spirit and the letter of earlier versions.

Examination of the three self-determination Articles reveals that in the 1993 Draft Declaration Articles 3, 4 and 26 were more ambitious and comprehensive than their final iterations. The 1993 Draft was written as the expression of the mindset of a more generous and less defensive time, when the aspirations of Indigenous peoples were

seen as promising a better future, rather than threatening a flawed and fragile present.

COMMENTARY

Self-determination looms large in the thinking and discourse of global Indigenous resurgence. Yet only three of the forty-six Articles of UNDRIP (or fewer than 6%) have self-determination as their core focus. At the same time, despite its ongoing pre-eminence, self-determination is an imprecise and often problematic term.

For Indigenous Australian academic lawyer Larissa Behrendt:

Self-determination is the ability [on the part of actors in the political domain] to recognize fundamental Indigenous rights in the way that Indigenous peoples want those rights to be recognized (Introduction in Garkawe, Kelly & Fisher 2001, p. 6).

Behrendt insists:

To achieve self-determination, control must first be vested in Indigenous communities [in Garkawe, Kelly & Fisher 2001, p. 7].

For many Indigenous activists this represents a minimalist response. In contrast, American Indian lawyer and diplomat James Anaya's argument is sophisticated and persuasive. Anaya maintains that the *concept* of self-determination lies at the heart of Indigenous self-belief and political consciousness:

*Self-determination is affirmed as a principle in the Charter of the UN and as a right of **all peoples** in international human rights covenants . . . In the colonial context, self-determination was understood as a right to independent statehood [or sovereignty]. A premise underlying this approach is that the State represents the highest possible form of self-determination for cultural or national communities. Of course, this premise is subject to question (Anaya J, The Influence of Indigenous Peoples on the Development of International Law in Garkawe, Kelly & Fisher 2001, pp. 111-112).*

The State and concepts concerning the State are directly relevant to self-determination. In general, First Nations representatives envisage a dramatically altered role for the declining State, consistent with a significantly different concept of

self-determination for Indigenous peoples. Anaya has explained that the nature of the State – and the closely related notion of self-determination – should not be seen as fixed or beyond the reach of political and social influence over time. The State is more fragile and less embedded than it might seem. Together with other First Nations theorists and commentators, Anaya is mindful of the ‘unravelling’ of the State, noting:

In response to accelerating developments over the last several decades, the State has diminished in importance in relation to both local and transnational spheres of community and authority (Anaya in Garkawe, Kelly & Fisher 2001, p. 112).

While many factors have contributed to the re-making of the modern State, Anaya has highlighted the role of international Indigenous activism:

In pressing their demands in the international domain, Indigenous peoples have undermined the premise of the State as the highest and most liberating form of human association (Anaya in Garkawe, Kelly & Fisher 2001, p. 112).

This view is consistent with those of Indigenous representatives and participants in the Working Group Indigenous Populations (WGIP), including Dodson, Clark, Sambo Dorough and Means (see Dodson, Clark Sambo Dorough and Means interviews, 2016). Clark has recalled:

For most of us – and definitely for me as an individual – the big issue . . . was self-determination. Self-determination stood at the top of the list. We were in the business of demanding sovereignty rights. . . We wanted every right that we had been denied through the process of colonization and above all, we demanded self-determination . . . (Clark interview 2016, p. 1).

Self-determination has been central to the Indigenous/UN relationship and fundamental to the global Indigenous agenda. Many First Nations activists and CANZUS representatives defined their roles and their careers in terms of the strength of their support for, or resistance to, self-determination as expressed in UNDRIP.

James Anaya provided a clinical but compelling interpretation of the dynamics of self-determination in the contemporary Indigenous context:

*[For Indigenous peoples] Self-determination is achieved not by independent statehood, but by the consensual development of context-specific arrangements that uphold for Indigenous peoples **both** spheres of autonomy commensurate with relevant cultural patterns **and** rights of participation in the political processes of the states in which they live (Anaya 2001 The Influence of Indigenous Peoples on the Development of International Law in Garkawe, Kelly & Fisher 2001, p. 112).*

Perhaps, before attempts are made to determine the most useful structural formula, a desire for self-determination must be cultivated in the minds of Indigenous peoples. Self-determination includes elements that sit beyond the range of normal academic theory. Though rarely explored in standard treatments, self-determination entails powerful, but elusive aspects. In particular, self-determination has acquired major *symbolic* significance. On deeper levels, participants and observers have been impacted by the symbolism surrounding Indigenous self-determination. Since the 1970s Indigenous elders have realized that First Nations demands for self-determination would probably not be accommodated or even entertained by the international corporate-government system in the short term. Importantly, non-Indigenous resistance has acted to strengthen, rather than undermine the symbolic resonance of self-determination.

Elders and delegates have understood that in the medium term, reluctant and condescending compromise was the most probable result at the national level. Still, looking to the distant future, the outlook for many was not entirely bleak. The symbolism inherent in the rise of UNDRIP – featuring an explicit and highly publicized agenda of Indigenous rights – was intended to serve as a focus of hope and an expression of shared purpose. For First Nations activists, the fundamental achievement of the campaign for self-determination was the creation and nurturing of a global Indigenous movement. Anything above and beyond that achievement, including the adoption of UNDRIP, would constitute an unexpected bonus. By the 1990s, co-ordinated Indigenous resistance to the international system had taken hold and found a voice. Articles 3, 4, 8 and 26 represented the ‘front line’ in the campaign for the Declaration. Yet UNDRIP was not a ‘stand-alone’ initiative. Seven largely

neglected Articles connected UNDRIP to other UN instruments and bound the Declaration to the UN system as a whole.

CLUSTER TWO – REFERENCES TO OTHER UN DOCUMENTS - (ARTICLES 1, 2, 41, 42, 43, 45 AND 46)

Article 1

In 1993, Article 1 was a relatively straightforward and concise Article that explicitly referenced the UN Charter and the Universal Declaration of Human Rights:

Indigenous peoples have the right to the full and effective enjoyment of all human rights and fundamental freedoms recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law (UN E/CN.4/SUB.2/1993/29/Annex I).

By 2007 significant changes had been made, including the addition of the concept of *collective* (or community based) Indigenous rights. Indigenous representatives from Alaska the USA and Australia (see Dodson, Clark Sambo Dorough and Lee interviews, 2006) played leading roles with regard to defining and explaining the concept of collective rights – which received substantial and possibly decisive support from friendly European and central and South American States in the early 2000s. A First Nations consensus emerged along the lines that the focus of western philosophy and law on the rights and obligations of the *individual* was inconsistent with Indigenous cultural and legal traditions and was therefore insufficient. In general, Indigenous thinking upholds the *collective* or community as the central and pre-eminent social and political entity from which the rights of individuals are derived. This concept of collective rights was reflected in the 2007 version:

*Indigenous peoples have the right to the full enjoyment, as a **collective** and as individuals, to all human rights and fundamental freedoms as recognized in the Charter of the UNITED NATIONS, the Universal Declaration of Human Rights and international human rights law (UNDRIP 2007, p. 8).*

Article 2

In 1993, Article 2 acted as an extension of Article 1 and served to locate Indigenes in relation to other peoples – especially members of minorities covered the previous year by the UN Declaration on the Rights of Minorities (18 December 1992).

Indigenous individuals and peoples are free and equal to all other individuals and peoples in dignity and rights, and have the right to be free from any kind of adverse discrimination, in particular, that based on their Indigenous origin or identity (Thornberry, 2002, p. 455).

By 2007 Article 2 had undergone a number of changes, including the deletion of the words **dignity**, and **adverse** and the re-positioning of **peoples** ahead of individuals:

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 (UNDRIP 2007, p. 10).

The final version is a positive, but minimalist statement, which fails to provide detail in terms of ‘discrimination’, ‘origin’ or ‘identity’.

Article 41

The first part of Article 41 in the 1993 version represented a clear statement of intent on the part of the UN. The second part was less specific, but enjoined UN divisions and agencies to lend appropriate and meaningful support to the provisions of the Declaration:

The United Nations shall take the necessary steps to ensure the implementation of this Declaration including the creation of a body at the highest level with special competence in this field and with direct participation of Indigenous peoples. All United Nations bodies shall promote respect for and full application of the provisions of this Declaration (UN E/CN.4/Sub.2/1993/29/Annex I).

By 2007, Article 41 had become more technical, more specific and slightly longer:

The organs and specialized agencies of the UNITED NATIONS system and other inter-governmental organizations shall contribute to the full realization of the provisions of this Declaration, through the mobilization, inter alia, of financial co-operation and technical assistance. Ways and means of ensuring participation of Indigenous peoples on issues affecting them shall be established (UNDRIP 2007, p. 87).

The high degree of difference between these two versions of Article 41 can be explained in structural terms. With the sudden addition of Article 46 in the final 2007 version, some Articles moved forward one space and one number. Thus Article 41 in the 1993 version closely resembles Article 42 in the 2007 version.

Article 42

In 1993 and prior to that time, Article 42 was entirely concerned with embedding the concept of a **minimum**, as opposed to an average or ‘**aspirational**’ standard as claimed by representatives of the CANZUS states, particularly Australia and New Zealand (both before signing up to UNDRIP and as an element of their ‘special conditions’ when they signed the Declaration in 2008 and 2010 respectively). Article 42 was originally the second shortest Article, enjoyed special prominence, and was frequently quoted by elements of the media and in First Nations conversations and written discourse during the late ‘90s and early 2000s.

1993

*The rights recognized herein constitute the **minimum standards** for the survival, dignity and wellbeing of the Indigenous peoples of the world (UN E/CN.4/Sub.2/1993/29/Annex I).*

2007

The final version featured significant differences:

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 (UNDRIP 2007, p. 89).

Article 43

In 1993, Article 43 consisted of one simple sentence:

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

By 2007, Article 43 had instead become the **minimum standards Article**, exactly the same as Article 42 in the 1993 version:

The rights recognized herein constitute the minimum standards for the survival, dignity and wellbeing of the Indigenous peoples of the world.

As noted in other sections of this study, introduction of the *minimum standards* concept has been one of the hidden successes of the Declaration.

Article 45

In 1993, Article 45 was the last Article and was seen by many Indigenous delegates (see Dodson, Clark and Sambo Dorough interviews, 2016) as a statement designed to proclaim State sovereignty and intended to placate the CANZUS states and their supporters:

Nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations (UN E/CN.4/Sub.2/1993/29/Annex I).

By 2007, Article 45 had been transformed into the former Article 44 with minor modifications:

Nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous peoples have now or may acquire in the future (UNDRIP 2007, p. 95).

The 1993 version of this Article (then numbered 44) was almost identical:

Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights Indigenous peoples may have or acquire (UN E/CN.4/Sub.2/1993/ 29/Annex I).

Arguably the earlier iteration is the more generous one, as it provides a broader framing of existing and future rights. In particular, it allows for rights Indigenous **may** have in the present – but which have remained hidden or unrecognized – as well as those that may be acquired in the future.

Article 46

This controversial and politically divisive Article only exists in the final 2007 version of UNDRIP as adopted on 13th September 2007. No. 46 is a lengthy three paragraph Article that features numerous phrases and words setting out the limits to Indigenous rights in relation to those of States. The concerns of CANZUS bloc representatives are evident in the areas of territorial integrity, political unity and meeting the requirements of a democratic society:

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 (UNDRIP 2007, pp. 98–99).*

Territorial integrity and political unity are the focus of paragraph 1, which has been written to preclude any action which might be seen as encouraging radical political change within any sovereign state. This appears to relate to hardline Maori political movements of various kinds, which have undoubtedly challenged the political unity – as opposed to territorial integrity – of the New Zealand State (see Jones and Hickford interviews, Wellington, NZ, November, 2016).

Paragraph 2 appears to set limits on the exercise of State power, but leaves the interpretation of the location of those limits in the hands of the State concerned. Presumably it is the officers of the State who will decide what is **strictly necessary** with regard to the rights of others, and also determine what constitute the **just and most compelling requirements** of a democratic society. In this scheme, the pre-existing sovereign State would be entitled to use force to fulfil the compelling requirement of defending the State against Indigenous-sponsored civil unrest or disruption.

The principles described in paragraph 3 are difficult to define with precision, but would normally be thought to include the underlying principle of defending the status quo against agents of physical or conceptual change. Principles of **good governance** and **good faith** should be understood to vary dramatically within a given polity, and even more so across regions and between distinct and dissimilar societies.

COMMENTARY

During its long and turbulent existence, the Working Group Indigenous Populations (WGIP) shaped and refined, or at least influenced, all the Articles of the Draft Declaration – with the exception of Article 46, added at the eleventh hour in September 2007 – without due consultation. The Articles which relate to other UN instruments of various kinds may be placed in two broad categories:

a/ Those that have been largely developed and defended by Indigenous representatives for the purpose of addressing specific concerns of First Nations communities and coalitions. Such Articles have been framed with a view to safeguarding and strengthening the exercise of rights by Indigenous groups and individuals in the face of both actual and anticipated resistance by States and their agencies.

b/ *Those that have been written or re-written and often extended by states' representatives in an effort to circumscribe or curtail earlier Indigenous-supported versions thought to represent a threat or potential threat to the interests of specific states or categories of states.*

Interviews with Working Group participants and other Indigenous leaders who contributed to the process have revealed an extraordinary level of consensus with regard to the actions and priorities of First Nations representatives. Similarly, perceptions concerning the agendas and responses of States representatives and NGO spokespeople represent a 'patchwork quilt' of shared, or at least *congruent* evaluations on the part of Indigenes from a broad diversity of backgrounds.

The debates and negotiations concerning alignment with other UN instruments particularly favoured States representatives. The UN was and remains the domain of specialist and career bureaucrats. In the main, diplomats and other State figures had jointly drafted and refined the 'flagship' UN documents and associated instruments. The Charter of the United Nations and the Universal Declaration of Human Rights were familiar territory for the corps of professional representatives.

By contrast, where the UN was concerned, even Indigenes trained in Law and International Relations but were 'strangers in a strange land'. On the basis of brief but significant participation in Geneva and New York, Maori sociologist and feminist Makere Stewart-Harawira offered the following perspective:

The political spaces in which diplomacy, mediation and negotiation with states and other interested parties occur are not those constructed or originally practiced by Indigenous peoples. They are spaces that constructed and bestowed by an imposed political regime . . . They are spaces within which diplomacy is conceived as occupying a separate and distinct space from that of the Indigenous cosmological and philosophical world . . . (Stewart-Harawira 2009 in Beier 2009, p. 210).

Overall, the seven Articles in this category were more ambitious, far-reaching and generous in earlier iterations than in the versions that found eventual inclusion in UNDRIP. Apart from the late and imposed Article 46, First Nations negotiators and

their supporters from the ‘friendly’ States and elsewhere succeeded in preventing the construction and acceptance of ‘referring’ Articles that were almost entirely dysfunctional.

CLUSTER THREE – NATION STATE ENTITLEMENTS - (ARTICLES 5, 6, 10, 33, 36, 37, 38 AND 39)

Article 5

In 1993, Article 5 consisted of just one sentence and one fundamental concept – the right to nationality:

Every Indigenous individual has the right to a nationality (UN E/CN.4/Sub.2/1993/29/Annex I, 23 August 1993).

In this Article ‘nationality’ should be understood to mean membership of a modern Nation State at the level of full citizenship.

By 2007 Article 5 had been repositioned as Article 6, but in every other way remained identical to the sentence above. There was little debate concerning this Article, but a number of First Nations representatives (see Clark, Dodson, Sambo Dorough and Jones interviews, 2016) have expressed disappointment that there is no mention of entitlement to formal documentation, particularly a passport or identity document, that furnishes proof of nationality and enables the citizen to pass freely between one State and another. Nor is there mention of dual or multiple nationality. The absence of a right to more than one nationality is problematic for Indigenous communities whose communities are located near or even across national boundaries.

This has been an issue for over a century along the Canada/USA border where numerous First Nations are located in close proximity to or even across the boundary. Within just one extended family, it is common to have both nationalities heavily represented. According to one respondent, the best ‘formula’ is for children to attend school and pursue sporting interests in the United States, while parents secure employment (higher wages and guaranteed superannuation) under the emblem of the Canadian maple leaf. For reasons of cost and quality of care, the whole family would normally seek medical and dental treatment in Canada. Interestingly, police,

fire and ambulance services and other government agencies, including armed services of both nations, have frequently demonstrated a willingness to enlist their cousins from ‘across the border’ – particularly in times of international conflict and war (see Crowshoe interview, 2016).

While the right to a nationality is necessary and appropriate, it should also entail a right to the official expression and documentation of that legal status. This right should also be permanent and immune from the vagaries of political change and administrative reform or reaction. Once granted at birth, nationality should remain the possession of the Indigenous individual. It should not be possible for nationality to be ‘withdrawn’ or ‘suspended’ at the discretion of officers of the State, as has allegedly occurred from time to time in Guatemala, El Salvador, Argentina and Brazil (see Dodson, Clark, Crowshoe and Means interviews, 2016).

Article 6

In 1993, Article 6 concerned some of the most compelling and extreme aspects of the Indigenous relationship with States, including removal of children and genocide:

Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and to full guarantees against genocide, or any other act of violence, including the removal of Indigenous children from their families and communities under any pretext.

In addition, they have the individual rights to life, physical and mental integrity, liberty and security of person (UN E/CN.4/Sub.2/1993/29/Annex 1).

This is one of the earliest applications of the term *collective right* within UNDRIP – as opposed to individual rights of various kinds. It is also the only time the word *genocide* is used as the focus of an Article. The expression, *as distinct peoples* is interesting. This term has received considerable attention within First Nations communities and there is little consensus concerning the emphasis that *distinctiveness* should receive. In addition, perspectives vary regarding the variety of ways in which Indigenous peoples may effectively demonstrate their *distinctiveness* (see Borrows, Sambo Dorough and Means interviews, 2016).

On a different note, the terms freedom, peace and security are imprecise. The concept of *freedom* may be understood to include freedom from the obligations and responsibilities of communal and family life as an Indigenous person. In terms of child removal, *under any pretext* is a powerful phrase, and can be interpreted as including child removal that has occurred in Australia's Northern Territory since 21 June 2007. Child removal has been authorized under provisions of the NT Intervention or Emergency Response legislation which has attracted significant – largely negative – international publicity.

Less than three months before the adoption of UNDRIP on 21st June 2007, the Australian Government announced '*A national emergency response to protect Aboriginal children in the Northern Territory from sexual abuse and family violence*'. This initiative has become known as the NT Intervention or NT Emergency Response. The catalyst was the release of the Report of the NT Board of Inquiry into the protection of Aboriginal children from sexual abuse entitled *Little Children are Sacred*. In the ensuing months, these emergency announcements were formalized into a package of Commonwealth legislation which was passed (with extraordinary speed) and received Royal Assent on 17 August, 2007 (Australian Human Rights Commission, May 2017).

While undoubtedly a highly developed and ambitious initiative, the NT Intervention should also be seen as a 'pretext' for a series of legislative incursions into Indigenous communities and reinstatement of Federal Government control over the lives of Aboriginal Australians throughout the Northern Territory. In a blaze of carefully layered publicity, the Howard Liberal Government ensured that the relevant NT Emergency legislation was enacted just one month before the adoption of UNDRIP at the UN in New York – an event which the Australian Government and other CANZUS States resisted with unprecedented obstinacy.

Article 10

In 1993, Article 10 included responses to the forcible removal of Indigenous and featured the resonant phrase '*free and informed consent*'. This concept achieved considerable currency across First Nations communities in 1993 and has maintained

considerable prominence in combination with the phrase ‘*agreement on just and fair compensation*’ (see Imai and Lee interviews, 2016). The complete Article addressed the issues of removal, consent, compensation and the option of return:

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free and informed consent of the Indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return (UN E/CN.4/Sub.2/1993/29/Annex I).

In the 2007 version, Article 10 was changed by the addition of just one word – *prior*:

*. . . No relocation shall take place without the free, **prior** and informed consent of the Indigenous peoples concerned . . . (UN E/CN.4/Sub.2/1993/29/Annex 1).*

Forced relocation and removal have been significant features of the histories of a majority of the world’s Indigenous peoples during colonization and in some regions, down to the present day. Some Indigenous spokespeople and community members are uncomfortable with the concept of compensation, arguing that no payment or financial settlement can ever adequately compensate an Indigenous family or community for the permanent loss of country, including in some cases rivers, lakes and coastline (see Dodson and Clark interviews, 2016 and 2017).

There are also concerns surrounding the nature and circumstances of any ‘agreement’. In many cases, ‘agreements’ have been determined and imposed by bureaucrats or other officers of the State, acting on behalf of economic and/or political interests, with little or no input from Indigenous themselves. In Australia, Canada and Aotearoa/New Zealand, members of First Nations communities generally prefer the concept of an independent arbitrator under the aegis of the United Nations or other global organization (e.g. Red Cross, Amnesty International).

The *option of return* is of great significance to many Indigenous families from remote and in many cases inaccessible areas of North America, Greenland, South America and Australia. There is no detail as to whether this *option* is understood to be limited to some individuals and not others, or whether it might be limited to a specific timeframe

or transcend generations and remain open-ended. The phrase *where possible* is problematic. It is likely the relevant Indigenous would have little or no role in deciding whether their return to their traditional lands was *possible*. Instead, officers of the State or their advisors would decide what was *possible* – and what action or initiative most closely aligned with the interests of their political masters.

Article 33

In 1993, Article 33 was a wide-ranging Article that addressed a number of significant Indigenous cultural domains:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards (UN E/CN.4/SUB.2/1993/29/Annex I).

The chosen sequence is interesting, suggesting that in the early 1990s, promotion and development of institutional structures were more pressing issues than the mere ‘maintenance’ of such structures. Culturally appropriate promotion and development are needed to reach and successfully engage with young people and children. It is also necessary to send appropriate cultural and political ‘messages’ to neighbouring Indigenous communities, educational institutions and different levels of government. A visible and distinctive ‘profile’ requires evidence of ongoing cultural activity including artwork, music, traditional ceremony, bush tucker, language and sports for all ages. *Distinctive juridical customs, traditions, procedures and practices* are also important, but in most parts of Australia, remain largely secret.

Communities rely heavily on the maintenance of traditional governance to ensure that cultural distance is ongoing. In the absence of a functioning Indigenous framework, imposed western structures expand to fill the vacuum and quickly become the ‘main game’ (see Clark, Borrows, Sambo Dorough and Means interviews, 2016). First Nations’ frameworks need to co-exist alongside – but at various points connect with – mainstream systems, while simultaneously remaining separate from them.

By 2007, Article 33 had become Article 34 with some significant changes in the area of cultural heritage:

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 (UNDRIP 2007, p. 73).

As can be seen above, the focus changed in the final 2007 version, with the addition of the word *spiritual* and the phrase ‘*in the cases where they exist*’. While Indigenous *juridical systems or customs* remain largely hidden from outsiders – and also from most community members much of the time – it is difficult to imagine a First Nations community in which they do not exist. In this context the word *spirituality* bears a heavy load, as it represents religion and philosophy and constitutes the underlying basis of law and custom.

Article 36

Article 36 in the 1993 version of the Draft Declaration was unusual by virtue of its explicit reference to pre-existing treaties. Maori, western Canadian First Nations and Great Plains Native American delegates pushed for an Article of this kind throughout the 1980s. Had they succeeded at that time, it would most likely have taken its place as one of the first ten Articles. Article 36 was eventually ‘bedded down’ in the early 1990s, but still embodies the more direct and assertive tone of the early Working Group era:

Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors, according to their original spirit and intent, and to have States honour and respect such treaties, agreements and other constructive arrangements. Conflicts and disputes which cannot otherwise be settled should be submitted to competent international bodies agreed to by all parties concerned (UN E/CN.4/SUB.2/1993/29/Annex 1).

This is a particularly concrete and explicit Article which demands close attention. The sequence *recognition, observance and enforcement* is ascending, with *enforcement* adding a meaningful dimension well beyond the range of the first two terms. *States*

or their successors is intended to include statutory corporations, quasi government authorities and other contemporary and future models or structures which may augment or even replace State authority within a given geographical region, tribal homeland or urban precinct. *According to their original spirit and intent*, serves to preserve and uphold the positive provisions of earlier agreements, but also acts to limit or even preclude any expansion beyond the terms and conditions of treaties dating back to the eighteenth and nineteenth centuries and beyond.

First Nations advocates in Aotearoa/New Zealand and Canada have encountered numerous legal and political problems stemming from adverse decisions based on strict adherence to the letter of treaties and other agreements written and signed as a reflection of almost unimaginable circumstances in vastly different times.

The 2007 version of Article 36 (re-numbered Article 37) is organized differently, but maintains much of the original style and specific detail:

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 (UNDRIP, p. 79).*

In addition to the adoption of a two paragraph structure, the final version embodies a number of changes. The reference to conflicts and disputes has been deleted. In its place is a Declaration-wide statement that nothing within UNDRIP should be interpreted as undermining pre-existing Indigenous Treaty rights. North American First Nations and Maori representatives exercised considerable influence in relation to paragraph 2 which represents a broadening and strengthening of the Article as a whole. It is not difficult to see why this Article is of special significance to Maori. The 1840 Treaty of Waitangi is the Foundation Document of Aotearoa/New Zealand.

The Waitangi Tribunal is the body with primary responsibility for application and interpretation of the Treaty. The Tribunal is a permanent commission of inquiry

established under the *Treaty of Waitangi Act 1975* (<https://www.waitangitribunal.govt.nz>). The Tribunal was established to provide rulings on the application of the provisions of the Treaty on questions of compensation, governance and the role of the Crown in contemporary New Zealand. In 2014 the Tribunal demonstrated that a mid-nineteenth century Treaty can achieve enhanced relevance – and create significant national and international controversy – in the early twenty-first century. After lengthy deliberation, the Tribunal found that Maori had no intention of renouncing sovereignty when they engaged with British representatives and signed the Treaty of Waitangi. First Nations spokespeople elsewhere seized upon this finding, emphasizing its relevance to the global Indigenous experience.

Article 37

In 1993, Article 37 was an over-arching statement concerning the ongoing obligation of States to enshrine the provisions of the Declaration in their own legislation. This Article had special relevance to Aotearoa/New Zealand and Canada, and especially to the evolution of New Zealand and Canadian Indigenous rights legislation:

States shall take effective and appropriate measures, in consultation with the Indigenous peoples concerned, to give full effect to the provisions of this Declaration. The rights recognized herein shall be adopted and included in national legislation in such a manner that Indigenous peoples can avail themselves of such rights in practice (UN E/CN.4/SUB.2/1993/29/Annex 1).

Presumably officers of the State would determine what measures are *effective* and *appropriate*. Consultation with Indigenous peoples or the representatives of Indigenous peoples would also be organized and controlled by the State at a time and place of their choosing. Most likely the First Nations representatives would be carefully selected and closely monitored by State bureaucrats and elected officials. Similarly, whether or not the legislation gave *full effect* to the provisions of the Declaration, this would be decided by officers of the State or politicians at provincial and national levels.

By 2007, Article 37 had become Article 38 and was almost unrecognizable. Article 38 is a pale shadow of its 1993 precursor (Article 37). Having been significantly ‘diluted’, it was drastically reduced in breadth, depth and value:

States in consultation and co-operation with Indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration (UNDRIP 2007, p. 70).

A closer analysis suggests that the final version of Article 38 is of little value to Indigenous peoples. While *consultation* and *co-operation* are mentioned, there is no detail concerning the processes or practices to be employed or developed by States for purposes of consultation and co-operation. Presumably, in the view of State representatives, decisions as to what *measures* are appropriate (especially in terms of legislative measures) will only be made by officers of the State. There is no elaboration in terms of the *ends* of the Declaration. There are a great number of *ends in relation to UNDRIP* and a considerable volume of legislation would be needed to ensure their achievement. This Article has been heavily criticized by Indigenous commentators (see Clark, Sambo Dorough and Means interviews, 2016) and is of limited value to Indigenous peoples.

Article 38

In 1993 the early iteration of Article 38 was framed as an expression of the ‘practical generosity’ of friendly States – especially the Scandinavians led by Sweden – and supported by other ‘internationalist’ nations in western Europe, central America and the Caribbean. Indigenous Australian and Canadian First Nations delegates have perceived this Article as an expression of the distinctive ‘practicality’ and generosity of the so-called ‘friendly’ states and have acknowledged the financial assistance that was provided to numerous Indigenous NGOs and individuals (see Clark, Dodson, Borrows and Chartier interviews, 2016). This Article was not the subject of prolonged negotiation and is consistent in its orientation:

Indigenous peoples have the right to have access to adequate financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for

the enjoyment of the rights and freedoms recognized in this Declaration (UN E/CN/.4/SUB.2/1993/Annex 1).

By 2007, Article 38 had been re-numbered Article 39 and was reduced to just one sentence. The final version was far less balanced, comprehensive and generous than in earlier iterations:

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 (UNDRIP 2007, p. 83).

The re-imagining and rewriting of Article 39 is representative of the process and politics that occurred in relation to Nation State Entitlement Articles. With few exceptions, Articles that focussed on the obligations and responsibilities of States to their Indigenous peoples were significantly narrower, weaker and less meaningful in their final 2007 versions.

The cluster of Articles concerning the relationships between States and Indigenes and particularly First Nations entitlements to support and assistance on the part of States constitute an area of State resurgence during the period under study. In the final 2007 version of these Articles, States regained the upper hand. By contrast, Indigenes were left with much less than they expected to secure during the early years of the Working Group Indigenous Populations (WGIP).

Article 39

The 1993 version of this Article (numbered Article 38) was an especially practical statement of support in relation to areas of concern in many First Nations communities:

*Indigenous communities have the right to have access to **adequate** financial and technical assistance, from States and through international cooperation, to pursue freely their political, economic, social, cultural and spiritual development and for the enjoyment of the rights and freedoms recognized in this Declaration (UN E/CN.4/Sub.2/1993/29/Annex I).*

In the final 2007 iteration, Article 39 is a simplified and scaled down version of the earlier Article 38 (1993), which concerned access to financial and technical assistance. While the 1993 version included the concept of 'adequate' assistance, the final statement makes no mention of different levels of assistance:

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 (UNDRIP 2007, p. 83).

The changes revealed above are representative of the pattern of transformation across much of the Declaration. From specific, detailed and generous beginnings, many Articles became more superficial and tokenistic in their final versions.

COMMENTARY

The 2007 or final versions of Articles 5, 6, 10, 33, 36, 37, 38 and 39 represent a mixed bag for Indigenous peoples. While the majority of Articles in question are narrower and less generous than in their 1993 iterations, there are some isolated but significant gains. In many ways, these Articles were 'battleground Articles' for Indigenous delegates and States representatives alike. The contest that ensued across the fourteen intervening years revealed much about both sides. The dominant States demonstrated that they were dedicated to the task of 'beating back and beating down' Indigenous demands. First Nations representatives and their 'friendly' State and NGO supporters showed they could rapidly build partnerships and sustain alliances with extraordinary enthusiasm and contagious goodwill. The UN system acted to minimize tensions and maintain momentum, while endorsing a version – most often a softer version – of every pre-existing Article. While Indigenous peoples were forced to accept many unpalatable changes, the most disturbing aspect could not be seen on the screens of laptops and monitors. The resistant and consistently ungenerous behaviour of States' officers – especially those representing the CANZUS bloc – was highly visible.

By contrast, Indigenous moral authority and shared purpose derived from thousands of years of prior ownership and recent recovery from colonial oppression. Indigenous peoples sought an international statement that would reflect their struggle for recognition.

Many believed the UN Declaration would make a difference and were determined to make it a political reality. It was hoped the Declaration would prove that colonialism had failed to destroy the Indigenous world. Indigenous representatives also believed they could 're-connect humanity' and 'bring out the good' in non-Indigenous colleagues and fellow travellers. Resurgent First Nations represented an unpredictable new presence on the world stage. The colourful and dynamic Indigenous cultural 'footprint' would prove particularly relevant in the domain of children, women and elders.

CLUSTER FOUR – RIGHTS OF CHILDREN, WOMEN AND ELDERS - (ARTICLES 7, 22 AND 44)

It is surprising that of the forty-six Articles of the Declaration only three (or just under 7%) are exclusively concerned with the rights of children, women and elders. All three elements occupy positions of special privilege within Indigenous communities and are central to the spiritual and social life of every First Nations language group. Some Indigenous leaders and spokespeople have argued that children, women and elders are 'covered' by the majority of more general Articles and that there was never any need for a comprehensive collection of Articles specific to their needs. Others have maintained that the opportunity to 'nail down' a series of family specific Articles should have been pursued because the resistant states – and especially the CANZUS bloc – may have been relatively unconcerned and even 'occasionally neutral' (see Clark, Sambo Dorough and Means interviews, 2016).

Article 7

In 1993, Article 7 was one of the most developed and community focussed of the draft Articles and featured five separate short paragraphs. While the words *children*, *women* and *elders* do not feature, the language employed is orientated toward communities as a whole. Moreover established communities and their underlying dynamics are largely shaped and organized around these three categories in accordance with cultural heritage and the practicalities of daily life.

Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide, including 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 population transfer which has the aim or effect of violating or undermining any of these rights;*
- (d) *Any form of assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures; and*
- (e) *Any form of propaganda directed against them*
(UN E/CN. 4/Sub.2/1993/29/Annex 1).

This is a wide ranging and relatively comprehensive treatment of issues concerning ethnocide, forced removal and misappropriation of resources. The inclusion of *other cultures or ways of life* and *administrative or other measures* and reference to *propaganda* indicate significant grassroots input and engagement over time. For many Indigenous *cultural values* and *ethnic identities* may be overlapping or interwoven, rather than consistent or 'monolithic', and this Article therefore allows for considerable diversity within and between Indigenous populations.

The final 2007 version of Article 7, re-numbered Article 8, employs a similar structure, but at certain points lacks the precision of earlier versions:

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; and*
- (e) *Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them* (UNDRIP, 2007, p. 21).

In paragraph 1 the term *collective and individual right* has been simplified to *the right* which represents a significant change of emphasis and weakens the intent. The addition of *States shall provide effective mechanisms* is flawed because effectiveness is difficult to determine at the best of times. Presumably, only policymakers and States' representatives would be making such determinations. In all likelihood, they would be making such assessments in terms of the interests of the State and its instrumentalities. In terms of paragraphs (a) to (e) the most dramatic changes have occurred in (e) where the concept of *propaganda* has been expanded considerably. Only propaganda specifically *designed* to promote or incite discrimination has been targeted. Propaganda that could be demonstrated to have been *designed* for some other purpose might be found to be acceptable, if it could be established that promotion or incitement of discrimination was an *unintended* consequence. While there has been some weakening of elements of this Article, in most cases changes are more restrained and less profound than in many other examples.

Article 22

In 1993, Article 22 was sometimes described as the 'special measures' Article. A great deal of the Article's potential impact was dependent on the nature of the 'special measures' chosen in relation to the application of the Article. Similarly, interpretation of the words *immediate* and *effective* represented an additional challenge. Still, other aspects were valuable because the language was specific and practical in orientation:

Indigenous peoples have the right to special measures for the immediate, effective and continuing improvement of their economic and social conditions, including in the areas of employment, vocational training and retraining, housing, sanitation, health and social security.

Particular attention should be paid to the rights and special needs of Indigenous elders, women, youth, children and disabled persons (UN E/CN.4/Sub.2/1993//29/Annex I).

By 2007, Article 22 had been changed almost beyond recognition. In the final version there is no reference to *immediate, effective and continuing improvement*. The term *economic and social conditions* has been deleted and there is no mention of *special measures* of any kind. Above all, employment, vocational training and *retraining, housing, sanitation, health and social security* have all disappeared. In their place, we find a series of bland and undemanding pronouncements that are conspicuously devoid of specifics:

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* (UNDRIP 2007, p. 49).

Presumably, *particular attention* means attention on the part of officers of the State. Yet there is no detail regarding the form or forms that the *particular attention* should take. Similarly, there is no suggestion as to the nature of the *measures* – *no longer special measures* – that should be taken by States and their representatives. It is not difficult to imagine the level of engagement that might be acceptable in terms of the expression *in conjunction with Indigenous peoples*. *Conjunction* is an imprecise term that can indicate ongoing liaison and co-operation, but also something as brief and superficial as a fleeting conversation on the part of representatives of a given State and those of an Indigenous community. *Full protection and guarantees* (against) *all forms of violence and discrimination* sounds meaningful, but there is nothing to indicate what forms *full protection and guarantees* might take. Taken as a whole, there can be little doubt that the 2007 final version of Article 22 is a pale shadow of earlier draft versions.

Article 44

In 1993, Article 44 was a non-controversial and relatively well supported Article. It was also an Article with special relevance – and resonance – for Canadian First Nations (included under one of the so-called ‘numbered treaties’) and for New Zealand Maori, who are deemed to be covered by the 1840 Treaty of Waitangi, regardless of whether their tribal ancestors were signatories or chose not to sign. *Treaty rights* remain a frequently and strongly contested domain. While many commentators describe *treaty rights* as ‘set in stone’, the reality is far less straightforward. Treaty rights only become meaningful if courts, tribunals and other bodies, charged with their interpretation, pronounce judgements or make determinations that support the maintenance or re-establishment of Indigenous land use, river and ocean based activities and educational, cultural and religious practice. Article 44 (Draft) is essentially a minimalist provision, but one that appears more generous than it actually is (see Dodson, Borrows, Sambo Dorough and Chartier interviews, 2016):

*Nothing in this Declaration may be construed as diminishing or extinguishing existing or future rights Indigenous people **may have** or acquire (UN E/CN.4/SUB.2/ 1993/29/Annex I).*

By 2007, Article 44 had been transformed into the Article which addressed the issue of equal treatment of First Nations women and girls (previously Article 43):

All the rights and freedoms recognized herein are equally guaranteed to male and female Indigenous individuals (UNDRIP 2007, p. 93).

It is interesting that this fundamental element of the Declaration was one of the last batches of Articles to be debated and drafted during the early 1990s. In the 1993 draft version the Articles numbered 42 to 45, formed Part IX of the Declaration and represented the ‘miscellaneous’ or ‘afterthought’ Articles of the Declaration. On the Indigenous side, the early years of drafting and negotiation were dominated by male representatives – many of them experienced senior men. Still, there were often substantial numbers of First Nations spokeswomen in Geneva during the meetings of the Working Group. It would be reasonable to expect that they would have argued for the inclusion of this Article during the first weeks or months of drafting.

In 2007 the Article that had previously occupied position 44 moved up to position 45. This Article had increased in length by two words:

*Nothing in this Declaration may be construed as diminishing or extinguishing the rights Indigenous peoples **have now** or may acquire in the future* (UNDRIP 2007, p. 95).

The difference concerns *existing* rights as opposed to rights which Indigenous *may acquire in the future*. This is a minor change, but it is potentially positive. While future rights remain the same, the possibility of doubt has been reduced in terms of present day rights, because such rights are now described as rights Indigenous simply **have now** – not rights that Indigenous **may have** (now). This demonstrates that – as many Indigenous representatives have argued (see Dodson, Clark and Sambo Dorough interviews, 2016) – relentless attention to detail is central to the process of drafting UN declarations.

COMMENTARY

Articles 7, 22 and 44 concern the rights of Indigenous children, women and elders. Taken together, they represent the vast majority of people in most First Nations communities. Yet there are *only* three Articles focussing entirely on them. In addition, the relevant Articles are comparatively short and devoid of detail. The field of Community Development and Community Justice was an area in which Indigenous representatives could have achieved a great deal. In relation to maternal and infant health, education and the training and employment of women and elders, worthwhile and workable concepts might have found a home within both the Draft Declaration and UNDRIP. With the benefit of hindsight, some Geneva delegates have even suggested that a less threatening regional or local emphasis on Indigenous community consolidation might have assisted the process of drafting and negotiating the Declaration (see Clark, Borrows and Means interviews, 2016).

The modest volume of material regarding women, children and elders may be explained by the nature of the late twentieth century global Indigenous resurgence. At the time, community organizations and both male and female First Nations delegates were strongly focussed on self-determination and maintenance of culture.

During the late 1980s and early 1990s, in tandem with self-determination, cultural heritage was a centre stage fixture. Disturbing and politically complex issues surrounding cultural security were frequently and passionately discussed, especially by longstanding community spokespeople and representatives. It is unsurprising that ideas concerning *cultural security* formed the core of a cluster of five Articles, including three of the earliest ones, located within Parts I and II of the 1993 Draft Declaration (UN E/CN.4/Sub.2/ 1993/29/ Annex I).

CLUSTER FIVE – CULTURAL SECURITY (ARTICLES 9, 11, 34 AND 35)

Article 9

In 1993, Article 9 appeared unusually straightforward and unthreatening in relation to the interests of States:

Indigenous peoples and individuals have the right to belong to an Indigenous community or nation, in accordance with the traditions or customs of the community or nation concerned. No disadvantage of any kind may arise from the exercise of such a right (UN E/CN.4/Sub.2/1993/29/Annex I).

No disadvantage of any kind is an exceptionally broad concept that extends well beyond formal and demonstrable discrimination on the part of government and its agencies, the private sector and individuals. Indeed *disadvantage* could be understood to include economic, educational and social disadvantage derived from or associated with Indigenous identity or identification. States representatives resisted the spirit and the logic of the second sentence and ensured that it was eventually replaced by a much narrower and less generous alternative by 2007:

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 or any kind may arise from the exercise of such a right (UNDRIP 2007, p. 23).

The final 2007 version of Article 9 retained emphasis on the right of the individual and group to belong to an Indigenous ‘mob’. Still, in both 1993 and 2007 versions, no allowance was made for an individual (or in many cases family) to be included and

accepted as part of *more than one* First Nations community. In parts of Aotearoa/New Zealand, Australia and North America, individuals and families are sometimes members of two or more Indigenous communities (see Clark, Chartier, Jones and Le Grice interviews, 2016). This apparently complicated, but structurally practical and culturally enriching pattern is not new. Membership of more than one community commonly emerges on the basis of acceptance of additional lines of descent involving multiple parents, a step parent or foster parent, grandparent(s), or in response to child removal, family breakdown or combinations of the above and other factors. The rise of the concept of belonging to a number of First Nations may be seen as an expression of Indigenous social solidarity in response to the renewed pressures and unrelenting agenda of colonialism in the contemporary context.

There are further problems with the final version of the Article. In particular, there is considerable scope for disagreement regarding the protocols and political dynamics pertaining to *traditions and customs* within any given First Nations community. It must be assumed that States and their representatives would exercise their own discretion in the event of any disagreement, dispute, or difference of opinion. Similarly, States could be expected to reserve the right to decide whether any claims of discrimination on the part of Indigenes were legally actionable under their own domestic legislation. Frequently this would mean the State would be passing judgement on its own policies and activities. The almost certain result would be in favour of the State and against the interests of the specific Indigenous community. Such an outcome would also be contrary to the needs and aspirations of First Nations within a given State or region more generally. While the final version of Article 9 is less generous than earlier iterations, there was little change over time. By contrast, Article 11 is one of the most transformed Articles of the Declaration and one that also concerns cultural security.

Article 11

In 1993, Article 11 was of special interest to Indigenes in central and South America and specific regions of Asia and the Pacific. Article 11 addressed the issue of armed conflict in areas containing Indigenous populations and was referred to as the 'Special Protection' Article. While there was detail regarding actions that States should *not*

perform, there was no detail concerning the *nature* of the special protection or the *process* by which it might be organized. Still, the drafters took the trouble to include situations described as *emergencies* in addition to the standard category of *armed conflicts*. Many *emergencies* (including the Malayan Emergency of 1948–1962) have included large scale and problematic involvement of Indigenous as the local majority population in particular localities. Interestingly, in the 1993 Draft version, *voluntary* – as opposed to *forced* – Indigenous participation was not precluded:

Indigenous peoples have the right to special protection and security in periods of armed conflict.

States shall observe international standards, in particular the Fourth Geneva Convention of 1949, for the protection of civilian populations in circumstances of emergency and armed conflict, and shall not:

- (a) Recruit Indigenous individuals against their will into the armed forces and, in particular, for use against other Indigenous peoples;*
- (b) Recruit Indigenous children into the armed forces under any circumstances;*
- (c) Force Indigenous individuals to abandon their lands, territories or means of subsistence, or relocate them in special centres for military purposes;*
- (d) Force indigenous individuals to work for military purposes under any discriminatory conditions.*

The above clauses fall well short of complete coverage of the socio-political contexts that entail armed conflict, extreme civil unrest and national and/or regional disintegration. In particular, there is no mention of the seizure or theft of Indigenous property and resources including vehicles, communication and agricultural equipment and supplies, foodstuffs and other vital resources. Mention of occupation and/or unauthorized re-configuring of Indigenous accommodation, administrative buildings and other structures is also absent.

The Fourth Geneva Convention of 1949 – a document containing 159 articles – represents the most direct legal underpinning for this Article. The 1949 Convention

includes much that is relevant to the circumstances of civilians located in regions and cities impacted by organized violence (International Committee of the Red Cross (CH) *Geneva Convention 1949 and additional protocols*). In Central America, across Asia and in South America, a large percentage of targeted civilians are likely to be Indigenous. A global pattern is discernible. After centuries of often catastrophic European engagement, Indigenous remain on or near the front lines of local and regional conflict worldwide.

Of great interest to Indigenous, the *special regime* for treatment of civilian internees is directly relevant to Indigenous activists in south-east Asia and South America. Civilian internees represent a growing category in areas where resource exploration and extraction are the focus of economic activity. In such regions, international conflict is unlikely. Instead, the use of armed bands and the 'proxy armies' has become widespread. Since the mid-twentieth century, most armed conflicts have been non-international. This reality has been addressed by additions to the Convention. In particular, the so-called 'Common Article 3' has been seen as a 'breakthrough' as it covers actions and activities of combatants in situations of non-international armed conflict (International Committee of the Red Cross).

By 2007, Article 11 had been transformed into an Article with an explicitly cultural focus which contained no references to armed forces or armed conflict. In place of the complicated structure employed in 1993, there were now two short, simple and related paragraphs:

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 (UNDRIP 2007, p. 27).*

This is an important and interesting Article that strives to straddle the past and future while maintaining meaningful contact with the present. ‘Practising’ culture is a necessity, but scope and capacity to ‘revitalize’ culture is also important. Spelling out past, present and future manifestations of culture is useful, because the notion of a ‘dominant past, troubled present and unlikely future’ continues to resonate in many quarters. Archaeological and historical sites are important to First Nations communities in relation to Indigenous commerce – especially eco-tourism and cultural tourism. In the next list, Indigenous music and dance are not named, though they are normally included within the performing arts. In Australia, Indigenous cultural production accounts for a large and rising proportion of Indigenous employment and income. There is also a cultural and political ‘bonus’ in the form of heightened domestic and international profile and enhanced collective esteem.

Paragraph 2 is more problematic as it concerns restitution – normally in the form of financial compensation at community level. The phrase *in conjunction with Indigenous peoples*, should probably read ‘in conjunction with the Indigenous peoples concerned’. If consultation is undertaken with members of another community, the results are likely to be counter-productive and politically unacceptable. The word *property* is a limiting one. Many important aspects of cultural production are conceptual, intangible and activity-based rather than in the form of ‘real property’. The addition of the words *activities, protocols and ceremonies* would have been helpful. In addition, and/or might be more appropriate than simply **or in violation of their laws**, because in most cases actions which occur *without free, prior and informed consent* are also **necessarily in violation of Indigenous laws, traditions and customs**.

Article 34

In the 1993 Draft, Article 34 consisted of just one sentence and contained little to suggest the nature of the original issue and ensuing debate. A brief background summary is helpful. Imposed and illegitimate ‘leaders’ or ‘spokespeople’ selected by States’ officers has been a longstanding problem for Indigenous in many regions. While complying with the wishes of State or ministerial leadership, such ‘puppet leaders’ – sometimes called *coconuts* in Indigenous Australia – have also supplied their superiors with the latest intelligence concerning First Nations policy development, strategy and

tactics. In recent times, with Indigenes taking more care with selection and monitoring of their spokespeople, ‘technical specialists’ (frequently located in IT or PR) have become the preferred alternative as ‘ears on the inside’ of community organizations and their associated global networks. The process of Indigenous global resurgence has underpinned a loss of innocence (or loss of *ignorance* in the words of Kevin Cook of Tranby Aboriginal College) within First Nations leadership. Closer engagement with other Indigenes and with States’ representatives has demonstrated the importance of solidarity and trust amongst Indigenes in the face of organized and relentless State resistance.

The 1993 version is a model of simplicity, but suffers from a lack of detail:

Indigenous peoples have the collective right to determine the responsibilities of individuals to their communities (UN E/CN.4/Sub.2/1993/29/Annex I).

In addition to determining *responsibilities*, most communities would seek to reserve the right to select, train and position community members and elected or chosen office holders in accordance with community priorities and consistent with political, administrative and financial demands at the time. The term *collective right* is important, inferring that decisions concerning an individual’s responsibilities should be made on a *collective* basis within a given community. This is not always practicable or desirable. In many Indigenous Australian communities, elders remain the principal decision makers, acting in the interests of the community, but not always as elected representatives or on the basis of consultation with every faction or element within that community.

By 2007, Article 34 had been re-numbered Article 35, but retained the same wording as in 1993. This suggests that the *responsibilities of individuals* Article was largely uncontested and the subject of little debate during the years 1993 to 2007. Yet the concepts entailed in this Article are not entirely straightforward. While it is appropriate for Indigenes to retain the collective right to determine the roles of community members, significant differences of opinion occur within Indigenous communities. Consensus would not prevail in every situation. Instead, the wishes of immediate and extended family and of the individual concerned would be taken into

account and balanced against those of the community as a whole. In general, the role of an individual will be shaped by the needs of the community, as perceived by elders and their advisors.

In the 2007 version, Article 34 has an entirely different focus that entails the embedding of Indigenous institutional structures and maintenance of First Nations cultural traditions:

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 (UNDRIP 2007, p. 73).

COMMENTARY

The changes that occurred in relation to Article 34, 2007 were representative of changes across a range of Articles within the Declaration. The general pattern was toward reinforcing cultural heritage, and away from embedding political and representative functions and responsibilities.

Article 35

In 1993, Article 35 represented a clear, practical and longstanding demand:

Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and co-operation, including activities for spiritual, cultural, political, economic and social purposes, with other peoples across borders.

States shall take effective measures to ensure the exercise and implementation of this right (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 35 represented a 'win' for thousands of First Nations peoples along the Canada/United States and Mexico/ United States borders. This Article focussed on the social, political and economic rights of Indigenous to maintain traditional links and relationships across contemporary domestic and especially international borders. This Article was also central to the agenda of politically influential Sami from northern

Scandinavia whose reindeer (or caribou) herds criss-cross numerous boundaries while maintaining their time-honoured patterns of annual migration. Interestingly, the 1993 version does not limit the 'border crossing right' to Indigenes striving to maintain longstanding traditions.

The creation or development of *new* contacts and relations is also prescribed. Moreover, *other peoples* include non-Indigenous peoples. In many border regions of central and South America, culturally significant relationships have evolved between First Nations peoples and citizens of neighbouring regions and states who are generally ethnically distinct and frequently non-Indigenous.

By 2007, Article 35 had become Article 36. The revised version employed a new structure and represented a 'tweaked' restatement of the earlier version:

1. *Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and co-operation, 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 co-operation with Indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right (UNDRIP 2007, p. 77).*

The first paragraph is a relatively generous statement. Yet, there is no detail regarding *access* or *movement* across borders and no mention of Indigenes having a right to frequent or unimpeded border crossing on foot, in private motor vehicles or by other means. Perhaps the most notable aspect is the right to *develop* contacts – including new contacts – in addition to maintaining pre-existing contacts and relationships. It is interesting that *educational* and *sporting* purposes are not specified, though these might be subsumed within the cultural and/or cultural categories.

COMMENTARY

International borders are largely irrelevant to Indigenous Australians – apart from the situation of Indigenes inhabiting islands in Torres Strait between Cape York

Queensland and Papua New Guinea (PNG). The Cocos/Keeling and Christmas Islands, Australia's remote island territories in the Indian Ocean are home to native or Indigenous peoples whose legal status as Indigenous Australians remains unclear. In both cases, culturally and politically relevant (and in some cases related) families inhabit nearby islands which are not under Australian jurisdiction. In Aotearoa/New Zealand there are no International borders in close proximity to the three main islands of the Dominion. By contrast, nations within the Americas remain separated by thousands of kilometres of international borders which divide hundreds of First Nations communities in accordance with the conventions and demands of colonialism.

The second paragraph is less generous to Indigenes as it simply calls upon States to take *effective* measures in relation to this right. States are likely to assume that any steps they take are sufficiently effective, whereas First Peoples representatives can be expected to perceive *effectiveness* from the point of view of their own community members, rather than in relation to the costs and strictures of government.

CLUSTER SIX – SPIRIT BUSINESS, LANGUAGES AND MEDICINE - (ARTICLES 12, 13, 24, 25 AND 31)

Article 12

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, as well as the right to the restitution of cultural, intellectual, religious and spiritual property taken without their free and informed consent or in violation of their laws, traditions and customs (E/CN.4/Sub.2/1993/29/Annex I).

Article 12, 1993 was concerned with safeguards against the erosion of Indigenous cultural heritage. In view of the ongoing renaissance of Indigenous art, music and performance, it was considered necessary to specify present and future as well as past manifestations of culture. It has been suggested by some North American activists that the wording of this Article owes much to collaboration between Alaskan and

Canadian Inuit and Indigenous representatives from Mexico and Australia. Article 12 was a powerful and wide-ranging reference to the fundamental importance of spiritual and religious traditions and an acknowledgement of the relationship between community and country. At the time, the emphasis on cultural sites and repatriation of human remains was particularly meaningful to many Indigenous Australians.

In 2007, Article 12 was concerned with:

1. *Indigenous peoples have the right to manifest, practise, 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 (UNDRIP 2007, p. 29).*

Overall, Article 12 in 2007 is a more restrained and less generous version of the 1993 Article. One notable exception to the pattern of narrowing and weakening Indigenous rights is the reference to repatriation of human remains – a subject of overwhelming and ongoing concern to Indigenous peoples dating back to the 1930s. In 1993 reference to repatriation of human remains was included within Article 13.

Article 13

Article 13, 1993 was particularly concerned with restoring spiritual life and the need to support effective Indigenous engagement in the area of custom and ceremony:

Indigenous peoples have the right to manifest, practise, 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 ceremonial objects; and the right to the repatriation of human remains.

States shall take effective measures, in conjunction with the Indigenous peoples concerned, to ensure that Indigenous sacred places, including burial sites, be preserved, respected and protected (UN E/CN.4/Sub.2/1993/29/Annex I).

Article 13, 2007 is significantly changed and consists of two distinct paragraphs. The second paragraph can be seen as a simplified – and significantly weakened – version of the original and does not treat *rights* in a broad or encompassing manner. Instead, particular applications are specified, presumably those that are not mentioned are understood to be excluded. The emphasis in the 2007 version is *cultural* rather than *political*:

1. *Indigenous peoples have the right to revitalize, use, develop and 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.*

COMMENTARY

The use of the phrase *States shall take effective measures* is necessarily problematic. It must be assumed that those entrusted with the responsibility for determining the *effectiveness* of any measures would in most cases be officers of the State. In accordance with the political needs and agendas of their political masters, such officers would most likely consider less ambitious, less controversial and relatively inexpensive measures *highly effective*.

Article 24

In 1993, Article 24 was an unusually focussed Article which concerned Indigenous ownership and utilization of traditional medicines and healing practices:

Indigenous peoples have the right to their traditional medicines and health practices, including the right to the protection of vital medicinal plants, animals and minerals.

They also have the right to access, without discrimination, to all medical institutions, health services and medical care (UN E/CN.4/Sub.2/1993/29/Annex I).

Indigenous peoples in tropical regions including South Asia, Central America, northern South America, northern Australia and the Pacific are involved in the cultivation of medicinal plants and the preparation of traditional medicines of many kinds. Relations between Indigenous and representatives of pharmaceutical corporations and governments have rarely been based on concepts of respect and co-operation. In 1993 some Indigenous Australian representatives regarded this Article as inappropriately vague and ungenerous. They explained that with an extreme shortage of white-fella-educated workers, traditional and/or remote communities needed ongoing support in their dealings with powerful and ambitious regional or global corporations – often assisted by city-centric governments. They argued that such assistance should be outlined or at least ‘flagged’ within the Article.

By 2007, Article 24 had been broadened to include reference to the inadequate health standards of Indigenous peoples, while still retaining its coverage of traditional medicines and access to the localities and materials from which they are derived:

- 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 realisation of this right (UNDRIP 2007, p. 53).*

While the final 2007 version of this Article is more focussed on improvements to Indigenous health, there is also mention of conservation of medicinal plants. The right to the use and cultivation of particular plants or products derived from them does not represent control or ownership of a particular medicinal drug, substance or process at any stage of production, distribution or sale. It would appear that even in 1993 Indigenous representatives were aiming 'lower than the target' in relation to the needs and aspirations of Indigenous communities engaged in *bush medicine* production.

Article 25

In 1993, Article 25 concerned the need to restore traditional relationships with the environment, but offered little in terms of identifying the steps that might be taken to achieve this goal:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual and material relationship with the lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard (UN E/ CN.4/Sub.2/1993/29/Annex I).

COMMENTARY

In 2007, Article 25 remained largely unchanged. Emphasis on rebuilding the spiritual relationship with the land was central. At the same time, the word *material* had been dropped. This change serves to weaken the Article as a *material relationship* might suggest a right to occupation and ownership of traditional lands or other environments:

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 (UNDRIP 2007, p. 55).

In addition to losing support regarding the *material* dimension of their relationship with the land, Indigenous were left without guarantees or assurances insofar as physical

access was concerned. This is a significant omission given that an increasing proportion of the world's Indigenous population is now urban-based and living at a considerable distance from traditional homelands. In what ways can First Nations peoples hope to maintain and strengthen their spiritual relationships with any environments if they are unable to secure unimpeded access to those environments? In central and northern Australia vast tracts of Indigenous land have been permanently 'set aside' for purposes of national security, with the traditional owners removed and disposed of everything but their Dreaming stories and other long-treasured cultural elements.

Article 31

In 1993, Article 31 concerned self-government at the local level and was one of the more practical Articles of the Draft Declaration:

Indigenous peoples, as a specific form of exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, including culture, religion, education, information, media, health, housing, employment, social welfare, economic activities, land and resource management, environment and entry by non-members, as well as ways and means for financing these autonomous functions (UN EC.4/Sub.2/1993/29/Annex I).

COMMENTARY

By 2007, Article 31 had been considerably extended, but had lost its clear emphasis on self-determination and self-government. The transformation that overtook Article 31 is another example of the pattern – both within and outside the United Nations – for the *cultural* aspects of Indigenous social and organizational existence to gain assisted ascendancy over the *political* dimensions. Throughout the 1980s and 1990s, and especially during the early twenty-first century, States and their representatives demonstrated an extraordinary dread of First Nations political resurgence. Assuming that every political initiative and aspiration would necessarily weaken and embarrass them, States defended their positions of privilege and monopoly with uncharacteristic vigour and relentless determination. By contrast, the concept and everyday reality of

local Indigenous culture and cultural performance were not threatening. Tourists and the international media could be expected to enjoy such displays which also provided evidence of the health and happiness of the Indigenous. First peoples political aspirations were seen differently. Such 'rumblings' served to question and undermine the legitimacy and potential longevity of the imposed State. Not surprisingly, Article 31, 2007 lists many aspects of Indigenous life that were and have remained acceptable to most States and their majority non-Indigenous populations:

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 (UNDRIP 2007, p. 67).*

While this Article contains a long list of areas and categories of Indigenous cultural production, it is entirely free of references to First Nations political or administrative autonomy or self-determination. At the same time, consistent with the general pattern within UNDRIP, States acting in conjunction with at least some Indigenous communities or individuals are charged with the substantial responsibility to *take effective measures* – as determined by their own officers – to uphold the rights outlined above.

CLUSTER SEVEN – RIGHTS TO EDUCATION AND INDIGENOUS MEDIA -
(ARTICLES 14, 15 AND 16)

Article 14

In 1993, Article 14 was concerned with community control of cultural heritage and the transfer of that heritage to future generations. The list of cultural domains included on the list makes interesting reading:

Indigenous peoples have the right to revitalize, use, develop and 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.

States shall take effective measures, whenever any right of Indigenous peoples may be threatened, to ensure this right is protected and also to ensure that they can understand and be understood in political, legal and administrative proceedings where necessary through the provision of interpretation or by other appropriate means (UN E/CN.4/Sub.2/1993/29/Annex I).

By 2007 significant changes had occurred to Article 14. The final three paragraphs embody a focus that is more educational and linguistic in emphasis, but remains devoid of any mention of music or art. The terms *oral traditions, histories, philosophies and literatures* have been removed and replaced by more prosaic words and less encompassing concepts:

- 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 (UNDRIP 2007, p. 33).

The final 2007 version has the style and content of a bureaucratic prescription. The wide-ranging grassroots political orientation of the 1993 version has been displaced by a narrow and functional statement that is less generous and less adventurous. The concern with *threats* to the rights of Indigenous peoples has vanished and been replaced by a reformist agenda that promises access where possible to an education in just one culture – albeit an Indigenous one – provided in *their own language*. This can be a challenge when there is a shortage of teachers fluent in that language and where a given community includes speakers of many distinct Indigenous languages (often the case in northern Australia).

Article 15

In 1993, Article 15 was overwhelmingly educational in its coverage and emphasis. The influence of the global Indigenous language revival movement was evident in the focus on culture and language. Maori and Inuit representatives were prominent supporters of this Article and it is likely the inclusion of adult learners was an Indigenous Australian addition:

Indigenous children have the right to all levels and forms of education of the State. All Indigenous peoples have this right and 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.

Indigenous children living outside their communities have the right to be provided access to education in their own culture and language.

States shall take effective measures to provide appropriate resources for these purposes (UN E/CN.4/Sub.2/1993/29/Annex I).

By 2007, Article 15 had been stripped of many of its more tangible aspects – including references to children – and become an undemanding statement of cultural solidarity:

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 co-operation 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 (UNDRIP 2007, p. 35).*

In many ways the 2007 version of Article 15 is a pale shadow of the 1993 iteration. Instead of a sustained emphasis on children and educational pedagogy, the later version is a call for shared and unthreatening social enlightenment at the expense of value added educational reform and reinvention.

Article 16

In 1993, Article 16 concerned the public presentation and representation of Indigenous cultures and was an expression of re-awakened pride and commitment on the part of resurgent Indigenous communities of many kinds:

Indigenous peoples have the right to have the dignity and diversity of their cultures, traditions, histories and aspirations appropriately reflected in all forms of education and public information.

States shall take effective measures, in consultation with the Indigenous peoples concerned, to eliminate prejudice and discrimination and to promote tolerance, understanding and good relations among Indigenous peoples and all segments of society (UN E/CN.4/Sub.2/1993/29/Annex I).

While some of the expression (in the English language version) is awkward, the sentiments are clear and meaningful. An awareness of the dignity and diversity of Indigenous cultures was a powerful concept in the UN Year of Indigenous People. A pre-occupation with education and public information was also characteristic of the time. In paragraph two the call to eliminate prejudice and discrimination was

indicative of the broadly shared desire to take the Indigenous message and Indigenous values to the world.

By 2007, Article 16 had become one of the most focussed and 'clinical' within the Declaration. The emphasis on Media access had become dominant:

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 (UNDRIP 2007, p. 37).*

For Article 16, changes that took place across the fourteen years in question were substantial, reflecting major changes within the global Indigenous domain and across the collective of States. The heady optimism and momentum for change that characterized the early 1990s was replaced by a more pragmatic orientation based on acceptance of the concept of compromise.

CLUSTER EIGHT – EMPLOYMENT AND WORKPLACE RIGHTS - (ARTICLES 17, 18, 19, 20 AND 21)

Five Articles comprise the cluster that addresses Employment and Workplace Rights. The influence of the UN-supported International Labour Organization (ILO) and especially ILO Convention 169 (1989) is apparent in relation to Articles 18, 19 and 20. Rights to local funding opportunities and to access to domestic and international markets for Indigenous primary producers and creative industries are entirely absent.

Article 17

In the 1993 version, Article 17 was simple and direct with an emphasis on the need for Indigenous media presence in all regions with Indigenous populations:

Indigenous peoples have the right to establish their own media in their own languages. They also have the right to equal access to all forms of non-Indigenous media.

States shall effective measures to ensure that State-owned media duly reflect Indigenous cultural diversity (UN E/CN.4/Sub.2/1993/29/Annex I).

COMMENTARY

By 2007, Article 17 had been expanded and transformed into an Article concerned with economic exploitation and access to education:

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 conjunction and co-operation 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 physical 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 (UNDRIP 2007, p. 39).

Article 18

In 1993, Article 18 was short and unremarkable serving to locate Indigenous rights within the context of international labour law:

Indigenous peoples have the right to enjoy fully all rights established under international labour law and national labour legislation.

Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour, employment or salary (UN E/CN.4/Sub.2/1993/29/Annex I).

COMMENTARY

By 2007, Article 18 had been transformed into a more aspirational and less straightforward statement:

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 (UNDRIP 2007, p. 41).

The final version of this Article is narrow and superficial in its coverage. Indigenous participation in decision making can be small and inconsequential, and it is often unclear as to how much impact a debate is likely to have on Indigenous rights at local, regional or national levels. Maintaining and developing Indigenous decision-making institutions that are acceptable to community members, younger generations of university-educated Indigenous and States has been an overwhelming challenge and one that is unlikely to be addressed – particularly in Australia and Aotearoa/New Zealand.

Article 19

In 1993, Article 19 concerned Indigenous engagement and participation in the political domain. Article 19 empowered Indigenous in the areas of decision making and representation. The underlying theme was participation:

Indigenous peoples have the right to participate fully, if they so choose, at all levels of decision-making in matters which may affect their rights, lives and destinies, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own Indigenous decision-making institutions (UN E/CN.4/Sub.2/1993/29/Annex I).

COMMENTARY

By 2007, Article 19 has been transformed, but remained concerned with representation:

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 (UNDRIP 2007, p. 43).

The reference to free, prior and informed consent also appears in a number of other Articles from the final 2007 Declaration. Many supporters of UNDRIP have been reassured by this phrase, but the right to *participate at all levels* had been lost, together with the emphasis on Indigenous decision making.

Article 20

The 1993 version of Article 20 was unusual in that in addition to the right to participate it gave Indigenous peoples the right to *determine* procedures and to *devise* measures that might affect them:

Indigenous peoples have the right to participate fully, if they so choose, through procedures determined by them, in devising legislative or administrative measures that may affect them.

States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures (UN E/CN.4/Sub.2/1993/29/Annex I).

COMMENTARY

By 2007, Article 20 had become a two-paragraph Article concerned with economic rather than political rights and included explicit reference to means of subsistence and development:

- 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 (UNDRIP 2007, p. 45).*

While this Article appears unusually generous, it should be noted that there is no indication as to what individuals or agencies should determine the nature or scope of *just and fair* redress. It must be assumed that officers of the State would be entrusted

with such responsibilities – despite the likely misgivings and sustained criticism of First Nations leaders and spokespeople.

Article 21

In 1993, Article 21 aligned closely with Articles 19 and 20, and revolved around economic and cultural autonomy:

Indigenous peoples have the right to maintain and develop their political, economic and social systems, 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. Indigenous peoples who have been deprived of their means of subsistence and development are entitled to just and fair compensation (UN E/CN.4/Sub.2/ 1993/29/Annex I).

Rather than breaking new ground, this Article affirms contemporary concepts of economic autonomy and regional entrepreneurship. In terms of the financial realities of Indigenous economic management, a phrase concerning rights to funding from the State and/or financial institutions might have provided a measure of reassurance for many Indigenous organizations and communities.

CLUSTER NINE – RIGHTS TO FAIR AND IMPARTIAL LEGAL PROCESSES - (ARTICLES 27, 28, 32, 33 AND 40)

Within the context of the evolution of UNDRIP, Articles concerning rights to fair and impartial legal processes have received little attention within First Nations communities. Lawyers and political scientists have been the most visible and consistent champions of these rights. It is interesting but unsurprising that there are just three Articles in this cluster. It would appear that First Nations representatives were overly trusting in relation to the intentions and processes of the international community as a whole and the machinations of States in particular.

Article 27

In 1993, Article 27 was one of the more ambitious and high profile Articles and one that received considerable attention in world media. Article 27 encapsulated the aspirations of grassroots activists in many communities – particularly in more remote

and resource-rich locations in Australia and North America. Restitution and compensation are central concepts within this Article:

Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. 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 (UN E/CN.4/Sub.2/1993/29/Annex I).

In the final 2007 version of Article 27 much has changed, with an emphasis on processes to *adjudicate Indigenous rights* and no mention of the possibility of *compensation in the form of territories or resources*. It is clear that significant ground was lost by Indigenous representatives during the evolution of this Article between 1993 and 2007. The final version is a pale shadow of the earlier iteration:

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 (UNDRIP 2007, p. 59).

From an Indigenous standpoint, the creation by States of a process to adjudicate disputes concerning Indigenous land, sea and resource rights is a disturbing scenario. In particular, States could be expected to exercise a significant level of influence over the composition, ongoing operations and overall orientation of such bodies, making it difficult for First Nations representatives to achieve positive outcomes on behalf of their poorly organized and under-resourced clients.

Article 28

The 1993 version of Article 28 was concerned with maintaining or restoring the integrity of the total environment – including the exclusion of hazardous (in some

cases nuclear) materials. The health of particular – but not all - First Nations populations was also addressed in the last paragraph:

Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance for this purpose from States and through international co-operation. Military activities shall not take place in the lands and territories of Indigenous peoples, unless otherwise freely agreed upon by the peoples concerned.

States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands and territories of Indigenous peoples.

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 (UN E/CN.4/Sub.2/1993/29/Annex I).

The 1993 version of Article 28 was directly relevant to the circumstances of Aboriginal peoples in remote northern and Western Australia, Alaskan Inuit and Canadian First Peoples whose traditional country was home to military facilities of various kinds – many of them highly classified. The reference to First Nations health is a response to State-sponsored actions and activities – rather than a demand for a broader proactive regional or national Indigenous health policy.

In 2007 the final version of Article 28 was a sweeping and at times vague representation of Indigenous frustration and impatience regarding ongoing State and corporate incursions of various kinds and had lost its focus on the health of Indigenous peoples:

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 (UNDRIP 2007, p. 85).

While this Article specifies that Indigenes should enjoy access and prompt decisions, there is no detail regarding the nature or scope of the tribunal or process in question. *Effective remedies for all infringements* might be determined by an independent tribunal or authority, but might also be imposed (or not) by officers of the State. Moreover, *due consideration to Indigenous customs, traditions, rules and legal systems and to international human rights* might well be minimal or inconsequential.

Article 32

In the 1993 Draft Declaration version, Article 32 concerns the collective right of Indigenous peoples to determine their own identity and to access *citizenship* of the State in which they reside. Article 32 was of particular significance to First Peoples in specific South and Central American countries with histories of state-sanctioned racism and discrimination in relation to numerically substantial Indigenous minorities. The term ‘collective right’ was rarely used in the Draft Declaration, but is given considerable prominence in this iteration:

Indigenous peoples have the collective right to determine their own citizenship in accordance with their customs and traditions. Indigenous citizenship does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live.

Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures (UN E/CN .4/Sub.2/1993/29/Annex I).

Article 32 in 2007 is one of the more straightforward and less controversial of the 1993 Articles, and demonstrates that Indigenous leaders and representatives were intent on delivering practical benefits to their constituents – particularly more politically and economically vulnerable Indigenes in remote and inaccessible areas. Direct comparison with the re-badged successor Article is revealing:

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 right to determine the structures and to select the membership of their institutions in accordance with their own procedures* (UNDRIP 2007, p. 71).

Apart from the use of two paragraphs, replacement of the term *collective right* with *right* is the most visible change, but there are others, *Indigenous citizenship* has become *identity* or *membership*. This change is unsurprising given that few First Nation representatives understand their status as community members to be a form of *citizenship* as generally understood in non-Indigenous societies. While much closer to the cultural reality, ‘community membership’ is a far weaker concept. Procedures is also a difficult term. The phrase *their own procedures* should be interpreted to mean processes chosen and followed by a particular community or coalition of communities within a region – as opposed to an individual or group. Overall, Article 32/33 underwent little change during the fourteen years in question, but should be seen as weaker in the 2007 UNDRIP version.

Article 33

In 1993, Article 33 was a wide-ranging Article that addressed a number of significant Indigenous cultural domains:

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices, in accordance with internationally recognized human rights standards (UN E/CN.4/SUB.2/1993/29/Annex I).

The sequence chosen by the drafters indicates that in the early 1990s development and promotion or marketing of institutional structures was seen as more urgent and central than the maintenance of such structures.

COMMENTARY

In 2007 the successor Article (Article 34) is less confident and less generous than earlier versions. In particular, allowance is made for the possibility that some Indigenous peoples do not possess their own traditional juridical systems or customs:

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 (UNDRIP 2007, p. 73).

Article 40

The 1993 version of Article 40 is practical in its orientation. In particular, it includes reference to financial co-operation and technical assistance, which are rarely mentioned in the Articles of the Draft Declaration. Indigenous participation, on the other hand, features in numerous 1993 Articles. The 1993 version positions the United Nations at the centre of the Indigenous equation:

*The organs and specialized agencies of the United Nations system and other inter-governmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, **inter alia**, of financial co-operation and technical assistance. Ways and means of ensuring participation of Indigenous peoples on issues affecting them shall be established (UN E/CN.4/Sub.2/ 1993 /29/Annex I).*

The term *shall contribute* offers little in terms of what might be contributed, where and when, or in relation to realization of Indigenous aspirations as expressed elsewhere in the Draft Declaration.

In the 2007 final version, Article 40 is a markedly different statement and a near perfect copy of Article 39 (1993):

*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 (UNDRIP 2007, p. 85).

The 2007 version of Article 40 is similar to the 1933 version of Article 39. This suggests that an ongoing consensus evolved in relation to some of the points covered. Still, *mutually acceptable and fair procedures* became *just and fair procedures*. *Mutually acceptable* was a stronger option because *acceptance by all parties* is a more meaningful test than a shared perception that a procedure is **just** in any particular circumstance. *Disputes with States* became *disputes with States and other parties* – allowing for disputes involving corporate or scientific bodies, for example. In addition, *shall take into consideration* became *shall give due consideration to* – a relatively subtle *modification that served to further weaken the phrase*. Overall, the changes that occurred served to broaden – but also weaken – the 2007 version.

CLUSTER TEN – ENVIRONMENTAL AND DEVELOPMENT RIGHTS - (ARTICLES 23, 29 AND 30)

In the months leading up to the adoption of UNDRIP in September 2007, a handful of Indigenous activists and mainstream commentators noted the minimal coverage of environmental and development rights in the Declaration. However, while only four Articles focussed entirely on Environmental or Development rights, at least a dozen contained references to development and/or the environment. Importantly, the Draft Declaration arose during the late 1970s and 1980s when Indigenous human rights were the primary preoccupation of most First Nations leaders and grassroots activists.

Article 23

The Draft Declaration version of Article 23 was an interesting combination of statements concerning economic and community development. Health is mentioned, together with housing and economic and social programmes:

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 determine and develop all health, housing, and other economic and social programmes affecting them and, as far as possible, to

administer such programmes through their own institutions (UN E/CN.4/Sub.2/1993/29/Annex I).

This was a consistent and balanced statement with the phrase – *determine and develop all programmes affecting them* – being the most significant element. In the early '90s this represented an ambitious agenda. While some States agreed to a measure of power-sharing, few indicated a willingness to allow First Nations representatives to *determine* programmes or policy settings.

In the final 2007 version of Article 23 the term *all* has been removed and other important changes have occurred consistent with the general pattern of broadening and dilution:

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 (UNDRIP 2007, p. 51).

To *develop priorities and strategies for exercising the right to development* is far less empowering than possessing and exercising *the right to determine and develop*. Similarly, *the right to be actively involved* is a world away from *having the right to determine and develop all health, housing and other . . . programmes*. The evolution of Article 23 between 1993 and 2007 is one of the more dramatic examples of the transformation and in effect undermining of the Draft Declaration.

Article 29

The 1993 Draft Declaration version of Article 29 focussed on Indigenous intellectual property. From the late '80s disputes and debates concerning intellectual property had become commonplace in Indigenous Australia, Aotearoa/New Zealand and North America. It is not surprising that early versions of this Article were wide-ranging and ambitious:

Indigenous peoples are entitled to the recognition of the full ownership, control and protection of their cultural and intellectual property.

They have the right to special measures to control, develop and protect their sciences, technologies and cultural manifestations, including human and other genetic resources, seeds, medicines, knowledge of the properties of flora and fauna, oral traditions, literatures, designs and visual and performing arts (UN E/CN.4Sub.2/ 1993/29/Annex I).

Recognition of *Indigenous ownership, control and protection* of Indigenous cultural and intellectual property is an understandable and well-supported demand. Yet it is unclear what form such recognition might take. *Special measures* are also mentioned, but no detail is provided in terms of the nature and scope of such responses.

The domain of intellectual property is a controversial and problematic one. It is not surprising that significant changes occurred during the late '90s and early 2000s. The final UNDRIP version of Article 29 was re-numbered 31 and is a lengthy Article in two parts, which represents an expanded version of the original:

- 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 (UNDRIP 2007, p. 67).*

While a stronger statement would have been more likely without the ongoing intervention of the CANZUS Group, the 2007 Article is more comprehensive and direct

than the Draft Declaration version (1993). Article 31 2007 suggests that in the domain of intellectual property Indigenous interests have been adequately supported by existing global legal frameworks.

Article 30

Article 30 of the 1993 Draft Declaration was a contested and controversial Article – enthusiastically supported by representatives of many First Nations communities in Australia and North America – but earnestly resisted by numerous States closely aligned with global economic corporations and entrenched extractive industries. Article 30 was another Article in which a version of the phrase *free, prior and informed consent* acted as a decisive element:

*Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain **their free and informed consent prior** to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. Pursuant to agreement with the Indigenous peoples concerned, just and fair compensation shall be provided for any such activities and measures taken to mitigate adverse environmental, economic, social, cultural or spiritual impact (UN E/CN.4/Sub.2/1993/29/Annex I).*

It is interesting that there is no direct reference to the use of rivers, lakes, seas or marine resources, though the term *other resources* might have been intended to include the above. In addition, *mineral, water or other resources* might have been thought to include oil and gas, but may not have done so in particular jurisdictions.

The final 2007 version of Article 30 was re-labelled Article 32 and is a longer three paragraph version, not significantly weaker or less generous than the original:

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 co-operate 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* (UNDRIP 2007, p. 69).

While there is great consistency between the 1993 and 2007 versions, there are also some differences. In paragraph two of the 2007 version, States are urged to *consult and co-operate in good faith with Indigenous peoples through their own representative institutions*. There is no mention however of what should occur in the event that such institutions do not exist, or if there are multiple and competing institutions which claim to be representative and legitimate. The third paragraph is also problematic in that – in the absence of an independent and permanent external tribunal – States could be expected to decide if particular mechanisms are effective and devise and impose (or not) appropriate measures to mitigate the adverse impacts of development.

CONCLUSION

Examination and analysis of the final forty-six Articles of the Indigenous Declaration is a painstaking but worthwhile process. Direct comparison with the earlier Articles of the 1993 Draft Declaration demonstrates that the changes that occurred over time were not random, or unsurprising. Instead, the overall pattern of change was in the direction of curbing and curtailing Indigenous rights. Explicitly ‘political’ Articles were in many cases significantly weakened or circumscribed. Less threatening cultural and environmental Articles fared better and were left intact, or even strengthened and reinforced in some instances. The popular and enduring view that *all* of the Articles of the Declaration were ‘trampled’ or ‘overturned’ is inaccurate. The opposing view –

that ‘nothing changed’ between 1993 and 2007 – is also unsustainable. Perhaps the most appropriate and valuable interpretation is relatively unconcerned with the comparative strengths and/or weaknesses of the early and final versions of the Declaration. In this interpretation, the patterns of emphasis chosen by Indigenous drafters and representatives are paramount. Despite the enduring popularity of assessments that emphasize the centrality of land, sea and the ‘total environment’, by far the most consistent and comprehensive emphasis of the architects of the Declaration has been the moral, social and cultural wellbeing of First Peoples communities, families and individuals.

CHAPTER 8 - CONCLUSION

INTRODUCTION

Lloyd Lee, of the Dine (Navajo) Nation has expressed views close to those of many Native Americans and other Indigenes around the world regarding the UN Indigenous Declaration:

The UN Declaration on the Rights of Indigenous Peoples is a vehicle for ensuring that governments are accountable to Indigenous Peoples. The Declaration helps Native Peoples maintain their distinct identities and ways of life. Interpretations of the Declaration will change over time, but the essence and foundation will remain the same. Indigenous Peoples should focus on the Declaration in their dealings with nation states. We Navajo worked on the creation of the Declaration. In the future we will strive to ensure that the United States government can never misinterpret or ignore the Declaration. (Lee L (Ed.) 2014, p. 185).

During an interview (Yarning engagement) in his office at the University of New Mexico, Albuquerque, Lloyd spoke about the influence of regional politics on the Native American/UN relationship:

Tribal and regional Native politics has always been important in North America. We connect with our federal and state political systems as tribal units and as regional confederations. We also connect with the outside world – including the United Nations – on that basis. We Navajo (or Dine) are unusual. We are large in number and very organized. Decades ago our leaders realized we needed to seize the opportunities that came with Tribal Government and prove that we could handle our own governance. We have taken these issues seriously and have had some success. We have also developed our own separate relationships with the UN and that is probably a big factor in why we focus on teaching about the Indigenous Declaration.

THE CAMPAIGN

The campaign to construct a UN Indigenous Peoples' Declaration was one of the great popular movements of recent times. The campaign spanned the last three decades of

the twentieth century and overflowed into the new millennium. For most Indigenous activists and leaders, international political engagement was a new and daunting experience. At various times, thousands of First Nations participants spent days or weeks in Geneva, Switzerland, attending meetings of the Working Group (Working Group Indigenous Peoples – WGIP) and liaising with other Indigenous spokespeople. In addition, tens of thousands who were unable to attend lent support and encouragement in person or via letter, email and telephone. Many also provided advice at a distance. Every year groups of Indigenous delegates tabled documents, read statements and presented arguments on behalf of their communities at the UN Human Rights precinct in Geneva. The underlying aim of this avalanche of activity was to re-define the position of First Nations peoples in the wider world, and to reinforce Indigenous' concepts of themselves as agents of change and fully-fledged members of the contemporary global community.

Most Indigenous activists and representatives had not previously worked together for as long on a project of comparable magnitude or with so much at stake. The Indigenous Declaration initiative began at a time of great optimism and energy. In the early 1990s the international human rights movement was a deeply felt and broadly supported response to many of the political issues and moral questions of the day. The Declaration project ended on a more subdued note at a time of global discord and uncertainty. Yet First Nations representatives and participants succeeded in raising the profile of Indigenous issues and Indigenous peoples in ways barely understood or appreciated at the time. Indigenous participants constructed a hidden but dynamic framework of organizational and personal relationships that linked regions and peoples across the Indigenous world. Building such a framework required teamwork, perseverance and attention to detail.

As a direct extension of working closely and collaboratively at the UN in Geneva, First Nations representatives committed themselves to a process of accepting and supporting one another. The experience of direct engagement with dissimilar but often complementary First Peoples' representatives changed First Nations activism and the Indigenous world forever. Indigenous activism became more connected, more outward-looking and more collectivist in its orientation. The non-Indigenous

world rediscovered native peoples and began to realize that First Peoples had a present and a future as well as a past. The larger domain of global politics was also transformed. Settler States could no longer see themselves as unquestioned masters of the lands, seas and peoples within their borders. Within the same States, educated urban cosmopolitans and technocrats confronted the disturbing reality of *continuing colonialism* on the fringes of towns, and in hidden corners of prosperous and 'advanced' States whose wealth derived from the relentless displacement of First Peoples. The Indigenous Declaration was a rallying point for First Nations and a source of profound and growing embarrassment for governments of the settler colonial dominions.

THE CANZUS BLOC

The global movement in support of the Indigenous Declaration was large, loud and well-organized. Despite its low profile in Australia and the other major Anglophone States (Canada, New Zealand and USA), the movement contributed to a shift in the global political balance away from large and developed settler States and toward non-State political actors – especially major NGOs and Indigenous organizations. Another important change occurred in *response* to First Nations diplomacy. The campaign to defend the rights and privileges of States against the inroads of First Nations positioned the CANZUS bloc at the forefront of UN Indigenous activities. For the CANZUS States, visibility and prominence as defenders of the status quo came at a high price. Consistently negative responses on the part of the CANZUS bloc and other resistant States toward the overtures of Indigenous representatives undermined carefully crafted government claims of acceptance, generosity and respect toward Native Peoples dating back to the 1950s.

More supportive States also revealed themselves and earned the gratitude and sometimes affection of First Nations representatives. Sweden, Norway, Denmark, Mexico, Argentina, Bolivia, Guatemala, Cuba and Costa Rica demonstrated their ongoing support for Indigenous Peoples on numerous occasions. Still, in the domain of global politics, while often a valued addition, the support of firm friends is seldom sufficient. Throughout the process of drafting and consulting, First Nations needed pathfinders from *within* the Indigenous world as well as friends *outside*. With a long

history of contact and contest with western governments, Arctic-dwelling Inuit demonstrated the advantages of long-term planning, independent and stable organization, and a self-concept that included the notion of 'Indigenous global citizenship' at a moral and spiritual level above and beyond that of any State.

INUIT AND THE INDIGENOUS DECLARATION PROJECT

As early advocates and champions of the Indigenous global initiative, the Inuit of northern Canada, Alaska and Greenland maintained their long-term vision and internationalist mindset into the twenty-first century. Throughout the Polar North, Inuit have been strongly committed to the concept of ongoing Indigenous global engagement for generations. Many have seen the eventual adoption of the Indigenous Declaration as an emphatic validation of their global orientation. Having already constructed dynamic formal and informal networks of engagement, reaching as far as Australia and Aotearoa/New Zealand, Inuit accepted a central role in building an international Indigenous presence. Canadian Inuit Frances Abele and Thierry Rodon have explained the Inuit contribution with unusual clarity:

Inuit achievements have been based on the adaptation of practices drawn from traditional Inuit society. We have also enjoyed unique 'structural advantages'. For example, the late arrival of colonization and absence of effective transportation and communication have assisted us. In addition, our geographical location between the two Superpowers has afforded us unusual opportunities. Above all, earlier Inuit communities developed attitudes and practices that have been capable of successful adaptation to new challenges . . . Those attitudes and practices have been fundamental to our success (Abele & Rodon in Beier 2009, pp. 115-116, 130).

This statement addresses a central but rarely acknowledged aspect of the Declaration project and may also be applied to representatives of other First Nations. While some commentators saw Indigenous diplomatic achievement as a product of acceptance of modern political approaches and communication technologies, the reality was less straightforward. Inuit and other First Nations activists and participants – including Indigenous Australians – harnessed contemporary technologies while maintaining

traditional protocols, attitudes and practices. Modern approaches were accepted as additions, rather than replacements for traditional ways. Indigenous responses to the events of September 2007 (the adoption of UNDRIP in the General Assembly) were also framed and underpinned by specific First Nations attitudes and values.

UNDRIP ADOPTION AND INDIGENOUS PERSPECTIVES

The adoption of the Indigenous Declaration in September 2007 was followed by a steady stream of responses from commentators including First Nations writers who had tracked the slow passage of the *global document* through the UN. Many viewed the Declaration as a product and expression of international Indigenous solidarity and as a challenge to the embedded power of resistant States. Some authors – including Native Hawaiian activist and attorney Mililani Trask – chose the concept and language of *grand achievement* as appropriate to the occasion:

The most significant initiative ever undertaken in the history of human rights took place between 1985 and 2007. Indigenous leaders . . . travelled to the United Nations to battle powerful States for the establishment of standards to safeguard the human rights and fundamental freedoms of the world's Indigenous Peoples. Notions of political and ethnic superiority have pervaded western law and society, shaping the evolution of international human rights law. Racist perceptions were widely shared within the UN system. Racism was powerful, widespread and central to colonialism. Indigenous Peoples have confronted racism, discrimination, exclusion, xenophobia, marginalization and forced assimilation. Indigenous advocates drafted the UN Declaration to address and dismantle the oppressive colonial legacy (Trask in Pulitano, 2012, p. 327).

By contrast, Maori academic Makere Stewart-Harawira was restrained in her appraisal, focussing instead on the far-reaching *ramifications* of UNDRIP:

The final adoption of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in September 2007 represented a culmination of the re-configuring of the relationship between Indigenous Peoples and colonizing States. The creation and adoption of the Indigenous Declaration was a product of the determination, persistence and agency of Indigenous Peoples who have struggled

to win recognition of their rights and of the injustices perpetuated through acts of imperialism. The Indigenous Declaration also draws a line in the sand between States who choose to acknowledge the rights of Indigenous Peoples . . . and those who refuse to recognize those rights outside their own juridical frameworks . . . (Stewart-Harawira in Beier (Ed.) 2009, p. 207).

Some more militant Indigenous observers were less impressed. South Australian Aboriginal academic and member of the Tanganakeld community, Irene Watson and Canadian Cree activist and scholar, Sharon Venne have presented a more critical view of the events of 2006 /2007 and the eventual adoption of the Declaration in September 2007. Like some other Indigenous activists and participants (see Clark, Dodson and Sambo Dorough interviews, 2016), Watson and Venne identified the relocation of the Indigenous Declaration project from Geneva to New York as a critical and detrimental factor:

In 2006 the drafting of the Indigenous Declaration shifted from Geneva to New York where Indigenous representatives working close to government became involved in the final drafting or re-drafting. In New York the process of ‘watering down’ the Declaration occurred in earnest. Prior to re-location, First Nations representatives had stood firm regarding recognition of the status of Indigenous Nations as ‘Peoples’ under international law. A new UN body – the Human Rights Council-assumed responsibility for ensuring the Declaration would be finalized. It seems Indigenes and others who participated in the final process saw it as ‘a means to an end’ – a process to deliver the Declaration at whatever cost. Instead, there should have been a further critical analysis of the final content with additional submissions made by Indigenous Peoples. . . (Watson & Venne in Pulitano (Ed.) 2012, pp. 90-91).

In addition to identifying the impact of structural changes and aspects of the internal politics at the UN, Watson and Venne took issue with many of the modifications made during the ‘watering down’ process, including the ‘last minute’ creation of Article 46:

The paramountcy of State sovereignty is guaranteed by Article 46(1) whereby the territorial integrity of the State is retained and guaranteed against all other claims

including those of colonized and dispossessed Indigenous Peoples. The opportunity for the decolonization of Indigenous territories or even a dialogue on coexistence between Indigenous Peoples and the colonial State is limited. Article 46 is intended to ensure the ongoing unequal and minority status of Indigenous Peoples. Governance initiatives on the part of Indigenous Peoples are likely to be considered repugnant or inconsistent with majority rule (Watson & Venne in Pulitano 2012, p. 103).

Watson and Venne have mounted a strong case in favour of the perception that the UN Indigenous Declaration upholds the rights of States at the expense of those of Indigenous Peoples. A close reading of the Articles of the Declaration, as in this thesis, provides a sound foundation for a detailed analysis of UNDRIP's creation, application and ultimate dilution. Nevertheless, to achieve a more complete analysis, the wider political and organisational context in which the Declaration's drafting took place must also be considered. This is because UNDRIP in its final version became a symptom and expression of an underlying history of Indigenous/ Settler engagement. Aotearoa's Steward-Harawira explains this issue with typical precision:

*The wider underlying Indigenous/Settler ideological conflict has involved a struggle over reshaping the politico-economic architecture of the world. This has taken place where the intersection of global and local interests has redefined Indigenous diplomacies and ontologies in ways that will have important political and ethical consequences for this planet . . . (Stewart-Harawira, M 'Responding to a deeply Bifurcated World: Indigenous Diplomacies in the 21st century' in Beier (Ed.) 2009 *Indigenous Diplomacies*, p. 207).*

This statement is a considered response to the adoption of the UN Declaration (UNDRIP). Though only constituting one element of the evolving Indigenous/UN relationship, the story of the Declaration sits close to the heart of both the rise of First Nations global diplomacy, and the evolution of UN responses and initiatives concerning the world's Indigenous Peoples.

A LESS GENEROUS INDIGENOUS DECLARATION

At the time of its adoption in 2007, the UN Indigenous Declaration (UNDRIP) assumed a less generous, less ambitious and more 'cultural' orientation than during previous decades. Times had changed and UNDRIP had changed with the times. The Declaration underwent a multitude of modifications during its lengthy gestation as a Draft Declaration. Most of the changes acted to reduce the responsibilities and obligations of States and provide the world's First Nations peoples with a less powerful statement of rights. Like most benchmark UN documents, UNDRIP was significantly transformed during its journey through the political and organisational labyrinth that is the United Nations. Numerous and often fundamental textual 'revisions' occurred because representatives of powerful member States raised objections to successive drafts, frequently insisting upon amendment after amendment. Governments of States with politically and economically significant Indigenous populations proved especially sensitive and resistant.

The actions and claims of governments are crucial to the UN because the United Nations is a 'meeting house' of States. The domestic and international priorities of member States shape and modify each international agreement that is advanced. Within the UN system, some States are more powerful and influential than others. The leverage enjoyed by any State can vary from day to day or even within a given day, depending on the nature of the issue, and the diverse and different influence of member States in relation to it. To complicate matters further, the UN Human Rights domain in Geneva is an exceptionally fluid political arena characterized by ongoing alliance-building, deal-making and division, disagreement and infighting at every level. State-based 'alliances' and non-government organization (NGOs) 'groupings', including numerous coalitions of Indigenous NGOs, are permeated by often dramatic differences of approach. During the evolution of the Draft Declaration and especially in the months prior to its final adoption, the frequency, scale and tempo of infighting and 'bloc building' rose significantly. First Nations activists and leaders were major participants in negotiations and debates around key aspects of the Declaration – especially self-determination. All too often, however, they were met with a wall of resistance from their former, settler/colonial masters.

FROM LATE TWENTIETH CENTURY INTERNATIONALISM TO EARLY TWENTY-FIRST CENTURY NATIONALISM

The late 1990s and early 2000s saw a decisive shift to the Right in attitude and orientation across the western world. While the 11th September 2001 attack on the Twin Towers in New York City represented a major political watershed, the drift to the Right was already underway before the close of the twentieth century. Within centres of power – including the UN precincts in Geneva and New York – the global Indigenous resurgence coupled with the needs and aspirations of First Peoples slid slowly into the margins. Resurrected nationalism and rejuvenated xenophobia underpinned a ‘New World Order’. While these developments seemed sudden and unprecedented, signs of attitudinal change within the western democracies began to appear in the late 1990s.

AUSTRALIA

In Australia, a hardening of attitudes arrived early, providing a groundswell of support for right wing parties and ensuring the unexpected election of the Howard Government in 1996. The election of the Howard Liberal/National Government marked the end of thirteen uninterrupted years of Labor dominance at a national level. Labor had become more conscious of the circumstances and aspirations of First Australians under the leadership of Prime Minister Paul Keating – a formidable advocate for Indigenous rights and for the alleviation of Indigenous disadvantage. In 1996 controversial political novice Pauline Hanson was returned as the new member for the predominantly blue collar Queensland seat of Oxley in the Lower House. Hanson was elected after making negative and inflammatory statements about Indigenous Australians and Asian immigration. At this point it became clear to many commentators that Australia was undergoing a change in orientation. The language of racism and xenophobia had returned. Superficial and narrow nationalism returned to popularity and ‘Aborigines’ and ‘foreigners’ were targeted in the print media and especially on talkback radio. Conservative elements within society and in particular John Howard, the new Liberal leader, seized political opportunities provided by a supportive and dominant media, an undercurrent of ethnic and cultural anxiety and a

yearning for a return to a simpler past. Internationalism and support for minorities, Indigenous Peoples and the environment were suddenly in headlong retreat.

While he eschewed grand theory, Howard was a consistent social conservative, a loyal monarchist and a political opportunist (Hollander 2008 'John Howard, Economic Liberalism, Social Conservatism and Australian Federalism' in *Australian Journal of Politics and History*, Vol 54 Issue 1, March 2008, pps. 85–103).

Some years later, Howard was happy to reveal his attitudes and values to an increasingly uncritical electorate:

I have often described myself as an economic liberal and a social conservative. I see no incompatibility between the two. . . I have always thought that a mix of that sort best suits the needs and temper of contemporary Australian society (Howard quoted in Hollander 2008, p. 102).

In settler colonial societies, including Australia, the rise of social conservatism has repeatedly contributed to major setbacks for Indigenous Peoples. A pattern can be identified. In settler-derived societies, contemporary representatives of the conservative side of politics often see themselves as champions of nineteenth century versions of their society. The problem occurs at the next level where they incorrectly perceive their ancestors and members of other settler communities as the *only* authentic 'nation builders' of that polity. Indigenous Peoples are thought to have been – without exception – 'obstacles in the way of progress' who refused to contribute to the grand imperial project. In fact, many Indigenes also contributed – though often with less personal investment and enthusiasm.

In conservative analyses of this type, little allowance is made for Indigenes who became part of the larger society, performing menial and dangerous work for little or no payment. 'Town natives' often lived on the fringes of cities and towns in arrangements that combined elements of Indigenous and non-Indigenous cultural, labour and social relations. Equally irrational assumptions are made concerning the colonists themselves. Not all settlers added value to the imperial enterprise. Many were indolent, illiterate, disrespectful and violent – preying on their fellow colonists and frequently abusing members of local Indigenous communities and other non-

Europeans. In every society worthwhile contributions are made by members of *all* social and economic categories. At the same time, dysfunctional attitudes and damaging actions are the handiwork of individuals and groups representing every sector and every class.

Though both creations of nineteenth century British colonial expansion, Australia and New Zealand differ markedly in many aspects – especially where Indigenous Peoples are concerned. Maori are essentially *one* Indigenous People with a single, though not uniform cultural heritage. By contrast, *hundreds* of culturally and linguistically diverse Australian First Nations constitute Indigenous Australia. Many Aboriginal nations have only engaged and collaborated closely outside their regions in recent times. Conscious of the dangers of disunity, Indigenous Australians have endeavoured to construct a more unified framework of interaction and a less fragmented pattern of response to the demands of Australia's numerous governments. In the cultural and political landscape of today's Australia, Aboriginal and Torres Strait Peoples are more peripheral than their Maori counterparts. The distancing of Australia's Indigenous Peoples from the cultural and political life of the nation has been a glaring and disturbing issue for many Indigenous Australians – and for visiting observers and commentators.

This is not a new development. The Australian national narrative has generally excluded the Indigenous Peoples of the continent and of Torres Strait. Instead, the story has featured British/Irish actors as the central characters. The core narrative has focussed on the achievements of male Anglo-Celtic individuals and groups. The Chinese, Afghans, South Sea Islanders, Jews, non-British Europeans, Americans and women of various ethnicities have all been peripheral to the heroic saga of Australian nation-building.

AOTEAROA/NEW ZEALAND

In Aotearoa/New Zealand – though remaining a 'work in progress' – the national narrative allows Maori a significant and complex role and a distinctive ongoing voice in the history of the nation. Throughout the late 1990s – consistent with profound cultural and historical differences – the emerging political milieu in Aotearoa/New

Zealand remained distinct and increasingly at odds with the settler/colonial norm. Yet the ongoing dominance of the NZ Labour Party through the early years of the twenty-first century did not prevent a hardening of *Pakeha* (Settler) attitudes and drift to the Right. Instead, drift occurred *within* the dominant party as well as across the wider political spectrum, which shifted to the Right as one entity, as if bolted securely to a single tectonic plate. By its second term, the Clark Labour Government became more Establishment orientated and significantly less supportive of Maori than at the time of its accession to power in 1999. The most dramatic example of NZ Labour's failure to maintain its commitment to Maoridom was its stand on the Foreshore and Seabed issue in 2003-2004. Apparently fearing an 'unstoppable *Pakeha* backlash', the Clark Government refused to act in a manner consistent with the spirit of the *Tiriti* (Treaty of Waitangi 1840) in its legislative response to the Court of Appeal decision of *Attorney-General v Ngati Apa*. Revisiting the events of 2003-2004, distinguished Maori academic Sir Edward Taihakurei Durie has explained that –

Both Maori and Pakeha struggled to come to terms with the full implications of the Court of Appeal decision. Maori understood the decision as an endorsement of their right to engage in long-practised traditional activities. Many Pakeha saw the decision as the first step in an unfolding process of transformation, with Maori securing exclusive rights to the entire coastline of New Zealand. Parliament intervened without delay, introducing legislation to provide a new basis for administering Maori customary claims to foreshore. The speed with which the legislation was enacted left little time for meaningful debate and reflection . . . (Durie E in Erueti and Charters 2007, p vii).

There is evidence that neither Clark nor her Attorney-General Margaret Wilson were overly concerned with the legal impact of the Court of Appeal decision. It seems more likely they identified a political opportunity to grandstand by 'playing the Settler Card' before a largely *Pakeha* audience. *Pakeha* stood to lose little of a tangible nature. The real problem concerned powerful, deep-seated and discriminatory elements within the national psyche. In symbolic terms, the Court's decision was a blow to the settler colonial concept of *nationhood* and challenged the privileged position of *Pakeha* at the heart of that concept.

Rather than identifying the problem, placating the community and leading the nation to the safety of higher moral ground, Clark and Wilson became captives of remnant colonialism, rejuvenated racism and knee jerk xenophobia. There was no reason to imagine, for example, that under any new protocols Maori who were successful in affirming their rights would exclude the public from access to beaches and other sites - except in special circumstances. Such fears were inconsistent with the history of Maori generosity and willingness to share. The actions of New Zealand's Clark Labour Government during 2003-4 demonstrated the ongoing centrality and resilience of the *settler colonial myth* in early 21st Century Aotearoa/ New Zealand. As in Australia under the Liberal Government of John Howard, the temptation to harness and exploit rather than defuse and reject the colonial politics of social division proved irresistible to leaders of the national government. Sadly, the leaders of the two South Pacific Settler States were not alone in their responses to the challenges posed by resurgent First Nations.

CANADA

In Canada and the United States, similar attitudes and orientations were on the rise in the early years of the new Millennium. The arrival of Prime Minister Stephen Harper's Conservatives as the new national government of Canada in 2006 was greeted with sullen resignation by that country's First Nations. Harper had a long history as a 'hardliner' where Canada's Indigenes were concerned. In the lead-up to the 2006 election, Harper's Conservatives promised to support the development of individual property ownership on reserves and to encourage lending for private housing and businesses. The Conservatives also vowed to replace the Indian Act with a 'modern legislative framework' which would include terminating collective rights and transferring legal responsibility to Native organisations and where necessary, the provinces and territories. The 'modern legislative framework' would provide for the devolution of full legal and democratic responsibility to First Nations within the Canadian Constitution (From 'Harper's Attack on the First Nations' socialistworker.org/2015/01/29 –

<https://www.bing.com/search?PC=MC02&q=stephen+harper+and+first+nations&first=21&FORM=PORE> – accessed 13th April 2018). Commentators were quick to point

out that Harper's Plan represented a revamped version of Assimilation and would serve to further inflame First Nations/Federal Government tensions across Canada.

Historian Stephen Azzi observed that Harper had little in the way of concrete or positive accomplishments to show for his engagement with Canada's First Nations or in other major policy areas. In Azzi's view, Harper's greatest achievement was winning power and remaining in office (from 'Is Harper the worst prime minister in history?' – <https://www.nationalobserver.com/2015/05/18/news/harper-worst-prime-minister-history> -accessed 13th April 2018). Canada's journalists frequently found Harper's comments ill-informed and eminently quotable. Consistent with his policy focus, Harper declared Human Rights unacceptable, insisting that –

Human Rights commissions are an attack on our fundamental freedoms and on the basic existence of a democratic society. Such institutions are a form of totalitarianism (From – 'Is Harper the worst prime minister in history?' - Above)

Few were surprised when the Harper Conservative Government strove to maintain Canada's unofficial membership of the CANZUS bloc and stood shoulder to shoulder with the other three anglophone States, voting to reject UNDRIP at the UN General Assembly in New York on 13th September 2007.

UNITED STATES

In the late 1990s the situation of Native Peoples presented a significantly different picture in neighbouring USA. In the United States, Native Americans lived under arrangements which varied according to region, state, tribal status and many other factors. In a highly complex and largely decentralized system, relationships with key elements of relevant state and federal bureaucracies were often all important (See Interview with Lakota Chief Bill Means at UN Precinct, New York City, May 2016). The arrival of a new President presented unique opportunities for negotiation, lobbying and deal-making by Native American chiefs and their supporters.

George W Bush was elected President in 2000 and assumed office in January 2001. In the late 90s as Republican Governor of Texas, Bush frequently championed states' rights at the expense of the rights of Native Americans. Bush was strongly opposed to Indian-run casinos and espoused the outdated view that –

“State law reigns supreme when it comes to the Indians”.

Bush’s early comments set the tone for policies towards Native Americans during his presidency. Bush demonstrated an almost complete lack of interest in Indigenous affairs. Historian Scott Merriman contends that Bush was inspired by the international scene and was bored by domestic issues. In Bush’s worldview, minorities took a backseat behind ‘regular Americans’ and Indians took a back seat behind the rest (From Landry A - Above).

Regrettably, Bush was in tune with the spirit of the times. The shallowness of his knowledge and the absence of his concern were consistent with the hardening of attitudes and the simultaneous reinstatement of the settler colonial ethos that characterized the late 90s. As President, Bush’s statements and actions served to reinforce and legitimize the ungenerous and often naïve views of North American and other political leaders in the CANZUS bloc at the UN. Bush consolidated and validated many of the prejudices and assumptions concerning the rights and aspirations of Indigenous Peoples that characterized his social class and culture. As President of the United States – the largest and most powerful member of the CANZUS bloc – Bush had the power to moderate and shape the bloc’s agenda. Instead - in company with the equally conservative leaders of Australia and Canada and the short-sighted support of the Labour Government of Aotearoa/New Zealand – George W Bush made a profoundly negative contribution to the West’s deepening Indigenous malaise.

In the early 21st Century, then, the leaders of the CANZUS bloc and their supporters across the world represented an identifiable cluster of countries and political leaders. They were profoundly sceptical about the role of the UN in advancing indigenous rights and, more generally, with respect to the global Indigenous resurgence. Yet despite the unrelenting attempts on the part of the CANZUS bloc and other resistant States to obstruct and undermine the progress of the Declaration at every stage, the UN Indigenous Declaration was eventually voted into existence. Nevertheless, as has been demonstrated throughout this Thesis, the CANZUS bloc made a formidable contribution to weakening the final Declaration and depriving the global indigenous community of human rights to which morally, ethically and historically they should properly have been entitled.

THE UN WORKING GROUP INDIGENOUS POPULATIONS (WGIP)

More than any other agency or sub-element of the United Nations, the Working Group Indigenous Populations (WGIP) is associated with the story of the evolution of the UN Declaration on the Rights of Indigenous Peoples. Commentators have traced elements of the documentary record of annual meetings and discussions during the lengthy lifespan of the WGIP and attested to the 'unique character' of the Working Group. While this approach offers a glimpse of the activities and priorities of the WGIP, it fails to recognize or address the vast and largely undocumented significance of the Working Group. The WGIP was a primary location for expansionist Indigenous political engagement and a site for defensive diplomacy on the part of settler States and their supporters. The meetings of the Working Group also provided a venue for numerous and varied 'interventions' and intercessions on the part of States which styled themselves '*Friends of the Declaration*' – generally led by the Scandinavians – and other States which strove to represent themselves as 'neutral' or 'even handed' in their responses to First Nations demands and initiatives.

At the same time, the Working Group was a valued forum and 'listening post' for a diverse array of Non-Government Organisations (NGOs), providing opportunities for engagement with representatives of 'progressive' States and interaction with both 'connected' and 'free range' Indigenous participants. Journalists and other media personnel came to rely on the Working Group as a source of 'inside information' regarding the 'underside' of Indigenous global diplomacy and the intricacies of the Indigenous/UN interface. None of these meaningful aspects of the life of the WGIP has been effectively treated or examined in the documentary record. Instead, the relevant documents concern the administrative functions of the UN and cannot be expected to chart the trajectories of political initiatives, unravel the processes of alliance formation and priority setting, or decipher the framing of responses on the part of diplomatic coalitions and other parties. Over-reliance on documentation demonstrates the adoption of a narrow perspective which excludes the possibility of immersion in the cultural milieu surrounding the WGIP. Uncritical acceptance of UN documents as the central and ultimate source of information regarding the evolution of the Working Group is a fundamental reason for understating the importance and

misinterpreting the numerous and largely concealed roles of the WGIP. Such documents have not been composed by First Nations participants or designed to describe or represent the hidden dimensions of a far larger and less accessible reality. Even a comprehensive survey of the documents reveals only a small part of the story. In general, UN documents do not identify or explore the mindsets or orientations of individuals operating outside the United Nations. Above all, the Working Group existed on a different and more powerful level as a *concept* in the minds of hundreds of thousands of Indigenous activists – and their largely non-Indigenous State-based opponents – in many parts of the world. By the late 1980s, the Working Group had achieved a special status and gained uncommon acceptance as a ‘protected space’ in which Indigenous could represent their ‘Mob’ and present their testimony without fear of institutional racism or government-initiated coercion. The positive and widely-shared Indigenous *concept* of the Working Group was based on the related notions of *acceptance* of cultural difference and *awareness* of the nature and impact of centuries of colonization.

Over time, First Nations participants came to identify strongly with the distinct ethos of WGIP. The Working Group did not develop or reveal its full character or *ethos* in the first instance, beginning life as a small and unremarkable UN sub-element on 7 May 1982 when it was established by the Sub-Commission on the Prevention of Discrimination and Protection of Minorities as authorized by the Economic and Social Council (ECOSOC) (*Study of the Problem of Discrimination against Indigenous Populations*, ESC Res 1982/34, ESCOR, 28th Plen Mtg, UN Doc E/RES/1982/34 (7th May 1982) (Study of the Problem of Discrimination’ from Davis M 2008 ‘Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples’ in *Melbourne Journal of International Law* Vol. 9, 2008 pp 1 33 p 1).

THE ATSIC CONNECTION

By 1992 the approach and performance of the UN Working Group had greatly impressed Australian Government representatives at the highest levels, including Dr

Peter Shergold, CEO of the Aboriginal and Torres Strait Islander Commission (ATSIC) who demonstrated considerable knowledge of the operations of the Group –

For ATSIC, Australia's peak Indigenous body, the Working Group has provided the major opportunity to pursue the rights of Indigenous Peoples in the international arena and to raise worldwide awareness of challenges that demand to be addressed. The Working Group is a forum which has accommodated a constructive if sometimes tense dialogue between States and NGOs representing their Indigenous citizens.

ATSIC has supported the Working Group through active participation of successive delegations of ATSIC Commissioners; by providing financial support enabling Indigenous Australian organisations to send representatives; and by contributing each year to the Voluntary Fund which in 1992 covered the costs of travel and accommodation for 41 Indigenous delegates from 19 countries (Shergold 1992 p 1).

Shergold's positive and informed appraisal of the roles and trajectory of UNWGIP and description of the close and amicable relationship with the Australian Government in 1992 stands in stark contrast with the UN/Australian Government relationship that developed after 1996 under successive hard line Liberal/National governments. For Australia and the Australian political establishment, relations with the United Nations became and have remained an ongoing and contested political and diplomatic zone in which the Indigenous dimension has proven especially divisive.

In structural terms, the Working Group was composed of just five independent members. In practice, thousands of Indigenous individuals participated as presenters, advocates and community representatives during the twenty-five year lifetime of the WGIP. Indigenous Australian scholar and UN participant, Megan Davis, has explained that the *mandate* of the Working Group was broad and ambitious. The mandate included -

Reviewing developments pertaining to the promotion and protection of the human rights. . . giving special attention to the evolution of standards concerning the rights of Indigenous populations. The WGIP was also

responsible for gathering information about the historical and contemporary experiences of Indigenous Peoples through their oral and written interventions. Information gathering was aided by a flexible working procedure and 'innovative rules' that accommodated widespread Indigenous participation. This created an environment in which frank and fearless discussion concerning the conduct of States – something not normally acceptable at higher levels within the UN system – was permitted (Davis 2008 p 7).

ETHOS OF THE WORKING GROUP

The *ethos* or culture of the Working Group Indigenous Populations was distinct from those of other contemporaneous UN sub-elements. The WGIP was open and 'democratic' in both its public image and day-to-day operations. First Nations representatives and grassroots Indigenous activists found the Working Group a noisy and bustling, but also welcoming environment which maximized opportunities for meaningful engagement with other Indigenous representatives and the building and re-working of extensive personal and organizational networks. Some commentators and scholars have made a connection between the positive and optimistic *spirit* of the 1993 UN Conference on Human Rights and the *ethos* of the Working Group. UN Legal Liaison Officer Markus Schmidt has identified problems with this interpretation, contrasting the unprecedented success of women's representatives with the many 'disappointments' suffered by Indigenous at the Vienna Conference. In Schmidt's view, First Nations participants endured major setbacks and some outcomes were unexpectedly extreme. Decisions to further entrench the discretionary powers of States included making technical assistance to Indigenous organizations contingent upon the endorsement of States, preventing those directly affected from providing any significant input (Schmidt 1995 p 598). The Final Text proved relatively weak and 'unassertive', not least because trenchant opposition from Canadian and Brazilian representatives proved decisive. Those States also led the (briefly) successful resistance to the addition of the letter 's' at the end of the word 'People'. The so-called 'S Debate' was lost by Indigenous representatives at Vienna in 1993, but the experience served to unify the diverse Indigenous factions and cement bonds

between organizations and individuals that would ensure eventual acceptance of the term *Peoples* and shape First Nations diplomacy for years to come.

While recognizing the remarkable achievements of Women's Movement representatives, Indigenous participants were buoyed and reassured by their close engagement with the UN, their amicable dealings with the international media and their intensive interaction with each other. Though correct in identifying specific irritations, Schmidt's appraisal fails to accommodate or incorporate the meaningful gains made by Indigenous participants throughout the Conference and the optimism and camaraderie that characterized First Nations interactions. Effectively coordinated and meticulously briefed Indigenous participants were a testimony to the long-term impact of Indigenous engagement with the Working Group. The UN-derived experience of pan-Indigenous liaison, information-sharing and informal *Yarning* throughout the previous decade transformed Indigenous diplomacy. Starting from naïve, haphazard and often ineffectual beginnings, Indigenous participation at the Geneva gatherings of the Working Group re-shaped First Nations organisations and coalitions, re-energizing the global Indigenous resurgence in the process.

ERICA-IRENE DAES

In 2004 Dr Erica-Irene Daes, Chair of the WGIP during its formative years, noted the extraordinary upsurge in First Nations engagement with the UN and the pivotal role of the Working Group in underpinning that transformation –

We have identified hundreds of competent Indigenous organizations in the course of the meetings of the Working Group. Strengthening the effectiveness of Indigenous voices at the United Nations should be a central mission of the World Body as we approach the end of the International Decade of Indigenous Peoples. I have proposed that the final year of the Decade be devoted to - Indigenous Peoples participation in international decision-making institutions (Daes 2004 p 4).

Dr Daes suggested that additional benefits to the United Nations and to Humanity broadly conceived, would derive from an enlarged and enhanced Indigenous presence

In order that United Nations fulfil its historic mission of achieving respect and freedom for all nations and peoples, it must enlist the broadest possible constituency for its future activities. The UN cannot rest content with the support of a majority of the world's governments. The UN must also mobilize the support of a majority of eligible individuals – including Indigenous peoples of all regions of the globe (Daes 2004 p 4).

Two years earlier, community organizations across indigenous Australia had been notified of the plan to dismantle the Working Group Indigenous Populations. In Guildford, Western Australia, Robert Bropho of the Nyungah Circle of Elders represented the views of many globally-minded Indigenous Australian activists when he declared –

The threat on the part of the Australian Government and governments of other countries of shutting down the UN Working Group Indigenous Peoples is a worldwide disgrace. It is even worse when you consider that this is happening during the Decade of Indigenous Peoples.

If we, as Indigenous people, do not speak up now, the suffering that was inflicted on us will continue to be inflicted on our children for many generations. We also have a right to speak on behalf of the Future of our children, the same as any nation of non-Indigenous people.

We say to the Indigenous People at the United Nations:

“Don't stop what you are doing now, because if you do, there will be no hope for any of us. Today, we the Indigenous peoples of the world, live in hope of Tomorrow – a better Tomorrow for ourselves and for our children” (Bropho, 2002 p 2).

In 2007 the fears of millions of First Nations activists across the world were realized when the UN Working Group Indigenous Populations (UNWGIP) was formally disbanded and replaced by the relatively exclusive, intensely bureaucratic and generally inaccessible Permanent Forum. Indigenous participants and activists condemned the axing of the Working Group. Charismatic and popular Chair of the

Working Group, Erica-Irene Daes saw the WGIP as an unexpectedly successful experiment – a colourful and dynamic ‘prototype model’ that demonstrated how a more open, democratic and grassroots-friendly UN might work.

(Despite appropriate representations prior to arrival, the author was forbidden entry to a meeting of the Permanent Forum Indigenous Issues [PFII] and denied access to members, presenters and officials within the UN Precinct in New York City on 9th and 10th May 2016 in accordance with ‘specific instructions’ from Australia’s Permanent Mission to the UN).

DOMINATION BY STATES

While some other parties - including Non-Government Organisations (NGOs) - are often strongly represented at the UN, *only* member States enjoy voting rights. Nonetheless, change has occurred within the UN. During the 1990s the UN became more accepting of outside influences. Structural and procedural changes enabled regional non-State organisations and other NGOs to contribute to major global initiatives – including the Indigenous Declaration. Nevertheless, States have retained the upper hand as ‘guardians’ of the World Body. Not surprisingly, States tend to ‘club’ together. Rather than acting alone, States form coalitions, tight-knit alliances and even semi-permanent voting blocs. It should not be assumed that the dominant presence of groups of States creates a stable or peaceful environment. Despite the organizational culture of protocol and restraint, ongoing conflict and division throughout the UN system and within UN agencies and sub-elements is the norm.

States enjoy the far-reaching advantage of *continuous incumbency* within the UN system. Supported by generous funding and longstanding relationships with ‘likeminded’ nations, larger and more committed States are most often embedded and entrenched. Above all, States are sensitive to any perceived threats to their political, economic or territorial interests. With the ability and determination to pursue reactive and narrowly-conceived policies concerning the Declaration’s content, entrenched States have been a big part of the ongoing *UN Problem* identified and analysed by numerous commentators. Influential States with significant indigenous populations responded predictably to the global Indigenous resurgence

and the evolution of the Indigenous Declaration. States placed themselves in *supportive, neutral or resistant* categories, with many changing position over time in response to domestic political and societal imperatives.

Within the CANZUS bloc, the United States showed little in the way of dramatic movement, remaining staunchly resistant on almost every issue. By contrast, Australia and Canada oscillated between supportive and resistant, reflecting changes of government, policy and political climate. Aotearoa/New Zealand also oscillated, but less dramatically. Other major nations with Indigenous populations – China, India, Russia and Brazil - were relatively predictable and resistant throughout the decades in question. Scandinavian support was comprehensive and consistent – especially on the part of Sweden, Norway and Denmark. To add to the political and policy difficulties and complexities, First Nations participants brought with them longstanding and deep-seated differences of attitude and orientation, both as members of cultural communities and as experienced observers and advocates.

In Geneva and New York Indigenous representatives were focussed on extracting major concessions from States. In response, many Western governments were determined to dilute and undermine the Indigenous Declaration. At the same time, other States, particularly Scandinavian states, were supportive of Indigenous demands. In addition, NGOs acted to balance the equation, often acting to ‘tone down’ the more extreme proposals of the main protagonists. Although UNDRIP encapsulated the lives and aspirations of First Nations, the document was repeatedly and decisively impacted by States’ representatives. As described and demonstrated previously, the pattern of State response changed in accordance with emerging developments within the global political landscape and in the domain of popular opinion.

The Draft Declaration arrived at the UN at a time when a powerful and broadly-supported human rights orientation was in the ascendant. In the early 90s, a UN human rights conference in Vienna was agreed upon. Protracted discussions and debates preceded the benchmark Conference in Vienna in June 1993. The Conference represented a highpoint for both the United Nations and Indigenous Peoples. 1993 was the UN Year of Indigenous People (later Peoples). 1993 also became Year One of

the UN Decade for Indigenous Peoples. In the domains of international law and global politics, Indigenous rights had emerged as a sub-element of human rights. Indigenous rights also developed within the domain of human rights at the UN. In many ways, 1993 was the 'pinnacle' for Indigenous visibility within the UN system. After reaching its peak in the mid-1990s, the Indigenous rights movement within the UN in Geneva became more divided and less focussed. Indigenous representatives were confronting better coordinated and more committed resistance from the CANZUS Bloc and their supporters. By the early 2000s, the global Indigenous resurgence had lost much of its momentum. A widespread conservative 'backlash' or 'counterattack' was taking hold in Australia and beginning to emerge in Aotearoa/New Zealand and Canada. Nevertheless, it is important to note that there was, at the same time, significant input from progressive member States and NGOs. This served to offset the impact of resistant States – particularly the hard-line CANZUS bloc (Canada, Australia, New Zealand and the United States).

THE CAUSE

During this time First Nations representatives remained committed to *The Cause*. Indigenous activists believed they were contributing to a new and distinctive chapter in the history of the world's First Peoples. Such individuals and their communities were part of the movement in support of the Declaration. Indigenous proponents of the Declaration represented one of the largest and most visible elements within the First Nations global resurgence, helping to add a significant Indigenous aspect to the politics of the late 20th Century and the new Millennium. Yet the Declaration was not supported with equal enthusiasm or commitment across the Indigenous world. Support for the Declaration project was concentrated in regions with a history of close engagement with western colonialism. In the Arctic and Sub-Arctic, Central and South America and in remote Oceania, cultural resilience and distance from Europe combined to create opportunities for greater Indigenous cultural and political autonomy – including opportunities to contribute to the Declaration project.

In the end, the Declaration (UNDRIP) - as both a tangible document and a cultural interface - constituted an encapsulation of the relationship between settler colonial intransigence and global Indigenous resurgence. While demonstrating the resilience

of the settler colonial ethos, the Indigenous Declaration project also served as a proving ground and showcase of First Nations teamwork, leadership, resourcefulness and organisational prowess. In this ongoing conflict of worldviews and ideologies, the language and concepts of rights gradually rose to prominence. Human rights represented an effective starting point, but 'collective rights' would prove more relevant to First Nations communities and more aligned with Indigenous cultural realities. While there are references to 'collective rights' within the Indigenous Declaration, they are generally combined with references to human rights. Irene Watson and Sharon Venne contend that the record demonstrates that Indigenous participants at the UN repeatedly sought to move *beyond* human rights:

Indigenous representatives lobbied for more than three decades for recognition as Peoples and as members of the international community. Their quest was for recognition of First Nations rights as Peoples. In an important way, human rights diminish the collective rights of Indigenous Peoples because human rights concern individuals within the context of a particular State.

Human rights also have the capacity to negate Indigenous worldviews in which Indigenes have obligations as well as rights. The individual rights orientation is a western approach that has never been appropriate for Indigenous Peoples. The rights of the individual are often at odds with those of the group and frequently conflict with collective relationships to the lands and seas . . . (Watson & Venne in Pulitano (Ed) 2012, p. 96).

THE RIGHTS DILEMMA

Watson and Venne have presented a persuasive argument that parallels statements from Indigenous respondents and Working Group participants (see Dodson, Clark, Borrows and Sambo Dorough interviews, 2016) and community responses across eastern Australia. Many other observers have been more generous. Adopting a positive view of the inclusion of collective rights within the Indigenous Declaration, Native American political scientist Sheryl Lightfoot contends that:

Adoption of the Indigenous Rights Declaration represents the first time a broad set of collective rights has been accepted within the human rights consensus. By

constituting Indigenous rights in both individual and collective terms, global Indigenous politics has created a Politics distinctive from other rights movements. By adding collective rights to the international human rights consensus, the Declaration opens a door to collective rights acceptance. This is a remarkable achievement, given that for decades English-speaking States have expressed misgivings regarding collective rights, insisting that there is a logical incompatibility between individual and collective rights. . . (Lightfoot 2016, p. 201).

Interestingly, Lightfoot does not take issue with the western philosophical and legal distinction between individual and collective rights which renders her stance dramatically at odds with most Indigenous thinking in this area. The First Nations consensus view at the UN has been that Indigenous rights represent a distinct version of collective rights and that – as the category of rights representing the needs of the community – collective rights are necessarily paramount. By contrast, the dominant State view has been relatively unconcerned with collective rights, demonstrating one of the key differences between non-Indigenous worldviews and those of Indigenous Peoples. The legal traditions and civic cultures of western States are built around the rights and obligations of the *individual* citizen. In many Indigenous analyses, western thinkers and theorists have lost sight of one of the pillars of human civilization – the pre-eminence of the social collective and the distinct role of the individual as a *member* and *agent* of the collective. Pre-occupation with the perceived importance of the *individual* has entrenched a major cultural misalignment in the discourse of western rights and served to distance contemporary western thinking from the worldviews of First Nations and other non-western Peoples.

SELF-DETERMINATION

Self-determination has been the central issue and problem of UNDRIP from the earliest meetings and has defined the Indigenous Declaration and even the careers and reputations of leading participants. Powerful States have refused Indigenous demands for equal treatment as distinct Peoples. First Nations have demanded rights equivalent to those of other Peoples - especially the right of self-determination. This debate has been widely reported and non-Indigenes have had

the opportunity to see that the First Nations agenda is balanced and reasonable – certainly more reasonable than the agendas of specific States . . . (From Interview [Yarning engagement] with Clement Chartier, Metis National Chairman, Ottawa, Canada, May 2016).

Self-determination remained the most divisive and contentious issue throughout the protracted evolution of the Draft Declaration. Like most major conflicts of ideas, the self-determination debate had moral and political dimensions. Longstanding and deep-seated differences of attitude and orientation meant that agreement between Indigenous participants and States' representatives was largely unachievable. First Nations leaders and activists ensured that self-determination remained near the top of the list of 'unresolved' Articles throughout the 1990s and into the new millennium. Their primary purpose was to maximise First Nations rights in relation to cultural resurgence and political re-awakening. Some States' representatives also retained self-determination as a political priority. Yet their orientation was utterly different. Specific States were committed to limiting the practical impact of the idea and curbing its influence as a rallying point. The governments of such States – including members of the CANZUS bloc – were disturbed by the remote but alarming possibility of political secession and territorial dismemberment. In fact, few Indigenous activists were interested in creating new States. Their broadly shared goal was to secure greater autonomy and self-reliance *within* existing nation states. The diverse dimensions of these disagreements can be discerned in the intensely political discussions surrounding specific Declaration Articles examined in preceding chapters.

FIRST NATIONS AS DISTINCT PEOPLES

For many Indigenous participants at the UN, anxiety was a constant companion. First Nations delegates feared that without cohesion and integrity as distinct peoples, First Peoples could not hope to achieve a meaningful level of self-determination. In the 1993 version of the Draft Declaration, Article 26 acted as an extension of the self-determination statement. The primary focus was reassertion of First Nations control over the *total environment* including lands, waters, coastal seas, sea-ice, flora, fauna and other resources (UN E/CN.4/SUB.2/1993/29/Annex I). Article 26 also included full recognition of traditional practices and institutions for the management of resources.

Overall, the 1993 version was remarkably generous and comprehensive. Over time, this Article was transformed. In the final 2007 version, *recognition with due respect* replaced *full recognition*. The final version of Article 26 was tightly circumscribed and relatively ungenerous. In the lead-up to adoption in 2007, the ambitions of First Nations were brought down to earth.

Comprehensive and generous Articles were replaced by statements that ensured the maintenance of State control over Indigenous lands and Indigenous peoples. The fundamental difference between settler-colonial and Indigenous perspectives concerned the concept of First Nations control. In the minds of many Indigenous peoples, self-determination means Indigenous control over Indigenous resources and peoples. To many non-Indigenous observers and commentators, First Nations control represents instability, increased corruption and erosion of the modern State. Only a handful of Indigenous Australian organisations have ever advocated new and separate Indigenous territories or precincts. Michael Mansell and the Aboriginal Provisional Government (APG) founded in 1990 and based in Tasmania, have been perhaps the most prominent and consistent of Australia's Indigenous separatists (See APG official website).

Like members of the APG in Tasmania, Alaskan Inuit Dalee Sambo Dorrough (a visitor to Tasmania during the 1990s) has embraced the prospect of Indigenous self-determination

Self Determination is an imprecise but powerful concept of great importance to Indigenous Peoples. In the High Arctic we have experienced extreme reactions against Self Determination. States have been dismissive of our cultural heritage and political capabilities. Our dealings with the Russians have always been difficult, but they occasionally demonstrate some respect. On the other hand, the Chinese have demonstrated no regard for Arctic Peoples and even less respect for our environment. Greater capacity to shape our own future on the basis of Self Determination would change our relationships with the outside world and help protect our fragile environment . . . (From Interview [Yarning engagement] with Dalee Sambo Dorrough outside Anchorage, Alaska, April 2016).

THE FORTY-SIX ARTICLES

A close examination of the forty-six UNDRIP Articles reveals patterns that chart the evolution of First Nations' political thinking around self-determination and related issues. The topic breakdown is striking. While there are only *four* Articles entirely concerned with aspects of self-determination, seven Articles refer to other UN documents, weaving the Indigenous Declaration into the larger framework of UN Human Rights. One example is Article 41, which in the 1993 version concerned the UN obligation to ensure the implementation and full application of the Declaration. Article 41 (1993) committed the UN to the creation of a body at the highest level with special competence in the Indigenous field. Direct participation by First Nations peoples was also specified (UN E/CN.4/Sub.2 /1993/29/Annex I). In the final 2007 version, the emphasis is different, but includes a full UN commitment to full realization of the provisions of the Declaration, and to the mobilization of financial co-operation and technical assistance to ensure the participation of First Nations peoples (UNDRIP, 2007, p. 87).

Article 42 (1993) (Article 43 in 2007 version) demonstrated the tug-of-war between Indigenous advocates and States representatives. This Article contains the statement:

The rights recognized within this Declaration constitute the minimum standards for the survival, dignity and wellbeing of Indigenous Peoples (UN E./CN.4/Sub.2 /1993 /29/Annex I) and UNDRIP, 2007, p. 91).

This Article was welcomed by North American First Nations and is widely recognized across Canada (see Imai and Chartier interviews, Canada, 2016). The ***minimum standards*** clause imposed additional pressure on States by requiring them to fulfil the demands of each article in the immediate term and without exception. The underlying logic is clear. In the longer term, with the benefit of enhanced skills and improved infrastructure, further advances would occur including enhanced First Nations autonomy and community wellbeing. Article 45 (1993) (Article 46 in the final 2007 version) was probably the most controversial in terms of its endorsement of States rights. Article 46 has been specifically targeted as 'paranoid overkill' by Indigenous representatives including Yarning participants (see Dodson, Clark and Sambo Dorough

interviews, 2016). The influence of States spokespeople was decisive in ensuring that the sovereignty of States was upheld by addition of Article 46 which included the statement:

Nothing in this Declaration may be interpreted as authorizing or encouraging any action which would dismember or impair. . .the territorial integrity or political unity of sovereign and independent States (UNDRIP, 2007, p. 97).

THE ELECTORAL LANDSCAPE

In the early 2000s resistant States, including the CANZUS bloc, embraced more extreme political scenarios that exaggerated First Nations ambitions. As late as 2007 Indigenous participants' focus on gradual change in relationships and structures *within* pre-existing States remained unacknowledged by the representatives of hardline States. The prospect of political disintegration retained its power to divert attention from more pressing challenges. At local and regional levels, across Anglosphere nations, in Scandinavia and in Central and South America non-Indigenous politicians anticipated the potential impact of First Nations demands on the electoral landscape. Casting the UN as the primary source of naïve and unworkable global initiatives, conservative factions proclaimed the pre-eminence of the non-Indigenous majority and the absolute superiority of the western capitalist system. Allegiance to the modern nation state became synonymous with rejection of Indigenous demands and disdain for the United Nations as a counterweight to the machinations of States and the antics of political factions. A widespread lack of awareness of the roles and contributions of the UN emboldened critics of the human rights agenda and undermined support for Indigenous rights. Even Indigenous advocates were largely unaware of the scope and range of pre-existing UN entitlements relevant to Indigenes. In the end, a compromise was forged around entitlements applicable to *all* Peoples.

REVISITING THE ARTICLES

Seven Articles deal with entitlements within the UN Indigenous Declaration. Specific obligations of States are stated in Indigenous-specific language. Article 6 refers to the collective rights of Indigenous peoples. In the 1993 version, Article 6 addressed the issues of child removal and genocide:

Indigenous Peoples have the collective right to . . . full guarantees against genocide or any other acts of violence, including the removal of Indigenous children from their families and communities under any pretext (UN E/CN.4/sub.2/1993/29/Annex I).

In the final 2007 version, Article 7 was less precise and less powerful, but still included explicit reference to collective rights:

2. Indigenous Peoples have the collective right to live . . . 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 (UNDRIP, 2007, p. 19).

Article 33 in the 1993 version was also concerned with the maintenance of community structures and traditions:

Indigenous Peoples have the right to promote, develop and maintain their institutional structures and their distinctive juridical customs, traditions, procedures and practices . . . (UN E/CN.4/Sub.2/1993/29/Annex I).

Though not described as *collective rights*, the rights described in Article 33 above would normally be considered collective rights, because none can readily be exercised by individuals acting on their own behalf or in isolation. Importantly, in the final 2007 re-numbered Article 34 version, the emphasis changed and included additions in the cultural domain:

Indigenous Peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices, and in cases where they exist, juridical systems or customs in accordance with international human rights standards (UNDRIP, 2007, p. 73).

CONNECTING TO THE UN CHARTER

At the beginning of the Declaration, Article 1 introduces the concept of human rights and connects UNDRIP to the UN Charter, the Universal Declaration of Human Rights and international human rights law. Article 2 serves to extend the context, introducing a moral reference point by stating that Indigenous peoples are equal to all other Peoples and individuals and have the right to be free from discrimination (UNDRIP,

2007, p. 11). While self-determination is a dominant concept in the opening pages of the Declaration, it is not the only focus. Article 3 is the first to focus on self-determination and Article 4 serves to extend and consolidate Article 3. In 1993, Article 4 upheld cultural cohesion and community identity. Indigenous participation in the life of the larger society was explicitly supported. In the final version (2007) Article 4 included the right to autonomy or self-government in local affairs and access to funding to sustain that level of autonomy (UNDRIP, 2007, p. 13). Articles 8 and 26 also address aspects of self-determination. In 1993 Article 8 concerned the right to maintain and develop Indigenous identities and characteristics. In the final version (2007) Article 8 addresses the issue of forced assimilation and destruction of culture. Deprivation of identity and integrity as distinct peoples, dispossession of lands, territories and resources, forced population transfer, forced assimilation or integration and propaganda designed to promote or incite discrimination against First Nations are all specifically targeted (UNDRIP, 2007, p. 21).

Each of these issues was identified as a direct threat to the social and cultural cohesion of Indigenous communities. The final 2007 version of Article 8 is also a statement of collective rights, but such rights were understood by different actors in very different ways. The word *spirituality* was added and an allowance was made for First Nations communities to have evolved without juridical systems or customs. *Spirituality* was mistakenly conceived as an individual domain by many non-Indigenous participants. For Indigenous activists it was necessarily a shared and collective arena. First Nations participants operated from a standpoint in which the primacy of collective rights is assumed in almost every situation. Conversely, those representing resistant States clung to the consensus concept of the centrality of individual rights, emphasizing the pre-eminence of the individual in other UN instruments – particularly the 1948 Universal Declaration of Human Rights.

THE SELF-DETERMINATION PROBLEM

During the 1970s and 1980s in early discussions within and between First Nations communities concerning the possibility of developing a global Indigenous Declaration, self-determination was one of many major topics. Within government, bureaucrats and politicians realized that negotiations regarding self-determination were

inevitable. At some point, leaders of States decided that a line would be drawn in the sand. The decision was made to take a stand on the issue of self-determination. States also realized that whatever was negotiated and eventually written into the Indigenous Declaration could be undone, or at least offset by their own domestic legislation. They also appreciated that the Declaration would never be *binding* in a technical sense and would not commit present or future governments to specific courses of action. Leaders of resistant States, including the CANZUS bloc, understood that the territorial integrity and economic wellbeing of their nation could never be jeopardized by a UN Indigenous Declaration. They also realized that ongoing and heavy-handed resistance to First Nations demands could deliver almost immediate and potentially limitless political dividends.

On earlier pages of this chapter, it was shown how in each of the three CANZUS States, domestic political considerations were central to the conduct of public campaigns of resistance to Indigenous demands. Politicians and leaders from a range of backgrounds and with little in common by way of ideology and political philosophy made almost identical choices in response to remarkably similar opportunities. Leaders calculated that votes could be captured and elections won by consistently appealing to the attitudes and values of less educated, less tolerant and more backward-looking sections of the electorate. Inflexible and often orchestrated resistance to the demands of local First Nations offered the additional attraction of reinforcing pre-existing links and creating opportunities for further joint political ventures with 'like-minded' settler colonial States. Some First Nations commentators, including Michael Mansell in Tasmania and Sam Watson in Brisbane, have targeted the roles of major global mining and resource corporations in undermining the Indigenous Declaration project. Such criticism is based on longstanding but outdated assumptions. Corporate reluctance to entertain First Nations demands may have been part of a package of support for 'traditional' settler colonial political leadership that maintained low taxation, was soft on corporate corruption and utterly unconcerned about environmental protection.

On the level of day-to-day politics and Indigenous/NGO/State deal-making, self-determination proved to be the central problem of the UN Indigenous Declaration

project. In 2007, after decades of often acrimonious debate and relentless political manoeuvring, Indigenous peoples were denied a fully-fledged right of self-determination. At the same time, States' representatives were able to dilute (but not remove) references to self-determination throughout the Declaration. Australian Aboriginal lawyer and academic Michael (Mick) Dodson was one of the first to appreciate the nature, scale and intractability of the self-determination problem:

Self Determination has always been important to Indigenous Peoples and to people in every other political category throughout the world. In Geneva representatives of Indigenous Peoples within wealthy advanced nations like Australia, Canada and New Zealand, realized that they were being offered much less than other Peoples have been offered. Unfortunately, in discussions at the UN, hard-line States including Australia were determined that Indigenous Peoples would be forced to accept a different and lesser version of Self Determination. That negative attitude carried over into many other areas and cast a shadow over the entire project . . . (Mick Dodson, Melbourne, February 2016).

REFLECTION

Since the adoption of the UN Indigenous Declaration, the responses of a diverse collection of commentators – including some Indigenous commentators – have been positive and optimistic, even generous. Mark Franke represented the views of many observers with unusual eloquence:

Perhaps the greatest hope for positive change in the international status of Indigenous peoples derives from Indigenous successes in recent decades. Indigenous Peoples have expanded their diplomacies on transnational levels and have successfully conducted intensive and protracted negotiations in support of the adoption of the UN Declaration on the Rights of Indigenous Peoples. The cornerstone of the Declaration is the right of Indigenous Peoples to Self Determination. There is now a considerable body of opinion suggesting that Self Determination carries with it into international law the possibility of Indigenous personality – distinct from those of other Peoples . . . (Franke 'The Political Stakes

of Indigenous Diplomacies: Questions of Difference' in Beier 2009 *Indigenous Diplomacies*, p. 54).

Canadian scholar Mark Franke's response sits toward the positive end of academic reactions. Still, Franke's emphasis on Indigenous 'success' is appropriate. Across the Indigenous world, political and diplomatic campaigns to advance Indigenous rights are perceived in positive terms – even when the results are in some respects disappointing. This is because the tangible outcomes are necessarily small in relation to the vast scale of the larger project with its multiple and diverse dimensions across First Nations regions and communities. The UN Indigenous Declaration initiative operated on social, political, diplomatic, psychological and spiritual levels as well as on those routinely described as legal and diplomatic. In her study of the development and impact of the Declaration, Sheryl Lightfoot identified and addressed some of the broader ramifications of the Indigenous Declaration:

Global Indigenous politics is much more than the mere correction of unjust historical exclusion. By creating a space for Indigenous Peoples, global Indigenous politics poses much larger challenges to the structure and practice of global politics than international relations theorists typically recognize. Indigenous Peoples' struggles are often hardly noticed in a world distracted by other issues. Indeed, in September 2007 news of the adoption of the Indigenous Declaration almost disappeared in the maelstrom of global media reporting (Lightfoot, 2016, p. 200).

In claiming that global Indigenous politics concerns more than the reinstatement of First Nations as actors on the world stage, Lightfoot is on firm ground. Yet, like most commentators, she has focussed on the evolution of First Nations relationships with global institutions, rather than on Declaration-related changes within Indigenous communities and in the lives of Indigenous families and individuals. The impact of international Indigenous diplomacy has not been limited to the reshaping of global politics and the rejuvenation of the conceptual frameworks of theorists. Instead, the most dramatic and positive influence of the Indigenous Declaration project relates to changes in the orientations and self-concepts of Indigenous peoples themselves. As prominent and accessible community representatives, First Nations activists and

scholars have been heavily impacted by the evolution of the Declaration project and other recent global political developments. Linda Tuhiwai Smith described major changes in the nature and circumstances of First Nations activism and research:

In the last two decades, the issues for Indigenous activists and researchers have changed dramatically. . . These changes require further conversations about how research aligns with activism, about how activism can incorporate research in activist arguments and about how these two activities connect with the visions, aspirations and needs of Indigenous communities. Indigenous activists working in the international domain have identified the extent to which States have discarded traditional knowledge, treaties and other agreements and understandings. In this environment, activists have had to demonstrate the logic that links global discussions and rhetoric with changes in the lives of local Indigenous communities. First Nations activists in the international arena have had to develop arguments that will be heard in a political environment where Indigenous people don't matter. . . or are viewed as downright dangerous (Tuhiwai Smith, 2012, pp. 218, 221).

There is a lack of congruence between the highly-developed and community-based views of Tuhiwai Smith (as outlined above) and the orientation and approach of Native American political scientist, Sheryl Lightfoot. Though adopting a political standpoint supportive of Indigenous resurgence, Lightfoot is a practitioner of the academic discipline of International Relations (IR). Though less frequently critiqued by Indigenous scholars than the disciplines of Anthropology and Psychology, IR is an academic expression of the legitimacy and centrality of the modern State and rose to prominence as an intellectual pillar and instrument of imperialism. Lightfoot explained:

International Relations incorporates a set of fundamental and enshrined assumptions that are highly problematic for Indigenous Peoples. Such assumptions can overlook, silence or completely erase Indigenous Peoples, their political communities and their alternative ways of being in the world (2016, p. 5).

Marshall Beier has argued that IR has been particularly influential and destructive in North America. Beier insists that IR is a fundamentally colonial discipline which has internalized the discourses of colonialism and has even demanded the absence and eventual erasure of Indigenous peoples (Beier 2005 in Lightfoot, 2016, p. 5).

Despite acknowledging the negative impacts and imperialist underpinnings of International Relations, Lightfoot remains confident that IR practitioners can address the exclusions and omissions that characterize IR by integrating contemporary Indigenous political theory into pre-existing theoretical models (Lightfoot, 2016, p. 5). This is an ambitious plan and Indigenous political theory may be inadequate to the task. Rejecting this approach, Canadian First Nations (Dene) political theorist Glen Coulthard appears closer to the mindsets of community-focussed First Nations activists, arguing:

State initiated politics of recognition is so limiting and problematic that Indigenous Peoples should reject and abandon the State in favour of traditional, land-based social, political and economic orders (Coulthard in Lightfoot, 2016, p. 6).

Like Coulthard, Anishinaabe scholar Duane Champagne is unconvinced of the value or relevance of International Relations. Coulthard also questions the application of political theory, insisting that First Nations orientations – including commitment to traditional lands, institutions social structures and belief systems – are highly unusual in global terms and place Indigenous outside theories of the formation and growth of States (Champagne et al. 2005 in Lightfoot, 2016, p. 7).

The pattern that emerges from the work of First Nations researchers is one of disconnect. Western academic disciplines are disconnected from First Nations cultural realities. Western science has failed to engage effectively with Indigenous peoples because underlying orientations and value systems are incompatible. Some Indigenous scholars have been willing to accept, adopt and apply western paradigms without modification, whilst others have identified the problem of incompatibility and sought to adapt western frameworks to align with traditional First Nations approaches and orientations.

THE INDIGENOUS DECLARATION AS A UNIFYING FOCUS

This thesis has argued that the construction and adoption of the Indigenous Declaration represents an important and unprecedented series of developments in global politics. Yet, in many respects, the connections between UNDRIP and the larger political domain remain unclear. Research has played a major role in creating public perceptions concerning First Nations resurgence and the Indigenous Declaration. At the same time, there is little evidence that social science research has raised awareness or created a deeper or more balanced understanding of Indigenous subjects in general or the evolution of the Declaration in particular. In accordance with disciplinary practice, researchers have approached each subject separately and have failed to locate either within the broader political context. This context includes an important but problematic Indigenous dimension. Research which is limited to examination of documents and analysis of their contents excludes a wide range of Indigenous conceptual possibilities. Such research asks questions dictated by the application of western scientific method. Accordingly, studies of the construction and adoption of the Indigenous Declaration have asked few questions about the orientations and aspirations of Indigenous Peoples – of which UNDRIP was originally a direct expression.

The deeper significance of the Indigenous Declaration lies in its role as a *common cause* and unifying focus within the larger domain of global Indigenous resurgence. Most commentators and researchers have focussed on the extent or absence of Indigenous political ‘success’ as measured by the creation and acceptance of western-inspired documents of various kinds. This is a needlessly narrow and superficial approach, which prevents assessment and evaluation of Indigenous actions and reactions in terms that are derived from and consistent with First Nations concepts and paradigms of change. In general, insufficient attention has been given to the views of Indigenous participants who remain indispensable and unsurpassed sources in relation to the entire Declaration project.

A LONG AND UNBROKEN CONTINUUM

This thesis contends that First Peoples participants and activists see the story of the Indigenous Declaration differently. Most see the Declaration saga as part of a long

and unbroken continuum, rather than an isolated, finite and self-contained episode. Many also appreciate the value and relevance of intensive face-to-face interaction or *Yarning* as a viable research method. First Peoples activists from Australia, Aotearoa/New Zealand and North America have come to embrace *Yarning* engagement as an authentic and effective research orientation and technique. *Yarning*-based enquiry enables a First Nations researcher to uncover and explore many of the key elements of the Indigenous/UN relationship, including political alignment, projection of culture and relationship-building, absent from the pages of documents and the laptops of commentators. *Yarning* sessions have consistently revealed that First Nations members look to a future in which UNDRIP is an abiding presence, but *not* the last word.

Perhaps creation of an enforceable United Nations Indigenous *Convention* – which builds on the foundations laid down by the authors of the Declaration – would ensure that the spirit of UNDRIP continues to motivate and inspire First Nations activists and representatives. Geoff Clark, Aboriginal activist, leader and commentator spoke for many Indigenous Australian United Nations participants when he recently declared:

Looking back to those times and the situations that confronted us in Geneva and thinking about our relationship with the United Nations more generally, we Indigenous representatives performed well, probably a lot better than most of us expected – certainly better than I expected. We brought something new and different to the UN and that was important and necessary. Our UN experience also affected us as individuals and especially as a group. We had come to see how the big world was run and we saw that. We had come to take a stand for our Mob and for other Indigenous Peoples around the world and we did that too. We wanted to strike a better deal for Indigenous Peoples and we did – but in the end we settled for less than we should have.

Indigenous representatives and our supporters back home were running out of patience. People were losing the will to fight. We needed something tangible to show the Mob. Some people also needed to convince themselves that the Indigenous Declaration had been worth all the sacrifices they had made in terms of their families and personal lives.

In terms of the future, I would like to see something that takes things further, something that goes beyond the limits of the Declaration. We need to consider working towards the next step - an Indigenous Convention. Something that is binding and enforceable. Yes, I like the sound of that . . . (Geoff Clark, Framlingham, Victoria, February 2016 and Carlton, Victoria, June 2017).

Dr Dalee Sambo Dorough, an Alaskan Inuit whose relationship with the UN began in the 1970s, has been a prominent Indigenous leader for more than thirty years. Dalee has described her response to learning of the adoption of the UN Declaration on the Rights of Indigenous Peoples on the morning of 13th September 2007:

“I can vividly remember how I felt on that day. It was such a relief when the Declaration was finally adopted – but it was not a total victory by any means. The CANZUS group went out of their way to make things harder – much harder for us than they might have been. The whole CANZUS campaign of resistance was a huge additional burden – especially for the Canadian First Nations and of course the Indigenous Australians . . . Yes, make sure you include the Indigenous Australians” (Dalee Sambo Dorough interview [Yarning engagement] near Anchorage, Alaska, 25th April 2016).

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