



International developments on the rights of indigenous peoples – Closing the ‘protection gap’

In recent years there have been significant developments at the international level that impact upon the recognition and protection of the human rights of indigenous peoples. Most notably, there have been: i) reforms to the machinery of the United Nations (UN) and the emphasis given to human rights within that system; ii) the making of global commitments to action, through the Millennium Development Goals (MDGs) and the Second International Decade of the World's Indigenous People; and iii) the further elaboration of human rights standards as they apply to indigenous peoples. These developments address the dual needs of ensuring that UN processes are more accessible and better address the needs of indigenous peoples; and recognising that there are additional indigenous-specific protections that are required if the human rights of indigenous peoples are to be fully realised.

Developments in both of these areas in recent years have begun to provide a solid platform for the protection of the human rights of indigenous peoples into the future, through international processes as well as within countries. This is despite there remaining significant challenges – such as the need to finalise the *Declaration on the Rights of Indigenous Peoples*.

Much of the focus at the international level has now begun to address the need for implementation. There exists concern at the existence of a ‘protection gap’ between the rhetoric and commitments of governments relating to the human rights of Indigenous peoples and the activities of governments on the ground. This ‘protection gap’ exists due to limited consideration of the government’s human rights obligations in the settling of policy and delivery of programs as they affect indigenous Australians.

Increasingly, developments at the international level have emphasised the need to close this ‘protection gap’ by activating the commitments of governments to human rights. There is a clear need to create a direct relationship between the commitments and obligations taken on by our government at the international level and the policies and programs on Indigenous issues within Australia.



This chapter sets out those key developments that have occurred at the international level, particularly in the past three to five years.¹ It also considers the status of those critical issues that remain under consideration within the UN system and that will have significant implications for the recognition of indigenous rights into the future.

Recent developments emphasise the importance of adopting a partnership approach that secures the effective participation of indigenous peoples. Accordingly, this chapter also considers what actions ought to be taken within Australia, by governments and by our Indigenous communities and organisations, to facilitate improved partnerships with Indigenous peoples and ultimately to address the 'protection gap' between international standards and commitments, and domestic processes.

International developments on the rights of indigenous peoples

The human rights of indigenous peoples² are firmly on the agenda of the United Nations. We are currently seeing the results of the advocacy of countless indigenous peoples at the United Nations (UN) level for more than 20 years come to fruition.

This is not to say that the acknowledgement sought by indigenous peoples has been met or that it will be fully met. Such acknowledgement hangs in the balance as the General Assembly of the UN continues to deliberate on the *Declaration on the Rights of Indigenous Peoples* until late 2007. It also depends on the implementation of the reform process to the UN generally, such as through the consolidation of mechanisms for participation by indigenous peoples into the new UN Human Rights Council.

But despite this, there have been substantial gains in the recognition of indigenous rights and the importance attached to them throughout the UN system. There is also significant potential for improved protection of indigenous rights through the reforms to the UN framework and mechanisms that are currently underway.

Recent developments can be categorised as follows:

- reforms to the machinery of the United Nations (UN) and the emphasis given to human rights within that system;
- the making of global commitments to action, through the Millennium Development Goals (MDGs) and the Second International Decade of the World's Indigenous People; and

1 From time to time the Aboriginal and Torres Strait Islander Social Justice Commissioner has included a review of international developments within the annual *Social Justice Report*. This chapter updates developments since the previous review, which was included as Chapter 6 of the *Social Justice Report 2002*. The Social Justice Commissioner also maintains an international developments website, available online at: www.humanrights.gov.au/social_justice/internat_develop.html.

2 The term 'indigenous peoples' is used in this report when referring generically to indigenous peoples at the international level. The term 'Indigenous peoples' (capitalised) is used when specifically referring to a particular grouping, such as the Indigenous peoples of Australia. See further the note on terminology contained at the front of this report for details on the use of the term 'indigenous' as opposed to Aboriginal or Torres Strait Islander.



- the further elaboration of human rights standards as they apply to indigenous peoples, particularly as it relates to securing the effective participation of indigenous peoples in decision-making processes as well as recognising the need to protect indigenous peoples' collective rights.

There remain challenges relating to these developments. Most notably:

- ensuring indigenous perspectives in the human rights system of the United Nations into the future;
- integrating indigenous perspectives into the MDG process;
- implementing the objectives and Program of Action for the Second Decade for the Worlds Indigenous People; and
- achieving final acceptance of the Declaration on the Rights of Indigenous Peoples by governments in a manner that maintains the integrity of the Declaration, and then ensuring that the Declaration is implemented both internationally and domestically.

This part of the chapter reviews recent developments and reflects on the current challenges being faced at the international level in the ongoing task of securing recognition of the rights of indigenous peoples. It is intended to provide a tool for indigenous peoples to have a greater awareness of international issues and international processes, which can then be utilised within their communities.

1) United Nations Reform and human rights

Over the past two years the UN system has continued to implement a substantial program of reform.³ This has largely resulted from the outcomes of the UN World Summit held in New York in September 2005. The reform process sets the broader framework within which to consider the level of protection that is provided for the human rights of indigenous peoples worldwide.

• The 'In larger freedom' report and World Summit

In early 2005, the then Secretary General of the UN, Kofi Annan, released a report outlining his vision for the United Nations into the future. Titled *In larger freedom: towards development, security and human rights for all*,⁴ the report took stock of progress towards achieving the outcomes of the UN Millennium Summit of 2000, including the Millennium Development Goals.⁵ The report and its proposals for reform formed the basis of deliberations at the World Summit of leaders at UN headquarters in New York in September 2005.

The Secretary-General focused on the structural change required at the UN level to revitalise international cooperation and to ensure that the machinery of the UN

3 The process of reforming the United Nations has been underway for some time, with recent reforms having their genesis in the mid-1990s. For background and further detail see: www.un.org/reform/.

4 *In larger freedom: towards development, security and human rights for all*, Report of the Secretary-General, UN Doc: A/59/2005, 21 March 2005, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.

5 The Millennium Development Goals are discussed in detail in the next section of this chapter.



was capable of supporting the achievement of the MDGs. The Secretary-General set out the challenge faced by the UN in the introduction to the report:

Five years into the new millennium, we have it in our power to pass on to our children a brighter inheritance than that bequeathed to any previous generation... If we act boldly — and if we act together — we can make people everywhere more secure, more prosperous and better able to enjoy their fundamental human rights.

All the conditions are in place for us to do so... In an era of global abundance, our world has the resources to reduce dramatically the massive divides that persist between rich and poor, if only those resources can be unleashed in the service of all peoples. After a period of difficulty in international affairs, in the face of both new threats and old ones in new guises, there is a yearning in many quarters for a new consensus on which to base collective action. And a desire exists to make the most far-reaching reforms in the history of the United Nations so as to equip and resource it to help advance this twenty-first century agenda.⁶

There were two key aspects to the Secretary-General's proposals that have influenced the reforms that were subsequently agreed at the World Summit. First, he sought to achieve better integration of the objectives of the UN by recognising the equal importance of efforts to protect human rights, alongside focussing on development and security. This focus required an 'upgrading' of the importance of human rights in the overall operations of the UN system. Second, he also sought to address the problem of lack of implementation by governments of their substantial commitments and legal obligations, particularly in relation to human rights as well as the achievement of the MDGs.

The Secretary-General's proposals were focused across three key objectives for UN activity:

- freedom from want (through making the right to development a reality for everyone, including through achievement of the MDGs);
- freedom from fear (addressing security through improved international consensus and implementation); and
- freedom to live in dignity (by making real the commitments of governments to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms).

The Secretary-General's report sets forth how the foundation of any reform has to acknowledge the inter-relationship between these issues. It states that 'Not only are development, security and human rights all imperative; they also reinforce each other'.⁷ Accordingly:

we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all these causes are advanced, none will succeed. In this new millennium, the work

6 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc: A/59/2005, 21 March 2005, paras 1-2, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.*

7 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, UN Doc: A/59/2005, 21 March 2005, para 16, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.*



of the United Nations must move our world closer to the day when all people have the freedom to choose the kind of lives they would like to live, the access to the resources that would make those choices meaningful and the security to ensure that they can be enjoyed in peace.⁸

The report therefore recommended changes to the UN human rights mechanisms. In particular it called for the establishment of a Human Rights Council, which would replace the existing Commission on Human Rights. The creation of a Council would see human rights elevated to a higher level within the UN structure.⁹ As the Secretary-General explained:

The establishment of a Human Rights Council would reflect in concrete terms the increasing importance being placed on human rights in our collective rhetoric. The upgrading of the Commission on Human Rights into a full-fledged Council would raise human rights to the priority accorded to it in the Charter of the United Nations. Such a structure would offer architectural and conceptual clarity, since the United Nations already has Councils that deal with two other main purposes — security and development.¹⁰

This reform would also be accompanied by other measures – such as a continued focus on harmonising the working methods of the human rights treaty committee system, and by increasing, in a sustainable way, the capacity of the Office of the High Commissioner for Human Rights.

The Secretary-General made clear that such reform needed to be accompanied by a redoubling of efforts by governments to meet their human rights obligations:

When it comes to laws on the books, no generation has inherited the riches that we have. We are blessed with what amounts to an international bill of human rights, among which are impressive norms to protect the weakest among us, including victims of conflict and persecution... But without implementation, our declarations ring hollow. Without action, our promises are meaningless.¹¹

The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. **We must move from an era of legislation to an era of implementation.** Our declared principles and our common interests demand no less.¹²

8 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, para 17, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.

9 The Commission on Human Rights was a functional Commission that reported to the Economic and Social Council (which in turn reports to the General Assembly of the UN). By replacing this with a Human Rights Council, human rights would be elevated within the UN structure as the Council would report directly to the General Assembly and exist at an equal level to that of the Economic and Social Council.

10 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General*, UN Doc: A/59/2005/Add.1, 23 May 2005, para 1. The creation of the Council would also seek to address growing criticisms of the ineffectiveness of the Commission on Human Rights, such as the politicization of human rights issues and lack of genuine scrutiny of rights abuses by States (governments).

11 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, paras 129-130, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.

12 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, para 113, available online at: www.un.org/largerfreedom/ accessed 21 February 2007. Emphasis added.



The Secretary-General referred to this as the **'implementation challenge'**. He further elaborated this challenge in relation to the Millennium Development Goals as follows:

The urgent task in 2005 is to implement in full the commitments already made and to render genuinely operational the framework already in place... The September summit must produce a pact for action, to which all nations subscribe and on which all can be judged. The Millennium Development Goals must no longer be floating targets, referred to now and then to measure progress. They must inform, on a daily basis, national strategies and international assistance alike. Without a bold breakthrough in 2005 that lays the groundwork for a rapid progress in coming years, we will miss the targets. Let us be clear about the costs of missing this opportunity: millions of lives that could have been saved will be lost; many freedoms that could have been secured will be denied; and we shall inhabit a more dangerous and unstable world.¹³

Many of the proposals of the Secretary-General contained in the *In larger freedom* report were adopted at the World Summit in September 2005, particularly those related to human rights.¹⁴

The World Summit resolved:

- to strengthen the United Nations human rights machinery with the aim of ensuring effective enjoyment by all of all human rights and civil, political, economic, social and cultural rights, including the right to development; and
- to integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system.¹⁵

The Summit also supported 'stronger (UN) system-wide coherence' including by 'strengthening linkages between the normative work of the United Nations system and its operational activities' and 'ensuring that the main horizontal policy themes, such as sustainable development, human rights and gender, are taken into account in decision-making throughout the United Nations.'¹⁶

13 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, para 72, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.

14 *2005 World Summit Outcome: Resolution adopted by the General Assembly*, UN Doc: A/Res/60/1, 24 October 2005. This is not to say that the Summit process and outcomes were not without controversy. Not all proposals for reform put forth by the Secretary-General were successful and the process and subsequent implementation of the decisions on reforms to the human rights system that took place after the Summit were extremely fraught, time consuming and full of controversy.

15 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, paras 123 and 126, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.

16 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, para 169, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.



To achieve this, the World Summit agreed to replace the Commission on Human Rights with a new Human Rights Council.¹⁷ The General Assembly subsequently adopted a resolution establishing the Council and establishing its functions in March 2006.¹⁸

• The creation of the Human Rights Council

The creation of the Human Rights Council, and the settling of its working methods, has been the main focus of activity in the UN human rights system since the World Summit.

The Human Rights Council was created as a subsidiary of the General Assembly of the UN (i.e., it is at a higher level than the Commission on Human Rights was). It retains many of the features of the Commission on Human Rights, including a focus on:

- promoting universal respect for human rights;
- addressing situations of violations of human rights, including gross and systematic violations; and
- promoting the effective coordination and mainstreaming of human rights within the United Nations system.

The resolution establishing the Council emphasises that it shall promote the indivisibility of all human rights: civil, political, economic, social and cultural rights, including the right to development.¹⁹

The functions of the Human Rights Council are set out in Text Box 1 below.

Text Box 1: Functions of the United Nations Human Rights Council²⁰

- (a) Promote human rights education and learning as well as advisory services, technical assistance and capacity-building, to be provided in consultation with and with the consent of Member States concerned;
- (b) Serve as a forum for dialogue on thematic issues on all human rights;
- (c) Make recommendations to the General Assembly for the further development of international law in the field of human rights;

17 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, paras 157-160, available online at: www.un.org/largerfreedom/ accessed 21 February 2007. The Summit also agreed to strengthen the Office of the High Commissioner for Human Rights through doubling its regular budget over the next five years (para 124) and to continue to improve the human rights treaty committee system (para 125).

18 *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006.

19 *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006. 'Indivisibility' means there is no hierarchy of human rights – all rights are of equal importance and should be protected equally.

20 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, UN Doc: A/59/2005, 21 March 2005, para 5, available online at: www.un.org/largerfreedom/ accessed 21 February 2007.



(d) Promote the full implementation of human rights obligations undertaken by States and follow-up to the goals and commitments related to the promotion and protection of human rights emanating from United Nations conferences and summits;

(e) Undertake a universal periodic review, based on objective and reliable information, of the fulfilment by each State of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all States; the review shall be a cooperative mechanism, based on an interactive dialogue, with the full involvement of the country concerned and with consideration given to its capacity-building needs; such a mechanism shall complement and not duplicate the work of treaty bodies; the Council shall develop the modalities and necessary time allocation for the universal periodic review mechanism within one year after the holding of its first session;

(f) Contribute, through dialogue and cooperation, towards the prevention of human rights violations and respond promptly to human rights emergencies;

(g) Assume the role and responsibilities of the Commission on Human Rights relating to the work of the Office of the United Nations High Commissioner for Human Rights, as decided by the General Assembly in its resolution 48/141 of 20 December 1993;

(h) Work in close cooperation in the field of human rights with Governments, regional organizations, national human rights institutions and civil society;

(i) Make recommendations with regard to the promotion and protection of human rights; and

(j) Submit an annual report to the General Assembly.

There are a number of significant differences between the Human Rights Council and its predecessor, the Commission on Human Rights. These include its increased status within the UN (due to being created at a higher level than the Commission had operated at) and the direct relationship that the Council enjoys with the General Assembly.

The other most significant difference between the Human Rights Council and the Commission on Human Rights is the addition of a new function as set out at paragraph (e) above – namely, the universal periodic review process.

The Secretary-General explained the purpose of this new function is to make explicit the role of the Human Rights Council as a 'chamber of peer review'.²¹ While there have for some time existed processes within the UN human rights system for dialogues between States on their human rights records, these processes have been criticised for being overtly political or ineffective (in the case of various procedures of the Commission on Human Rights) or have not been utilised (in the case of State-to-State complaint procedures under various human rights treaties).²²

21 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, para 6.*

22 As an example of a State to State complaint procedure see Article 41, International Covenant of Civil and Political Rights.



The new universal periodic review function is intended to foster the capacity of the Human Rights Council to provide a forum for the regular scrutiny of the human rights records of all Member States of the UN. As the Secretary-General has stated:

(The universal periodic review mechanism's) main task would be to evaluate the fulfilment by all States of all their human rights obligations. This would give concrete expression **to the principle that human rights are universal and indivisible**. Equal attention will have to be given to civil, political, economic, social and cultural rights, as well as the right to development... Under such a system, every Member State could come up for review on a periodic basis.²³

This mechanism is intended to 'complement but... not replace'²⁴ reporting procedures under human rights treaties. Those reporting procedures arise from 'legal commitments and involve close scrutiny of law, regulations and practice with regard to specific provisions of those treaties by independent expert panels.'²⁵ By contrast:

Peer review would be a process whereby States voluntarily enter into discussion regarding human rights issues in their respective countries, and would be based on the obligations and responsibilities to promote and protect those rights arising under the Charter and as given expression in the Universal Declaration of Human Rights. Implementation of findings should be developed as a cooperative venture, with assistance given to States in developing their capacities.

Crucial to peer review is the notion of universal scrutiny, that is, that the performance of **all** Member States in regard to **all** human rights commitments should be subject to assessment by other States. The peer review would help avoid, to the extent possible, the politicization and selectivity that are hallmarks of the Commission's (on Human Rights) existing system... The findings of the peer reviews of the Human Rights Council would help the international community better provide technical assistance and policy advice.²⁶

Under the periodic review process, every State would regularly be reviewed every four years. This would reinforce that domestic human rights concerns are truly matters of legitimate international interest.

The Secretary-General argued that this review process 'would help keep elected members accountable for their human rights commitments.'²⁷ Under the resolution establishing the Human Rights Council, members elected to the Council are required to 'uphold the highest standards in the promotion and protection of human rights',

23 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, para 6.*

24 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, para 7.*

25 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, para 7.*

26 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, paras 7-8. Emphasis added.*

27 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General, Addendum – Human Rights Council, Explanatory note by the Secretary-General, UN Doc: A/59/2005/Add.1, 23 May 2005, para 8.*



to 'fully cooperate with the Council and be reviewed under the universal periodic review mechanism during their term of membership'.²⁸

Similarly, when casting votes in elections for the Council, members of the UN are required to 'take into account the contribution of candidates to the promotion and protection of human rights and their voluntary pledges and commitments made thereto'. They may also by a two-thirds majority of the General Assembly 'suspend the rights of membership in the Council of a member of the Council that commits gross and systematic violations of human rights'.²⁹

The processes for the conduct of the universal periodic review mechanism are to be developed within the first year of the Council's operation (i.e., by June 2007). The detail of how the Council will perform this function remains to be settled.³⁰

Non-government organisations and Indigenous Peoples Organisations have identified the universal periodic review process as a significant process for improving the scrutiny of human rights issues within the Human Rights Council. In particular, it has the potential to provide a powerful tool for highlighting ongoing concerns about Indigenous rights.³¹

It remains to be seen how open the process for participation in the universal periodic review will be made (such as by enabling interventions by non-government organisations (NGOs) in any dialogue process, or the making of submissions for consideration as part of the review). Current discussions in Geneva on this process are considering the involvement of independent experts in preparing analytical and evaluative documents as the basis for the review, identifying key issues for dialogue, drafting the final report with conclusions and recommendations and follow up actions.

Regardless of the formal procedures adopted, however, the review process will provide an opportunity to focus international attention on the human rights records of all States. At its most limited, this could occur through the preparation of parallel reports on key issues of human rights compliance by non-government organisations. At best, it could be facilitated through direct participation of NGOs and of independent UN experts in the review processes within the Council.

As such, this mechanism should provide an opportunity to create a connection between domestic policy debate and international dialogue about the human rights record of a country. This potential is discussed further in Part 2 of this chapter.

28 *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006, para 9. The members 'shall be elected directly and individually by secret ballot by the majority of the members of the General Assembly; the membership shall be based on equitable geographical distribution, and seats shall be distributed as follows among regional groups: Group of African States, thirteen; Group of Asian States, thirteen; Group of Eastern European States, six; Group of Latin American and Caribbean States, eight; and Group of Western European and other States, seven; the members of the Council shall serve for a period of three years and shall not be eligible for immediate re-election after two consecutive terms': *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006, para 7.

29 *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006, para 8.

30 For up to date details on the operation of the Human Rights Council visit: www.ohchr.org/english/bodies/hrcouncil/.

31 This will particularly be the case once the Declaration on the Rights of Indigenous Peoples has been approved by the General Assembly of the UN, as the Declaration would appropriately be considered as identifying 'obligations and responsibilities to promote and protect' human rights arising under the Charter of the UN.



The timetable for which countries will be subject to the review process in what year has not been settled as yet. However, it has been agreed that every year both countries that are currently members of the Human Rights Council as well as non-members of the Council will be included in the annual list for review.

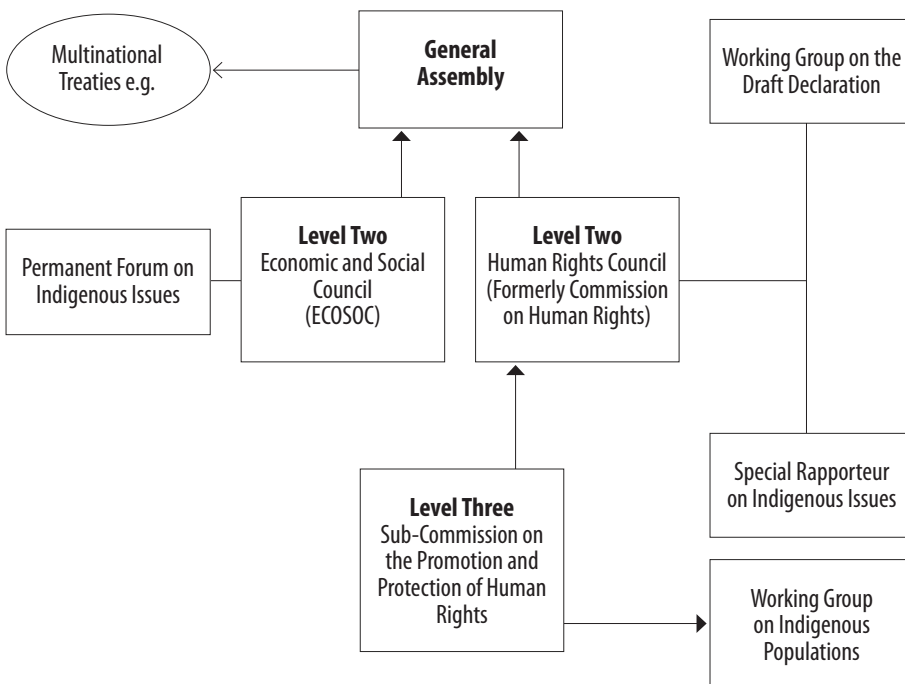
The fact that Australia is not currently a member of the Council, and is unlikely to become one until at least 2015, will not prevent the possibility of Australia being reviewed under this process in the next year or two.³²

- **Indigenous participation in the processes of the Human Rights Council**

In establishing the Human Rights Council, it was decided that all the existing processes of the Commission on Human Rights would be retained for a minimum period of twelve months.

As a result, the UN structure as it currently exists and as it relates specifically to indigenous peoples is shown in Diagram 1 below.

Diagram 1: Overview of Indigenous mechanisms within the UN system, with a focus on human rights procedures



32 Australia falls within the Western Europe and Other States regional grouping for the purposes of membership. Traditionally, Australia, the United States of America, New Zealand and Canada form part of the 'Other States' group and rotate membership. Canada is confirmed as a member of the Council until 2009, and the CANZ group has decided that New Zealand will be the candidate for the following two terms (ie, 6 years from 2009).



From an Indigenous perspective, this means that the Human Rights Council has retained, but is currently considering the future status of, the following relevant mechanisms:

- *The system of Special Rapporteurs who report to the Human Rights Council:* These Special Rapporteurs are appointed as experts and provided with a mandate which they exercise independently of the Council. It includes Rapporteurs on specific issues such as health, housing, education and so forth. These Rapporteurs are obliged to consider the distinct problems of discrimination against Indigenous peoples within their mandated areas. It also includes the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples, who prepares a report to the Council each year (usually on a chosen topic or theme), can receive complaints (or communications) from indigenous peoples, and who can also conduct country visits.³³
- *The Sub-Commission on the Protection and Promotion of Human Rights:* The Sub-Commission is comprised of a number of independent experts who provide advice to the Council (and formerly the Commission on Human Rights) on key issues. The Sub-Commission's members have initiated and prepared numerous reports on indigenous human rights issues over the years, such as on indigenous peoples' relationship to land; treaties between States and indigenous peoples; and indigenous peoples' permanent sovereignty over natural resources.³⁴
- *The Working Group on Indigenous Populations (WGIP):* The WGIP consists of five members of the Sub-Commission, who report back to the Sub-Commission and through it to the Human Rights Council. Through open meetings (usually lasting for one week annually in Geneva that occurs mid-year) the Working Group has facilitated the participation of indigenous peoples in reviewing the extent to which indigenous peoples enjoy human rights globally, as well as identifying areas for the further development of human rights standards relating to indigenous peoples. Most notably, it has produced the initial version of the Declaration on the Rights of Indigenous Peoples, as well as guidelines and draft principles relating to numerous issues, such as indigenous heritage protection, and the principle of free, prior and informed consent.³⁵

The Working Group on the Declaration on the Rights of Indigenous Peoples also continued to exist when the Human Rights Council was created. However, with the adoption by the Human Rights Council of the Declaration on the Rights of Indigenous Peoples in June 2006, the mandate of the Working Group was fulfilled and the Working Group ceased to exist.

33 For information on the role and activities of the Special Rapporteur see further: www.ohchr.org/english/issues/indigenous/rapporteur/.

34 For information on the role and activities of the Sub-Commission see further: www.ohchr.org/english/bodies/subcom/index.htm.

35 For information on the role and activities of the Working Group see: www.ohchr.org/english/issues/indigenous/groups/groups-01.htm. For an overview of the achievements of the WGIP over its 24 sessions, see: *Information on achievements of the Working Group*, UN Doc: E/CN.4/Sub.2/AC.4/2006/CRP.1, 30 June 2006, and *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006, Annex 3.



These procedures and mechanisms within the UN human rights system are also supplemented by the work of the UN Permanent Forum on Indigenous Issues.

As shown in Diagram 1, the Permanent Forum is a specialist body of the Economic and Social Council (ECOSOC). Accordingly, it is not subject to the review of human rights mechanisms. It does, however, have a broad mandate which includes consideration of human rights issues (alongside issues relating to economic and social development, culture, the environment, education and health).

The functions of the Permanent Forum differ from those of the human rights mechanisms that relate to indigenous issues noted above. This is because it is focused on providing expert advice and recommendations on indigenous issues to the ECOSOC, as well as to the various programmes, funds and agencies of the United Nations; and on raising awareness and promoting the integration and coordination of activities relating to indigenous issues within the United Nations system. It does not, therefore, primarily focus on reviewing situations of abuses of human rights or on standard setting. The work of the Permanent Forum on Indigenous Issues is discussed further in the next section of this chapter.

In accordance with the resolution establishing the Human Rights Council, a review has commenced to recommend whether and how any of the existing human rights mechanisms should be improved or rationalized.³⁶ Any modification proposed to the existing practices must, however, 'maintain a system of special procedures, expert advice and a complaint procedure'.³⁷

As a consequence of this review of all the human rights mechanisms and procedures, the Human Rights Council will be determining by mid-2007 the existence of processes which enable specialist input on indigenous human rights issues. They will also be determining the ongoing processes that enable the participation of indigenous peoples in the revised human rights structure.

The indigenous specific procedures of the Human Rights Council (or the Commission on Human Rights as it then was) were most recently reviewed in 2003 and 2004. The specific focus of that review was to identify any duplication in mandates and procedures and the potential for rationalising processes.³⁸

The review noted the existence (at the time) of four mechanisms within the United Nations system that deal specifically with indigenous issues (namely, the WGIP, Special Rapporteur, Permanent Forum on Indigenous Issues and Working Group on the Draft Declaration). The 2003 report noted the distinct and complementary mandates of these four mechanisms.³⁹ The 2004 report then found that:

36 An intergovernmental working group was established in June 2006 to conduct this review. See further Resolutions A/HRC/1/L.6 and A/HRC/1/L.14.

37 *Human Rights Council: Resolution adopted by the General Assembly*, UN Doc: A/RES/60/251, 3 April 2006, para 6. These processes are variously referred to as 'mandates, mechanisms, functions and responsibilities'.

38 This was in accordance with paragraph 8 of ECOSOC Resolution 2000/22. This required a review of existing mechanisms across the UN within 2 years of the creation of the Permanent Forum on Indigenous Issues. See: Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004 and Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2003/72, 23 June 2003.

39 See in particular Annex A in Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2003/72, 23 June 2003.



The two Working Groups, the Special Rapporteur and the Permanent Forum each have a unique and specific mandate within the United Nations system. However, it is also evident that in accomplishing its mandate one mechanism could touch upon subject matters that might be the primary concern of another mechanism. This in itself should not be characterized as an overlap of mandates, but rather as an acknowledgement and reinforcement of the interrelated nature of the many issues facing indigenous peoples. Should any rationalization or streamlining of indigenous mechanisms take place, the unique and specific activities undertaken by each mechanism should be taken into account.⁴⁰

The 2004 Report noted the strong support for the role of the Special Rapporteur,⁴¹ as well as for the continuation of the WGIP by most indigenous organisations and some Member States.⁴² As noted in the *Social Justice Report 2002*, Australia was among a handful of Member States who opposed the continued existence of the WGIP, alongside the United States of America.⁴³ The 2004 Report also noted strong support for the role of the Permanent Forum on Indigenous Issues, and for it to be 'the focal point for indigenous issues within the United Nations system'.⁴⁴

The 2004 report also found that:

Although examined under a different mandate, similar themes are being considered by both the (WGIP) and the Permanent Forum. The themes of Working Group meetings of the last four years have been reflected in substance in the reports and recommendations emerging for the Forum during its first three sessions. As human rights is one of the mandated areas of the Permanent Forum, it has become the practice of indigenous delegates attending the Permanent Forum since the first session to set their suggested recommendations in context by providing a review of developments from the various indigenous regions and their homelands. Coordination of the themes of the Working Group, the Special Rapporteur and the Permanent Forum would seem desirable, in order to avoid duplication and to promote effectiveness.⁴⁵

The report concluded that:

The increased attention being given to indigenous issues within organizations of the United Nations system is a welcome development. The United Nations should continue to mainstream indigenous issues and to expand its programmes and activities for the benefit of indigenous peoples in a coordinated manner... it is clear that every effort must be made to ensure coordination among (the various mechanisms), while recognizing the specific tasks that each is mandated to perform.⁴⁶

40 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 41.

41 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 43.

42 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 42.

43 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC Sydney 2002, pp215-216.

44 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 44.

45 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 45.

46 Economic and Social Council, *Information concerning indigenous issues requested by the Economic and Social Council – Report of the Secretary-General*, UN Doc: E/2004/85, 6 July 2004, para 50.



Importantly, the UN World Summit in September 2005 had highlighted the ongoing importance of addressing indigenous peoples' human rights and for maintaining processes for the participation of Indigenous peoples. The Summit reaffirmed:

our commitment to continue making progress in the advancement of the human rights of the world's indigenous peoples at the local, national, regional and international levels, *including through consultation and collaboration with them*, and to present for adoption a final draft United Nations declaration on the rights of indigenous peoples as soon as possible.⁴⁷

The current review by the Human Rights Council of all existing human rights mechanisms and procedures must be seen in the light of the 2004 review of Indigenous mechanisms, and the ongoing commitment to advancing the human rights of Indigenous peoples in the World Summit document.⁴⁸

As part of the process of reviewing the existing mechanisms, the Human Rights Council has requested advice from the Sub-Commission on the Protection and Promotion of Human Rights outlining its vision and recommendations for future expert advice to the Council, as well as indicating the status of ongoing studies and an overall review of activities.

Indigenous organisations have provided input into this process through the submission of information to the Working Group on Indigenous Populations (WGIP) at its 24th session in July 2006. An overview of the concerns of Indigenous organisations relating to the ongoing mechanisms for Indigenous participation and for ongoing scrutiny of indigenous issues by the Human Rights Council is provided in Text Box 2 below.

Text Box 2: Summary of proposals by Indigenous Peoples for future United Nations mechanisms to protect and promote the human rights of Indigenous Peoples⁴⁹

- The Human Rights Council should affirm that the human rights of indigenous peoples will continue to be a distinct and ongoing thematic area of its work.
- It should lay to rest any insecurities among indigenous peoples that the United Nations reform process and ongoing reorganization of the United Nations

47 2005 World Summit Outcome: Resolution adopted by the General Assembly, UN Doc: A/Res/60/1, 24 October 2005, para 127. Italics added. Note: the use of the phrase 'Indigenous peoples' in the Summit Outcome Document represents a significant shift in the recognition provided to Indigenous peoples by the UN. The phrase 'peoples' (as opposed to 'people') denotes acceptance of a collective status for Indigenous nations, and hence the applicability of the principle of self-determination. This had also been recognised in the Programme of Action for the Second International Decade of the World's Indigenous People. The usage of 'peoples' was not an oversight – the implication of using the phrase 'peoples' and whether to include it had been debated in the General Assembly in relation to the Program of Action for the Second International Decade.

48 This commitment is also clear in the General Assembly's resolutions establishing the Second International Decade of the World's Indigenous People and the Programme of Action for the Second Decade. These are discussed further in the next section of this report.

49 Extracted from: *Communication Of the Indigenous Peoples' Caucus to the President of the Human Rights Council on future United Nations mechanisms to protect and promote the human rights of Indigenous Peoples*, Annex 4 in *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006.



human rights structures could lead to the diminution or disappearance of existing positive functions which are central to the advancement of the rights of indigenous peoples.

- The Human Rights Council should establish an appropriate subsidiary body on Indigenous Peoples, in fulfilment of all areas of its mandate. In doing so, the Human Rights Council should draw on the advice and assistance of human rights experts, including the growing number of experts among indigenous peoples.
- Existing United Nations arrangements for indigenous peoples have differentiated functions with complementary mandates which do not duplicate each other. Any future arrangements should enhance and not diminish the existing functions provided by:
 - the Working Group on Indigenous Populations,
 - the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples and
 - the United Nations Permanent Forum on Indigenous Issues.
- The adoption of the United Nations Declaration on the Rights of Indigenous Peoples means that the Human Rights Council could undertake useful work to promote its implementation, e.g. by providing guidelines for the implementation of specific articles or rights within the Declaration.
- The Declaration warrants the continuation and enhancement of appropriate mechanisms within the United Nations human rights system with the necessary focus and expertise on the rights of indigenous peoples.
- The Indigenous Peoples' Caucus has identified a number of areas in which further standard-setting and/or review of developments on indigenous peoples' rights is needed, including:
 - Guidelines for the implementation of free, prior and informed consent of indigenous peoples to policies, programmes and projects affecting their rights, lands and welfare;
 - The human rights of indigenous women and children and youth;
 - Indigenous health, housing, education and other economic, social and cultural rights;
 - Examining international standards applicable to development programmes and projects affecting indigenous peoples, and their adequacy for protecting and promoting their human rights;
 - The human rights impacts on indigenous peoples in relation to the production, export and unregulated use of banned toxics and pesticides;
 - The impacts of militarization on the human rights of indigenous peoples;
 - The ongoing human rights impacts of colonial laws and policies on indigenous peoples and possible remedies;
 - The marginalization of indigenous peoples in the negotiation and implementation of peace accords and agreements between Governments and armed groups, and their impacts on the human rights of indigenous peoples; and
 - Administration of justice for indigenous peoples.



- Access to all future mechanisms should be open to all indigenous peoples' organizations, and fostering their full and effective participation through written and oral interventions. Indigenous peoples' attendance and full participation at these meetings should continue to be supported by the United Nations Voluntary Fund for Indigenous Populations, and that the mandate of the Voluntary Fund be amended to enable this to happen.

The independent experts of the WGIP have also made a series of recommendations to the Sub-Commission (and for consideration by the Human Rights Council) identifying the specific needs for continued expert advice on indigenous issues.⁵⁰

In common with Indigenous organisations, the WGIP recommend that 'Indigenous issues' should be automatically included in the agenda of all the substantive sessions of the Human Rights Council as a separate agenda item. They also recommend that all special procedures of the Human Rights Council and human rights treaty-monitoring bodies should consider indigenous issues in exercising their mandates.⁵¹

The WGIP acknowledge the role of the Permanent Forum (including providing advice to the UN directly from indigenous experts, although the Permanent Forum is not a human rights body); and the Special Rapporteur (particularly in relation to advice on the implementation in practice of human rights norms relating to indigenous groups). They state that these mechanisms do not, however, provide the necessary coverage for all human rights issues for Indigenous peoples into the future.

In particular, they argue the ongoing need for:

- **An expert human rights body focused on indigenous issues:** to consider recent developments on issues which may need to be brought to the attention of the Human Rights Council. Such a body would need to address issues on which there is no study to date, and to address these developments in as dynamic a way as possible, including by means of interactive exchanges. The WGIP have also identified a range of specific areas where the advice of an expert body in the human rights of indigenous peoples could be useful. They include contributing to securing the implementation of the goals of the Second International Decade of the World's Indigenous People, assisting the Office of the United Nations High Commissioner for Human Rights in the field of technical assistance in relation to indigenous peoples and possibly contributing to the Universal Periodic Review process of the Human Rights Council.

50 See further: *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006, Annex 3 and Annex 4.

51 *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006, Annex 3 and Annex 4.



- **Action-oriented in-depth studies of specific issues affecting the rights of indigenous peoples.** Such studies would explore what is needed to achieve full legal recognition and implementation in practice of the rights of indigenous peoples, with conclusions and recommendations which are submitted to a superior body for discussion and action. This is not within the mandate and/or the current practice of the Permanent Forum or the Special Rapporteur. The WGIP has identified many issues which still require in depth studies. The WGIP members argue that the Special Rapporteur and the Permanent Forum do not have the time or the adequate mandates or resources to engage in such studies.
- **Ongoing standard-setting processes.** The adoption of the United Nations Declaration on the Rights of Indigenous Peoples by the Council should not be the end of standard-setting activities within the United Nations system in the field of indigenous rights. There is a need for the drafting of codes of good practice and guidelines with regard to implementation. Such codes are a bridge between a norm and its implementation in practice. Certain concepts in the United Nations Declaration on the Rights of Indigenous Peoples would benefit from guidelines on implementation.⁵² Such codes need to be drafted by experts in human rights generally, as well as by experts in indigenous issues, with the close involvement of the representatives of as many indigenous peoples and organizations as possible. Standard-setting and the drafting of such codes or guidelines is not within the mandate of either the Permanent Forum or the Special Rapporteur, and they would not have the time to undertake the task.⁵³

To achieve this, the WGIP have recommended that:

- there should be an expert body providing advice on the promotion, implementation and protection of the rights of indigenous peoples;
- this expert body should produce in-depth, action-oriented reports and studies and to engage in the elaboration of norms and other international standards relating to the promotion and protection of the rights of indigenous peoples;
- this expert body should be assisted by the widest possible participation of indigenous peoples and organizations; and
- should report to the Human Rights Council through a wider human rights advisory expert body.⁵⁴

52 As examples of standard setting work that could be undertaken to support the implementation of the Declaration on the Rights of Indigenous peoples (once adopted by the General Assembly) see the 'Minority Profile and Matrix' implementation tool: Economic and Social Council, *Reviewing the promotion and practical realization of the Declaration on the Rights of persons belonging to national or ethnic, religious and linguistic minorities*, UN Doc: E/CN.4/Sub.2/2006/3, 23 June 2006.

53 Recommendations of the Working Group on Indigenous Populations with regard to the two documents which the Human Rights Council asked the Sub-Commission on the Promotion and Protection of Human Rights to submit, contained in *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006, Annex 3 and Annex 4.

54 Recommendations of the Working Group on Indigenous Populations with regard to the two documents which the Human Rights Council asked the Sub-Commission on the Promotion and Protection of Human Rights to submit, contained in *Report of the Working Group on Indigenous Populations on its twenty-fourth session (Geneva, 31 July-4 August 2006)*, UN Doc: A/HRC/Sub.1/58/22, 14 August 2006, Annex 3 and Annex 4.



The comments from the Indigenous Peoples Caucus and the recommendations of the WGIP indicate what is at stake with the current review process being undertaken by the Human Rights Council.

The preliminary conclusions of the Working Group established by the Human Rights Council to review the existing mechanisms suggests that the Sub-Commission will be abolished and replaced with a new body, likely to be called the 'Expert Advisory Body' or the 'Human Rights Consultative Committee'.⁵⁵ The role and functions of this body are yet to be settled, and it is unclear whether it will include a specific focus on Indigenous issues. It is also unclear whether it will replicate the consultative processes that exist through an Indigenous specific advisory body such as the Working Group on Indigenous Populations.

In all likelihood, the biggest threat will come to the continued existence of the Working Group on Indigenous Populations. The need for such a body – either in its existing format or in a revised structure – is clearly articulated above.

The challenge that has emerged through the current human rights reform process is to maintain the capacity for direct participation of and engagement with Indigenous peoples on human rights issues within the structures of the newly created Human Rights Council.

It would be totally unacceptable if one of the outcomes of the reform process was to limit the capacity of indigenous peoples' participation. Indeed, such an outcome would be contrary to the commitments made at the World Summit to advance recognition of indigenous peoples' human rights through participatory processes. It would also contradict commitments made by the General Assembly of the UN in relation to the Second International Decade of the World's Indigenous Peoples, as well as be inconsistent with the emerging processes for implementing a rights based approach to development (discussed further in the next section).

• Integrating human rights across the activities of the United Nations

Accompanying these reforms to the UN structure have been sustained efforts to mainstream human rights across the UN by integrating them into all policies and programs.

This has occurred through the increased recognition of the right to development and the entrenchment within the UN of a human rights based approach to development and poverty eradication.

This has been accompanied by an increased recognition of the right of Indigenous peoples to effective participation in decision making that affects them. These developments have in turn begun to crystallise in a growing acceptance of the emerging concept of free, prior and informed consent.

55 Human Rights Council, *Intersessional open-ended intergovernmental Working Group on the implementation of operative paragraph 6 of General Assembly resolution 60/251 established pursuant to Human Rights Council decision 1/104 – Summary of the discussion on expert advice*, UN Doc: A/HRC/3/CRP.4, 30 November 2006, available online at: www.docip.org/Human%20Rights%20Council/Session3/5.Summary-Expert%20advice.pdf.



Previous *Social Justice Reports* and *Native Title Reports* have discussed at length the right to development as well as the adoption by the UN agencies of the *Common Understanding of a Rights Based Approach to Development Cooperation*.⁵⁶ In summary:

- The Declaration on the Right to Development (DRD) was adopted by the UN General Assembly in 1986. The right to development is recognised as an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, through which all human rights and fundamental freedoms can be fully realised.
- Accordingly, development is defined as a process which belongs to people, not to States. Article 2(1) of the Declaration states that ‘The human person is the central subject of development and should be the active participant and beneficiary of the right to development.’
- Article 1 of the Declaration also makes it clear that the goal of development is the realisation of all human rights and fundamental freedoms. Development must be carried out in a way which respects and seeks to realise people’s human rights. Thus development is not only a human right in itself, but is also defined by reference to its capacity as *a process* to realise all other human rights.
- This emphasises the universality and indivisibility of human rights: it focuses on improving all rights, civil and political, as well as economic, social and cultural. The preamble to the Declaration notes that the development process ‘aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting there from’.
- The right to development therefore encompasses the following issues for Indigenous peoples:
 - ensuring development is non-discriminatory in its impact and in its distribution of benefits;
 - requires free and meaningful participation by all people in defining its objectives and the methods used to achieve these objectives;
 - is directed towards the goal of realizing the economic, social, and cultural rights of people;
 - facilitates the enjoyment of indigenous peoples’ cultural identity, including through respects the economic, social and political systems through which indigenous decision-making occurs; and

⁵⁶ See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, HREOC Sydney 2003, Chapter 3; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, HREOC Sydney 2005, Chapter 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, HREOC Sydney 2005, pp51-52. See also the discussion of the Common Understanding in Chapter 2 of this Report.



- is self-determined development, so that peoples are entitled to participate in the design and implementation of development policies to ensure that the form of development proposed on their land meets their own objectives and is appropriate to their cultural values.⁵⁷
- The importance of ensuring effective enjoyment of the right to development for all peoples has been an ongoing commitment of the UN for some time. It was affirmed in the Vienna Declaration at the World Conference on Human Rights in 1993 (Article 10 states that the right to development is ‘a universal and inalienable right and an integral part of fundamental human rights’). It is also integral to the Millennium Development Goals process (discussed further below) and its importance was recently reiterated at the World Summit in 2005.
- The UN agencies have committed to ensuring that all their policies and programming are consistent with the right to development through the adoption in 2003 of the *Common Understanding of a Rights Based Approach to Development Cooperation*.⁵⁸
- The Common Understanding requires that all programmes should contribute to the realisation of human rights; and be guided by human rights standards at all phases of development and planning. It recognises that people should be recognised as active participants in their own development and not as passive recipients. Accordingly, the Common Understanding emphasises the importance of process (through participation and empowerment) as well focusing on marginalised communities, through the adoption of targets and goals that are aimed at reducing disparities in the enjoyment of rights.

These developments to implement into practice the key elements of the right to development place considerable emphasis on participation of affected peoples and individuals.

As recent *Social Justice Reports* and *Native Title Reports* have documented, Australia’s existing human rights treaty obligations also emphasise rights of Indigenous peoples to effective participation in decision-making that affects them, either directly or indirectly.⁵⁹

Both the Committee on Economic, Social and Cultural Rights and the Human Rights Committee have interpreted common Article 1 of the international covenants (the right of all peoples to self-determination) as applying to the situation of indigenous peoples.⁶⁰ Through a number of individual communications and general recommendations, the Human Rights Committee has also elaborated on the scope of Article 27 of the International Covenant on Civil and Political Rights

57 For a detailed discussion applying these principles within the Australian context see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, HREOC Sydney 2003, Chapter 1. See also: ME Salomon and A Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Issues Paper, Minority Rights Group International, 2003.

58 The Common Understanding is discussed in detail in Chapter 2 of this report.

59 See for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2000*, HREOC Sydney 2000, Chapters 3 and 4; Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, Sydney, 2002, Chapter 2 and p188.

60 See further: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, Sydney, 2002, pp13-19.



(the protection of minority group rights) and its application to the land and resource rights of Indigenous communities, and the positive obligation on States to protect Indigenous cultures.⁶¹ The Committee has indicated that in determining whether the State has violated the rights of indigenous peoples under Article 27, it will consider whether measures are in place to ensure their 'effective participation' in decisions that affect them.⁶²

Similarly, the Committee on the Elimination of Racial Discrimination (CERD) has issued a General Recommendation emphasising that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) places obligations on States who are parties to the Convention to take all appropriate means to combat and eliminate racism against indigenous peoples. It has called on States to:

- a) recognise and respect indigenous peoples distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous identity;
- c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life, and *that no decisions directly relating to their rights and interests are taken without their informed consent*; and
- e) ensure that indigenous communities can exercise their rights to practice and revitalise their cultural traditions and customs, to preserve and practice their languages.⁶³

The CERD has also, under its early warning/ urgent action procedure and periodic reporting mechanism, highlighted the necessity for the informed consent of indigenous peoples in decision-making that affects their lives as an integral component of the right to equality before the law (under Article 5 of the ICERD).⁶⁴

These developments in international law (through binding treaty obligations) and UN policy and practice demonstrate the increased acknowledgement and reliance on human rights as providing a framework for proactively addressing existing inequalities within society and for recognising and protecting the distinct cultures of Indigenous peoples. And there are increasing expectations that this be done on the basis of full and effective participation of affected indigenous peoples.

61 For an overview of the Human Rights Committee's jurisprudence on Article 27 see Jonas, W, *The recognition of distinct cultural rights in international law*, Speech, Lanzhou China 17 June 2000, Available online at: www.humanrights.gov.au/speeches/social_justice/recognition_of_cultural_rights.html, accessed 21 February 2007.

62 *Lansman et al v Finland No. 2*, (25 November 1996) CCPR/C/58/D/671/1995, para 10.7.

63 Committee on the Elimination of Racial Discrimination, *General Recommendation XXIII – Indigenous Peoples*, UN Doc CERD/C/51/Misc.13/Rev.4, 18 August 1997, para 4. Emphasis added.

64 See for example, Committee on the Elimination of Racial Discrimination (CERD), *Decision 2(54) on Australia – Concluding observations / comments*, UN Doc: CERD/C/54/Misc.40/Rev.2, 19/3/1999; CERD, *Concluding observations – Australia*, UN Doc: CERD/C/304/Add.101, 19/4/2000.



These developments have been reflected upon by the various indigenous mechanisms within the UN. Both the Working Group on Indigenous Populations and the Permanent Forum on Indigenous Issues have given detailed consideration to the development through the UN processes and international law of an emerging **principle of free, prior and informed consent**.

In particular, the following studies and workshops have been conducted that have advanced the understanding of the principle of free, prior and informed consent:

- The WGIP released a preliminary working paper in 2004 on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources, to provide a framework for the drafting of a legal commentary by the Working Group on this concept.⁶⁵
- The Permanent Forum on Indigenous Issues conducted the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples in January 2005. The workshop was a recommendation of the third session of the Permanent Forum, with the issue having arisen continually throughout the first three sessions of the Forum from 2002-2004.⁶⁶
- The Permanent Forum Secretariat co-convened a workshop with my Office at the International Engaging Communities Conference in Brisbane in 2005, titled *Engaging the marginalized: Partnerships between Indigenous Peoples, governments and civil society*. The workshop developed Guidelines for engagement with indigenous peoples based on international law and practice, and informed by the principle of free, prior and informed consent.⁶⁷
- The WGIP issued a revised working paper on the principle of free, prior and informed consent of indigenous peoples for its 2006 session. Contributions were invited to identify best practice examples to govern the implementation of the principle of free, prior and informed consent of indigenous peoples in relation to developments affecting their lands and natural resources.⁶⁸

65 Working Group on Indigenous Populations, *A preliminary working paper on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources that would serve as a framework for the drafting of a legal commentary by the Working Group on this concept*, UN Doc E/CN.4/Sub.2/AC.4/2004/4, 8 July 2004, available online at <http://www.ohchr.org/english/issues/indigenous/docs/wgip22/4.pdf>, accessed 21 February 2007.

66 Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3, 17 February 2005, available online at www.humanrights.gov.au/social_justice/conference/engaging_communities/report_of_the_international_workshop_on_fpic.pdf, accessed 21 February 2007.

67 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Partnerships between Indigenous Peoples, governments and civil society*, United Nations Workshop on Engaging the Marginalised, 2005 International Conference on Engaging Communities, Brisbane, Australia, 15 August 2005. Conference proceedings are available online at www.humanrights.gov.au/social_justice/conference/engaging_communities/index.html#link1 accessed 21 February 2007.

68 Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoaella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, available online at www.ohchr.org/english/issues/indigenous/docs/wgip24/2005-wp1.doc, accessed 21 November 2007.



- The WGIP also released at its 2006 session a working paper on draft principles and guidelines on the heritage of indigenous peoples that places considerable emphasis on the need to respect the principle of free, prior and informed consent.⁶⁹

Both the Permanent Forum and the WGIP have emphasised that the principle of free, prior and informed consent is not a newly created right for indigenous peoples. Instead, it brings together, or synthesises, the existing legal obligations of States under existing international law (such as the provisions outlined above relating to self-determination, cultural and minority group rights, non-discrimination and equality before the law).⁷⁰ In addition, the principle of free, prior and informed consent:

- Has been identified as an integral component in the implementation of obligations under Article 8(j) of the Convention on Biological Diversity. It's key elements are reflected in the *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact assessments Regarding Developments Proposed to take place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*.⁷¹
- Is explicitly named in relation to indigenous peoples in existing international treaties such as *ILO Convention (No.169) Concerning Indigenous and Tribal Peoples in Independent Countries* (see Articles 6 and 7 for example).⁷²

69 Working Group on Indigenous Populations, *Standard setting: future priorities for standard-setting activities. Review of the draft principles and guidelines on the heritage of indigenous peoples*, UN Doc: E/CN.4/Sub.2/AC.4/2006/5, 16 June 2006.

70 For an overview of the existing human rights obligations and jurisprudence relating to the principle of free, prior and informed consent see: Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, paras 10-27; and Commission on Human Rights, Working Group on Indigenous Populations, *Standard-Setting, Legal Commentary on the Concept of Free, Prior and Informed Consent*, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, available online at www.ohchr.org/english/issues/indigenous/docs/wgip24/2005-wp1.doc, accessed 21 February 2007.

71 As adopted in 2000. The guidelines set out processes 'whereby local and indigenous communities may have the option to accept or oppose a proposed development that may impact on their community': Secretariat of the Convention on Biological Diversity, *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*, Montreal, Canada 2004, p9, available online at: www.biodiv.org/doc/publications/akwe-brochure-en.pdf, accessed 21 February 2007.

72 Article 6 refers to the principle of free and informed consent in the context of establishing mechanisms for free participation at all levels of decision-making in "elective institutions and administrative bodies responsible for policies and programmes which concern (indigenous peoples)". The article also refers to consultations through representative institutions whenever consideration is being given to legislative or administrative measures which may directly affect indigenous peoples. Article 7 provides: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions, and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the fullest extent possible, over their own economic, social and cultural development. In addition they shall participate in the formulation, implementation and evaluation of plans and programs for national and regional development, which may affect them directly... Governments shall ensure that whenever appropriate, studies are carried out, in cooperation with the peoples concerned, to assess the social, spiritual, cultural and environmental impact on them of planned development activities. The results of these studies shall be considered as fundamental criteria for the implementation of these activities".



- Is also referred to in several contexts in the United Nations Declaration on the Rights of Indigenous Peoples, as adopted by the Human Rights Council in June 2006 (see Articles 11, 21 and 31 for example).

As the Secretariat of the Permanent Forum have noted:

The principle of free prior and informed is increasingly emerging as a practical methodology within the UN system for designing programs and projects, which either directly or indirectly affect indigenous peoples. It is also a mechanism for operationalizing the human-rights based approach to development.⁷³

The Working Group on Indigenous Populations explains the importance of the application of the principle of free, prior and informed consent to indigenous peoples as follows in Text Box 3.

Text Box 3: The principle of free, prior and informed consent and Indigenous peoples⁷⁴

Substantively, the right of free, prior and informed consent is grounded in and is a function of indigenous peoples' inherent and prior rights to freely determine their political status, freely pursue their economic, social and cultural development and freely dispose of their natural wealth and resources – a complex (series) of inextricably related and interdependent rights encapsulated in the right to self-determination, to their lands, territories and resources, where applicable, from their treaty-based relationships, and their legitimate authority to require that third parties enter into an equal and respectful relationships with them based on the principle of informed consent.

Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.

In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:

- Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- Their consent is sought and freely given prior to the authorization and start of development activities;

73 Secretariat of the Permanent Forum on Indigenous Issues, *Engaging Indigenous Peoples in governance processes: International legal and policy frameworks for engagement*, Background Paper submitted for United Nations Workshop on Engaging the Marginalised, 2005 International Conference on Engaging Communities, Brisbane, Australia, 15 August 2005, p4. Available online at: www.humanrights.gov.au/social_justice/conference/engaging_communities/unpan021100.pdf.

74 Extracted from: Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Iulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc: E/CN.4/Sub.2/AC.4/2005/WP.1, 14 July 2005, paras 56-58, p15.



- Indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being; and
- Their choice to give or withhold consent over developments affecting them is respected and upheld.

Human rights, coupled with best practices in human development, provide a comprehensive framework for participatory development approaches which empower the poorest and most marginalized sections of society to have a meaningful voice in development. Indeed, this is integral to a human rights-based understanding of poverty alleviation as evidenced by the definition of poverty adopted by the Committee on Economic, Social and Cultural rights: "in light of the International Bill of Rights, poverty may be defined as a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights (E/C.12/2001/10, para. 8).

Moreover, the realization of human rights requires recognition of conflicts between competing rights and the designing of mechanisms for negotiation and conflict resolution. More specifically, human rights principles require the development of norms and decision-making processes that:

- Are democratic and accountable and enjoy public confidence;
- Are predicated on the willingness of interested parties to negotiate in good faith, and in an open and transparent manner;
- Are committed to addressing imbalances in the political process in order to safeguard the rights and entitlements of vulnerable groups;
- Promote women's participation and gender equity;
- Are guided by the prior, informed consent of those whose rights are affected by the implementation of specific projects;
- Result in negotiated agreements among the interested parties; and
- Have clear, implementable institutional arrangements for monitoring compliance and redress of grievances.

While the WGIP has focused on the application of the principle of free, prior and informed consent in relation to land and resources, the Permanent Forum on Indigenous Issues has considered the application of the principle across a broader range of issues. They note it applies:

- In relation to indigenous lands and territories; including sacred sites (may include exploration, such as archaeological explorations, as well as development and use);
- In relation to treaties, agreements and other constructive arrangements between states and indigenous peoples, tribes and nations;
- In relation, but not limited to, extractive industries, conservation, hydro-development, other developments and tourism activities in indigenous areas leading to possible exploration, development and use of indigenous territories and/or resources;



- In relation to access to natural resources including biological resources, genetic resources and/or traditional knowledge of indigenous peoples, leading to possible exploration, development or use thereof;
- In relation to development projects encompassing the full project cycle, including but not limited to assessment, planning, implementation, monitoring, evaluation and closure – whether the projects be addressed to indigenous communities or, while not addressed to them, may affect or impact upon them;
- In relation to UN agencies and other intergovernmental organizations who undertake studies on the impact of projects to be implemented in indigenous peoples territories;
- In relation to policies and legislation dealing with or affecting indigenous peoples; and
- In relation to any policies or programmes that may lead to the removal of their children, or their removal, displacement or relocation from their traditional territories.⁷⁵

The Permanent Forum have identified the common elements of the principle of free, prior and informed consent as those set out in Text Box 4 below.

Text Box 4: Elements of a Common Understanding of the principle of free, prior and informed consent⁷⁶

What?

Free should imply no coercion, intimidation or manipulation;

Prior should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/ consensus processes;

Informed – should imply that information is provided that covers (at least) the following aspects:

- a. The nature, size, pace, reversibility and scope of any proposed project or activity;
- b. The reason/s or purpose of the project and/or activity;
- c. The duration of the above;
- d. The locality of areas that will be affected;
- e. A preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle;

75 Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3, 17 February 2005, para 45.

76 Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3, 17 February 2005, paras 46-48.



- f. Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and
- g. Procedures that the project may entail.

Consent

Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest holders. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent.

Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

When?

FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

Who?

Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In FPIC processes, indigenous peoples, UN Agencies and governments should ensure a gender balance and take into account the views of children and youth as relevant.

How?

Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

Procedures/Mechanisms

- Mechanisms and procedures should be established to verify FPIC as described above, including mechanisms of oversight and redress, such as the creation of national mechanisms.
- As a core principle of FPIC, all sides of a FPIC process must have equal opportunity to debate any proposed agreement/development/project. "Equal opportunity" should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language/s as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.



- FPIC could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of FPIC have not been respected may lead to the revocation of consent given.

The principle of free, prior and informed consent has recently received important international endorsement by the United Nations General Assembly. In adopting the program of action for the Second International Decade of the World's Indigenous People, five key objectives were agreed for the Decade. They include:

Promoting the full and effective participation of indigenous peoples in decisions which directly or indirectly affect them, and to do so in accordance with the principle of free, prior and informed consent.⁷⁷

The Program of Action for the Second International Decade was adopted by consensus. In other words, no governments expressed objections to this objective. All governments have committed to advance this objective internationally and through their domestic policies and programmes over the course of the International Decade.

The principle of free, prior and informed consent has emerged as a primary focus for discussion in advancing the rights of indigenous peoples, particularly in relation to land and resources, heritage protection, intellectual property and biological diversity. The exact content of the principle, however, will continue to be debated and negotiated in international forums in the coming years.⁷⁸

2) The making of global commitments to action – The Millennium Development Goals and the Second International Decade of the World's Indigenous People

As noted earlier in this chapter, the Secretary-General of the UN laid down the 'implementation challenge' for the global community in his *In larger freedom* report in preparation for the World Summit in 2005. He stated:

When it comes to laws on the books, no generation has inherited the riches that we have... But without implementation, our declarations ring hollow. Without action, our promises are meaningless.⁷⁹

77 United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, para 9, available online at www.un.org/esa/socdev/unpfii/en/second_programme_of_action.htm, accessed 22 November 2006.

78 Canada, Australia, New Zealand and the United States of America, for example, have raised their opposition to this principle and identified this as one of the principle reasons for opposing the adoption of the Declaration on the Rights of Indigenous Peoples. See for example, the joint statement by Australia, New Zealand and the USA on free, prior and informed consent, delivered at the 5th session of the Permanent Forum on Indigenous Issues, 22 May 2006, available online at www.docip.org/Permanent%20Forum/pfi5_185.PDF, accessed 22 November 2006; and Statement by Ambassador Paul Meyer (Canada) to the 1st session of the Human Rights Council, 29 June 2006, available online at www.docip.org/Human%20Rights%20Council/Session1/Intervention%20avant%20le%20vote/5.Canada.pdf, accessed 22 November 2006.

79 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, 21 March 2005, UN Doc: A/59/2005, paras 129-130, available online at www.un.org/largerfreedom/, accessed 21 February 2007.



The time has come for Governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual, to which they too often pay only lip service. We must move from an era of legislation to an era of implementation. Our declared principles and our common interests demand no less.⁸⁰

He also defined the challenge as to 'implement in full the commitments already made and to render genuinely operational the framework already in place'.⁸¹

For indigenous peoples, there currently exist two frameworks at the global level which provide a focal point for this implementation challenge:

- the Millennium Development Goals, as agreed at the Millennium Summit in 2000 and due to be achieved by 2015; and
- the Second International Decade of the World's Indigenous People, as agreed in 2004 and also due to end by 2015.

For indigenous peoples, a focus on implementation through these frameworks is particularly crucial. This is due to considerable concern at the limited achievements of the First International Decade of the World's Indigenous People from 1995 – 2004. Principle among the concerns about the Decade was that governmental action did not match the rhetoric and commitments made to any significant degree.

Similarly, the resolution affirming the Program of Action for the Second International Decade noted ongoing concerns about 'the precarious economic and social situation that indigenous people continue to endure in many parts of the world in comparison to the overall population and the persistence of grave violations of their human rights' and accordingly 'reaffirmed the urgent need to recognize, promote and protect more effectively their rights and freedoms'.⁸²

Concerns have also been expressed at the absence of Indigenous participation in the formulation of the Millennium Development Goals (MDGs). There has been identified an ongoing need to ensure that the MDGs are culturally relevant and able to assist the situation of indigenous peoples.

These concerns have been at the forefront of discussions during the establishment of the Second International Decade of the World's Indigenous People in 2004 and the approval of a Program of Action for the Decade in 2005.

International efforts over the past two years have sought to ensure that the MDG process and the Second International Decade are mutually reinforcing and complementary in their focus, in order to maximise the opportunities to advance the situation of Indigenous peoples. The Permanent Forum on Indigenous Issues, in particular, has led these efforts.

80 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, 21 March 2005, UN Doc: A/59/2005, para 139, available online at www.un.org/largerfreedom/, accessed 21 February 2007.

81 *In larger freedom: towards development, security and human rights for all, Report of the Secretary-General*, 21 March 2005, UN Doc: A/59/2005, para 72, available online at www.un.org/largerfreedom/, accessed 21 February 2007.

82 United Nations, General Assembly, *Draft Programme of Action for the Second International Decade of the World's Indigenous Peoples*, 18 August 2005, UN Doc A/60/270, preamble, available online at http://www.tebtebba.org/tebtebba_files/unpf/pf5/N0546496-PoA%20of%202nd%20Decade.pdf, accessed 22 February 2007.



• The Millennium Development Goals and Indigenous peoples

At the United Nations Millennium Summit in September 2000, world leaders agreed to a set of time bound and measurable goals and targets for combating poverty, hunger, disease, illiteracy, environmental degradation and discrimination against women.⁸³ These are commonly referred to as the Millennium Development Goals (MDGs). At the Millennium Summit, world leaders committed to the achievement of the goals by 2015.

The purpose of the MDGs is set out in the Millennium Declaration as follows:

We will spare no effort to free our fellow men, women and children from the abject and dehumanizing conditions of extreme poverty, to which more than a billion of them are currently subjected. We are committed to making the right to development a reality for everyone and to freeing the entire human race from want.⁸⁴

There are eight MDGs, supported by 18 targets and 48 indicators. The 8 MDGs and 18 targets are set out in Text Box 5 below.

Text Box 5: The Millennium Development Goals

Goal 1. Eradicate extreme poverty and hunger

Target 1: Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day.

Target 2: Halve, between 1990 and 2015, the proportion of people who suffer from hunger.

Goal 2. Achieve universal primary education

Target 3: Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.

Goal 3. Promote gender equality and empower women

Target 4: Eliminate gender disparity in primary and secondary education, preferably by 2005, and in all levels of education no later than 2015.

Goal 4. Reduce child mortality

Target 5: Reduce by two thirds, between 1990 and 2015, the under-five mortality rate.

Goal 5. Improve maternal health

83 United Nations General Assembly, *United Nations Millennium Declaration*, UN Doc: A/RES/55/2, 18 September 2000, available online at http://unstats.un.org/unsd/mdg/Resources/Static/Products/GAResolutions/55_2/a_res55_2e.pdf, accessed 22 February 2007. The goals were proposed by the Secretary-General of the UN, Kofi Annan, in his report *We the peoples: The role of the United Nations in the twenty-first century*, UN Doc: A/54/2000, 27 March 2000. For general background see: United Nations, *Fact sheet: The Millennium Development Goals*, United Nations Department of Public Information, New York, October 2002, available online at www.un.org/millenniumgoals/MDGs-FACTSHEET1.pdf, accessed 22 February 2007.

84 United Nations General Assembly, *United Nations Millennium Declaration*, UN Doc: A/RES/55/2, 18 September 2000, para 11.



Target 6: Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio.

Goal 6. Combat HIV/AIDS, malaria and other diseases

Target 7: Have halted by 2015 and begun to reverse the spread of HIV/AIDS.

Target 8: Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases.

Goal 7. Ensure environmental sustainability

Target 9: Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources.

Target 10: Halve, by 2015, the proportion of people without sustainable access to safe drinking water and sanitation.

Target 11: By 2020, to have achieved a significant improvement in the lives of at least 100 million slum dwellers.

Goal 8. Develop a global partnership for development

Target 12: Develop further an open, rule-based, predictable, non-discriminatory trading and financial system. Includes a commitment to good governance, development and poverty reduction – both nationally and internationally.

Target 13: Address the special needs of the least developed countries. Includes: tariff and quota-free access for least developed countries' exports; enhanced programme of debt relief for heavily indebted poor countries (HIPC) and cancellation of official bilateral debt; and more generous ODA for countries committed to poverty reduction.

Target 14: Address the special needs of landlocked developing countries and small island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly).

Target 15: Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term.

Some of the indicators listed below are monitored separately for the least developed countries (LDCs), Africa, landlocked developing countries (LLDCs) and small island developing States (SIDS).

Target 16: In cooperation with developing countries, develop and implement strategies for decent and productive work for youth.

Target 17: In cooperation with pharmaceutical companies, provide access to affordable essential drugs in developing countries.

Target 18: In cooperation with the private sector, make available the benefits of new technologies, especially information and communications.

The Millennium Declaration agreed on a series of 'fundamental values to be essential to international relations in the twenty-first century' which underpinned the commitments made in the Declaration, including the MDGs. These agreed values are:



- **Freedom.** Men and women have the right to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice. Democratic and participatory governance based on the will of the people best assures these rights.
- **Equality.** No individual and no nation must be denied the opportunity to benefit from development. The equal rights and opportunities of women and men must be assured.
- **Solidarity.** Global challenges must be managed in a way that distributes the costs and burdens fairly in accordance with basic principles of equity and social justice. Those who suffer or who benefit least deserve help from those who benefit most.
- **Tolerance.** Human beings must respect one other, in all their diversity of belief, culture and language. Differences within and between societies should be neither feared nor repressed, but cherished as a precious asset of humanity. A culture of peace and dialogue among all civilizations should be actively promoted.
- **Respect for nature.** Prudence must be shown in the management of all living species and natural resources, in accordance with the precepts of sustainable development. Only in this way can the immeasurable riches provided to us by nature be preserved and passed on to our descendants. The current unsustainable patterns of production and consumption must be changed in the interest of our future welfare and that of our descendants.
- **Shared responsibility.** Responsibility for managing worldwide economic and social development, as well as threats to international peace and security, must be shared among the nations of the world and should be exercised multilaterally. As the most universal and most representative organization in the world, the United Nations must play the central role.⁸⁵

The Millennium Declaration also reaffirmed the commitment of all Member States to the purposes and principles of the Charter of the United Nations, and rededicated States to support all efforts to uphold, *inter alia*, respect for human rights and fundamental freedoms, and respect for the equal rights of all without distinction as to race, sex, language or religion.

These guiding principles and commitments are repeated here as they indicate that the purposes of the Millennium Summit, as encapsulated in the MDGs, are intended to apply and to benefit *all* people. This is in accordance with the understanding that human rights are universal, inalienable and indivisible.

It is important to recall this, as the focus in implementing the MDGs to date has been almost exclusively on the developing world.

The role of developed nations in implementing the MDGs has focused on 'making the case for aid and for urgent debt relief; ensuring that aid is allocated to sectors and services relevant to the Millennium Development Goals; and opening markets

85 United Nations General Assembly, *United Nations Millennium Declaration*, UN Doc: A/RES/55/2, 18 September 2000, para 6.



more widely to developing countries, especially the least developed countries.⁸⁶ The MDGs have been treated by developed nations as a matter of foreign policy and not as a series of goals and targets to which they are committed to meeting within their own borders and for their own people.

Accordingly, the initial implementation phase of the MDGs has overlooked the relevance and importance of the goals for indigenous peoples within developed countries, including Australia.

Text Box 6 extracts the comments of Indigenous delegates from Australia that were presented to the Permanent Forum on Indigenous Issues on the difficulties in implementing the MDGs in the Australian context.

Text Box 6: The Millennium Development Goals and Australia⁸⁷

1. Indigenous peoples in Australia suffer significant disparities in the enjoyment of economic, social and cultural rights, as reflected in several of the MDGs (particularly goals 2 (universal primary education), 4 (child mortality), 5 (maternal health) and 6 (HIV/AIDS, malaria and other diseases)).
2. These disparities tend to be masked at the international level due to the lack of disaggregation of data? and the comparative high level of enjoyment of rights by non-Indigenous Australians. As an example, the 17 year life expectancy gap between Indigenous and non-Indigenous Australians is not given proper acknowledgement internationally such as through the World Development Report as this data is not disaggregated in the World Development Index.
3. As a result, there is insufficient recognition that there are challenges for meeting the MDGs for Indigenous peoples in Australia. Concern was expressed that Australia treats the MDGs as a matter of foreign policy, relevant only to Australia's international aid programme.
4. Related to these issues, concern was expressed that the MDGs do not 'capture' the systemic discrimination and marginalisation that is experienced by Indigenous peoples in Australia and in other countries. The MDGs need to be made more culturally relevant to indigenous peoples so that they address those issues that affect indigenous peoples, such as loss of land, identity, language, disempowerment, captivity and stolen generations.
5. There is currently an absence of mechanisms in Australia for Indigenous peoples to be active participants in the planning, design, implementation, monitoring and evaluation of policies, programmes and projects. This is particularly the case with the absence of Indigenous representative structures at a national and regional level.

⁸⁶ Permanent Forum on Indigenous Issues, *Indigenous Peoples and the Millennium Development Goals*, Website, available online at: www.un.org/esa/socdev/unpfii/en/mdgs.html.

⁸⁷ Extracted from: Indigenous Peoples' Organisations of Australia Human Rights Network, *Report of consultations on the 5th session of the Permanent Forum on Indigenous Issues: 27-28 April 2006*, HREOC Sydney 2006.



6. There is a need for Australian governments to adopt a human rights based approach to development to underpin poverty eradication strategies. This requires recognition of Indigenous peoples as distinct peoples and the respect for their individual and collective human rights.
7. The meeting noted that Indigenous peoples have the right to full and effective participation in decisions which directly or indirectly affect their lives. Such participation should be based on the principle of free, prior and informed consent.

Recommendations:

- i. That the PFII emphasise that the achievement of Millennium Development Goals is an objective for all States, not just some States. It is not justified for some States to take the view that, because they are 'developed' States, they do not have targets to achieve. States with Indigenous Peoples, such as Australia, have much to achieve under the Millennium Development Goals.
- ii. That the PFII recommend that States work in partnership with Indigenous Peoples to identify key indicators and goals that are culturally relevant to Indigenous Peoples to measure progress in the implementation of the Millennium Development Goals.
- iii. That the PFII recommend that the Millennium Development Goals are implemented in a manner consistent with the Programme of Action for the Second Decade of the World's Indigenous People, to ensure both programs are working together for successful outcomes for Indigenous Peoples in their communities.
- iv. In the implementation of the Second Decade Program of Action, there must be agreed 'plans of action' designed and implemented at the national level, as recommended in Paras. 91 – 99 of the Programme. Such plans must be pursued by tri-partite partnership by Indigenous Peoples, States and country-based UN and international agencies.

Specifically in relation to Goals 4-6, the following comments were noted relating to Aboriginal and Torres Strait Islander health.

In Australia, unacceptable health disparities persist between Aboriginal and Torres Strait Islander (Indigenous) peoples and non-Indigenous Australians. The significance and extent of these disparities is most often lost when Australia provides health statistics and social data to international reporting bodies and other agencies, as the relatively small proportions represented by Indigenous specific data (where available) is swamped by the overall health, and improving outcomes, for the population as a whole.

This longstanding and entrenched inequality constitutes a threat to the survival of Aboriginal and Torres Strait Islander peoples, their languages and cultures, and does not provide Aboriginal and Torres Strait Islander peoples with the ability to live safe, healthy lives in full human dignity.

A rights based approach to health programming is essential to achieve lasting improvements in Indigenous health within the shortest possible timeframe and on a basis of equality. At present, Aboriginal and Torres Strait Islander peoples do not receive equality of opportunity in the provision of primary health care services and health infrastructure.



A rights based approach requires the adoption of a holistic understanding of Indigenous health, which addresses physical, spiritual, cultural, emotional and social well-being, community capacity and governance.

There are significant disparities in under-5 year old mortality rates for Indigenous infants in Australia. While these rates are not as high as for infants in developing nations, the disparities in morbidity and mortality from largely preventable illness and infectious diseases are disproportionately high. Low birth weight, poor nutritional status and failure to thrive contribute to a cycle of impaired development, suboptimal immune status and increased susceptibility to infections. There is also an increasing body of evidence that suggests early childhood diseases and nutritional disadvantage are significant antecedents to the development of chronic disease in later life.

Recommendations (extract only)

- v. That the UNPFII encourage governments to incorporate the principles of the MDGs into domestic policy for indigenous peoples in order to facilitate and accelerate the reduction in disparities for health and social justice indicators. There is also a need for the development of culturally appropriate and country specific targets, which reflect the circumstances of indigenous peoples. Many developed countries, including Australia, treat the Millennium Development Goals as foreign policy, with no consideration given to the potential for operationalising these international principles on a domestic level.
- vii. That the UNPFII promote a human rights based approach to development and fully incorporate the right to health as a tool to progress and strengthen policy formulation and service implementation, in order to improve health outcomes for indigenous populations.
- viii. That the PFII encourage States to establish, with the effective participation of indigenous peoples, specific timelines, benchmarks and targets for the achievement of indigenous health equality. These should be based on performance indicators, disaggregated by region and indigenous status. Governments should be required to provide regular reports to the PFII (and other appropriate national and international agencies, particularly the WHO).
- ix. Given the global similarities in health outcomes for indigenous peoples, UN agencies and WHO should prioritise the establishment of specific procedures and mechanisms for addressing indigenous health, and for monitoring outcomes at the country level.

The Permanent Forum on Indigenous Issues, in exercising its role of coordinating UN activity on Indigenous issues, has focused on the application of the MDGs to indigenous peoples. In 2002 it established the Inter-Agency Support Group on Indigenous Issues (IASG). This is an ongoing Group comprised of the various UN agencies and funds, which meets annually in order to support and promote the mandate of the Permanent Forum within the UN system. The IASG has provided important analysis of the application of the MDGs to the situation of Indigenous peoples.



In its 2004 workshop report, the IASG noted the following concerns about the MDG process as it has applied to indigenous peoples to date:

The Support Group considers that indigenous and tribal peoples have the right to benefit from the Millennium Development Goals, and from other goals and aspirations contained in the United Nations Millennium Declaration, to the same extent as all others. However, as the 2005 review of the implementation of the Millennium Development Goals nears, it appears from the available evidence that indigenous and tribal peoples are lagging behind other parts of the population in the achievement of the goals in most, if not all, of the countries in which they live, and indigenous and tribal women commonly face additional gender-based disadvantages and discrimination.

Detailed information and statistics describing their situation are often lacking... Lack of adequate disaggregated data is a problem for the achievement of the Millennium Development Goals. Nevertheless, the information available — both statistics that do exist and experience acquired in the course of our work — indicates that these peoples rank at the bottom in terms of the social indicators in virtually every respect.

Concern has also been expressed that the effort to meet the targets laid down for the achievement of the Millennium Development Goals could in fact have harmful effects on indigenous and tribal peoples, such as the acceleration of the loss of the lands and natural resources on which indigenous peoples' livelihoods have traditionally depended or the displacement of indigenous peoples from those lands.

Because the situation of indigenous and tribal peoples is often not reflected in statistics or is hidden by national averages, there is a concern that efforts to achieve the Millennium Development Goals could, in some cases, have a negative impact on indigenous and tribal peoples while national indicators apparently improve.

While the Millennium Development Goals carry a potential for assessing the major problems faced by indigenous peoples, the Millennium Development Goals and the indicators for their achievement do not necessarily capture the specificities of indigenous and tribal peoples and their visions. Efforts are needed at the national, regional and international levels to achieve the Millennium Development Goals with the full participation of indigenous communities — women and men — without interfering with their development paths and their holistic understanding of their needs. Such efforts must take into account the multiple levels and sources of the discrimination and exclusion faced by indigenous peoples.⁸⁸

The Permanent Forum on Indigenous Issues has also argued that:

indigenous peoples... are often the most marginalized populations in society, deprived of their right to development, including access to education, healthcare, water and participation in policy processes affecting their lives. It is clear that, the indicators of achieving the MDGs must be reviewed to capture the specificities of indigenous and tribal peoples and their visions.⁸⁹

88 Economic and Social Council, *Report of the Inter-Agency Support Group on Indigenous Issues on its 2004 session*, UN Doc: E/C.19/2005/2, 14 February 2005, Annex 2, paras 4-6, available online at: <http://daccessdds.un.org/doc/UNDOC/GEN/N05/237/10/PDF/N0523710.pdf?OpenElement>.

89 Permanent Forum on Indigenous Issues, *Indigenous Peoples and the Millennium Development Goals*, Website, available online at: www.un.org/esa/socdev/unpfi/en/mdgs.html.



These concerns were re-iterated at the launch of the Second International Decade of the World's Indigenous People in New York in May 2006.⁹⁰

Ms Mililani Trask, representing the Global Indigenous Peoples' Caucus, noted that 'the effort to meet the targets laid down for MDGs could in fact have harmful effects for indigenous peoples such as the acceleration of loss of lands and natural resources or the displacement from those lands.' She argued that the MDG indicators need to be redefined to be relevant to indigenous peoples by taking into consideration:

culturally appropriate indicators, redefining the process of impoverishment caused by dispossession of ancestral lands, loss of control over natural resources and indigenous knowledge, devastating social and environmental impacts, impacts from militarization and conflict and forced assimilation into the mainstream society and integration into the market economy.⁹¹

She also stated that:

The current MDG poverty indicator of living with \$1/day cannot capture nor adequately reflect poverty as perceived by Indigenous Peoples'. Poverty alleviation must start from Indigenous Peoples own definitions and indicators of poverty. Governments speak of 'poverty' while Indigenous Peoples speak of 'rights'. Within indigenous territories, poverty is also defined by power deficits, lack of self-determination, marginalization and lack of mechanisms for meaningful participation and access to decision-making processes...

The human-rights based approach to development is essential to the achievement of the MDGs. The MDGs must therefore be firmly grounded on a rights-based approach, to have meaning for Indigenous Peoples.⁹²

The report of the fifth session of the Permanent Forum (conducted in 2006) states that:

there is a clear need to redefine approaches to the implementation of the Goals so as to include the perspectives, concerns, experiences and world views of indigenous peoples. Statements also confirmed that there was a need for indigenous peoples to provide their own definitions of poverty and development and that there should be full and effective participation of indigenous peoples in the implementation of the Goals.⁹³

The Permanent Forum also recommended that:

self-determination, free, prior and informed consent and accountability form the basis of, and prerequisite for, any relationship that can be called a true partnership for development, and urges all States, indigenous peoples, United Nations bodies,

90 See in particular the joint intervention by over 100 hundred Indigenous organisations submitted to the Permanent Forum on Indigenous Issues: *Joint statement on the Draft UN Declaration on the Rights of Indigenous Peoples and Millennium Development Goals: Importance of a human rights-based approach*, 22 May 2006.

91 Mililani Trask, *Comments on behalf of the Global Indigenous Peoples' Caucus at the launch of the Second International Decade of the World's Indigenous People*, United Nations General Assembly, 12 May 2006, available online at: www.docip.org/Permanent%20Forum/pfi5_8.PDF.

92 Mililani Trask, *Comments on behalf of the Global Indigenous Peoples' Caucus at the launch of the Second International Decade of the World's Indigenous People*, United Nations General Assembly, 12 May 2006, available online at: www.docip.org/Permanent%20Forum/pfi5_8.PDF.

93 Permanent Forum on Indigenous Issues, *Report on the fifth session (15-26 May 2006)*, UN Doc: E/2006/43, para 4.



international development agencies, corporations and the private sector, as well as civil society, to uphold these vital principles.⁹⁴

The Permanent Forum have identified that the next step in redressing these concerns is to facilitate processes for indigenous peoples 'to identify gaps in existing indicator frameworks, examine linkages between quantitative and qualitative criteria, and propose the development of indicators that are culturally-specific, measure exclusion, and reflect the aspirations of indigenous peoples.'⁹⁵

To date, they have convened two regional meetings to progress this: one for the Latin American and Caribbean region (held at Puerto Cabezas, Nicaragua in September 2006)⁹⁶ and the other in Ottawa, Canada in March 2006 focusing specifically on the situation of indigenous peoples in developed countries, including Australia.⁹⁷

The Ottawa meeting identified numerous challenges at the national and international level in developing appropriate indicator frameworks and linking these to the Millennium Development Goals. They noted that:

- **The purpose of data collection and indicators is to ensure that States are meeting their constitutional and legal responsibilities towards indigenous peoples.** States can tend to focus on developing indicators, but not focus sufficiently on the interventions required to meet targets tied to indicators. Indicators development should ultimately result in benefits to indigenous peoples by informing linkages between program outputs to outcomes. This is consistent with international standards and the human rights principle of progressive realization of economic, social and cultural rights.
- **Indicators must place significant emphasis on indigenous peoples' inherent values, traditions, languages, and traditional orders/systems, including laws, governance, lands, economies etc.** Collection of data and development of indicators should, therefore, also represent indigenous peoples' perceptions and understanding of well-being. It was noted, however, that not everything relating to indicators development undertaken by governments is relevant to indigenous peoples and not everything that indigenous peoples perceive can be measured.
- **Indicators should also focus on the interplay between indigenous and non-indigenous systems (social, political and economic, colonization, industrialization) that result in a series of impacts, such as racism and discrimination, migration to urban centre's, youth suicide and disconnection to land and culture.**
- **Indicators that demonstrate inequities and inadequacies in government funding for indigenous peoples' programming and services should also be developed.** This data can be illuminating by linking funding levels to mandated areas of government responsibility, assessing their

94 Permanent Forum on Indigenous Issues, *Report on the fifth session (15-26 May 2006)*, UN Doc: E/2006/43, para 11.

95 See further: www.un.org/esa/socdev/unpfii/en/workshops.html.

96 See further: www.un.org/esa/socdev/unpfii/en/workshops.html.

97 Permanent Forum on Indigenous Issues, *Report of the meeting on Indigenous peoples and indicators of well-being*, UN Doc: E/C.19/2006/CRP.3, 20 April 2006, Available online at www.un.org/esa/socdev/unpfii/documents/workshop_indic_report.doc, accessed 26 February 2007.



accountability and projecting demand and other impacts into the future.

- There should be a balance of comparative indicators to assess well-being among non-indigenous and indigenous peoples, and indigenous-specific indicators based on indigenous peoples' visions and understandings of well-being.⁹⁸

The Workshop recommended that 'the United Nations should identify and adopt appropriate indicators of indigenous identity, lands, ways of living, and indigenous rights to, and perspectives on, development and well-being' and that these indicators should be applied in performance measurement and monitoring processes by the UN system, as well as its member States, intergovernmental organizations and other development institutions.⁹⁹

Accordingly, the Workshop proposed a series of indicators that could be further considered at the national and international level based on the two key themes of:

- Identity, Land and Ways of Living; and
- Indigenous Rights to, and Perspectives on, Development.

The Workshop noted that 'more exact indicators need to be developed in a measurable form, with full participation by indigenous peoples from all regions'.¹⁰⁰ The proposed indicators relate to the following issues:

- Maintenance and development of Traditional Knowledge, Traditional Cultural expressions and practices;
- Use and intergenerational transmission of indigenous languages;
- Support of, and access to, bilingual, mother tongue, and culturally appropriate education;
- Ownership, access, use, permanent sovereignty of lands, territories, natural resources, waters;
- Health of communities – including community safety, community vitality, and support for safe and culturally appropriate infrastructure;
- Health of ecosystems;
- Patterns of migration;
- Indigenous governance and management systems;
- Free, prior, informed consent, full participation and Self-determination in all matters affecting indigenous peoples' well-being;
- Degree of implementation/compliance with international standards and agreements relating to indigenous peoples' rights; and

98 Permanent Forum on Indigenous Issues, *Report of the meeting on Indigenous peoples and indicators of well-being*, UN Doc: E/C.19/2006/CRP.3, 20 April 2006, paras 9-20.

99 Permanent Forum on Indigenous Issues, *Report of the meeting on Indigenous peoples and indicators of well-being*, UN Doc: E/C.19/2006/CRP.3, 20 April 2006, para 33.

100 Permanent Forum on Indigenous Issues, *Report of the meeting on Indigenous peoples and indicators of well-being*, UN Doc: E/C.19/2006/CRP.3, 20 April 2006, para 34.



- Government funding for indigenous peoples' programs and services.¹⁰¹

Within the Australian context, there exist detailed indicator frameworks for various sectors. Most important among these is the *Overcoming Indigenous Disadvantage Framework*, as endorsed by the Council of Australian Governments.¹⁰²

The Steering Committee for Government Service Provision, which produces the biennial *Overcoming Indigenous Disadvantage Report* against the indicator framework, has noted difficulties and data limitations in presenting some areas of the framework. Importantly, these include the identification of alternative indicators 'that would more clearly reflect outcomes for Indigenous people' and the adequacy of indicators for measuring Indigenous culture and health.¹⁰³

In particular, the Committee has undertaken consultations, including with Indigenous peoples to identify ways of improving the following current indicators relating to Indigenous culture:

- Indigenous cultural studies in school curriculum and involvement of Indigenous people in development and delivery of Indigenous studies;
- Proportion of people with access to their traditional lands;
- Participation in organised sport, arts or community group activities; and
- Governance arrangements.

It has also identified potential additional indicators relating to heritage, language and recognition of Indigenous culture and law.¹⁰⁴

Guidance is provided in addressing these difficult issues through the Ottawa Workshop's proposed indicators of indigenous identity, lands, ways of living, and indigenous perspectives on development and well-being.

The focus at the UN level, primarily due to the efforts of the Permanent Forum on Indigenous Issues, is firmly on ensuring that Indigenous peoples are able to enjoy the benefits of the Millennium Development Goals process through international efforts and domestic action. The process of developing a series of culturally based indicators to complement the MDGs is underway at the international level, and will continue to gain prominence in the coming years.

These developments provide valuable guidance in assessing the appropriateness of indicator frameworks within Australia; as well as assessing the policy basis of program interventions by governments, so as to establish whether they are consistent with a rights based approach to development and sufficiently target overcoming existing inequalities in the enjoyment of rights by Indigenous peoples in Australia.

101 Permanent Forum on Indigenous Issues, *Report of the meeting on Indigenous peoples and indicators of well-being*, UN Doc: E/C.19/2006/CRP.3, 20 April 2006, pp 10-14.

102 See further: www.pc.gov.au/gsp/indigenous/index.html, and *Social Justice Report 2005*, HREOC, Sydney, 2005, Chapter 3.

103 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: Key indicators, Request for comment – March 2006*, Productivity Commission, Melbourne 2006, p3, available online at: www.pc.gov.au/gsp/indigenous/consultation2006/consultationpaper.pdf.

104 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous disadvantage: Key indicators, Questionnaire – March 2006*, Productivity Commission, Melbourne 2006, pp 3-10, available online at: www.pc.gov.au/gsp/indigenous/consultation2006/consultationquestionnaire.pdf.



• The Second International Decade of the World's Indigenous People

On 20 December 2004, the UN General Assembly proclaimed the Second International Decade of the World's Indigenous People (the Second Decade). The Second Decade commenced on 1 January 2005 and runs until 2015. It provides a focal point for all UN activity on Indigenous peoples over the next decade, as well as the efforts of governments through international cooperation and within countries.

The Decade follows on from the International Year for the World's Indigenous People in 1994 and the 1st International Decade of the World's Indigenous People which took place from 1995-2004.

While there had been some notable positive developments during the 1st International Decade (such as the establishment of the Permanent Forum and the creation of the role of Special Rapporteur on Indigenous Issues), there was widespread concern that this progress was not sufficient to meet the objectives of the 1st Decade.¹⁰⁵

In particular, indigenous peoples were concerned at the slow progress of action within the UN to implement the 1st Decade's objectives (primarily due to financing restraints) as well as limited actions at the national level. One of the primary objectives of the 1st Decade was not met – namely, the finalisation and adoption of the Declaration on the Rights of Indigenous Peoples.

In establishing the Second Decade, the UN General Assembly expressed its concern at 'the precarious economic and social situation that indigenous people continue to endure in many parts of the world in comparison to the overall population and the persistence of grave violations of their human rights', and reaffirmed 'the urgent need to recognize, promote and protect more effectively their rights and freedoms'.¹⁰⁶

Accordingly, the preliminary focus in establishing the goal and objectives of the Second Decade has been on ensuring that the commitments made by governments and the UN are action-oriented and focused on implementation.

The Permanent Forum has stated its intention to use its coordination role within the UN to promote an integrated approach to the Second Decade and the MDGs, so that they are complementary and mutually reinforcing. The Program of Action for the Second Decade also notes:

that given that the time frame for the implementation of the Millennium Development Goals is the same as that of the Second Decade, the MDGs and the Permanent Forum's focus and recommendations on them should also inform the plan of action for the Second Decade.¹⁰⁷

The Program of Action for the Second International Decade of the World's Indigenous People was approved by consensus by the UN General Assembly on

105 For an overview of the concerns of Indigenous Peoples Organisations see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC, Sydney, 2002, pp193-200.

106 United Nations General Assembly, Resolution – *Second International Decade of the World's Indigenous People*, UN Doc: A/RES/59/174, 20 December 2004, available online at: www.un.org/esa/socdev/unpfii/en/second.html.

107 United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, para 4.



21 November 2005. The approval of the Program of Action followed extensive consultations on a draft program.¹⁰⁸

A copy of key provisions of the Program of Action for the Decade is included as Appendix 4 to this report. The goal and objectives of the Second Decade are set out in Text Box 7 below.

Text Box 7: The goal and objectives of the Second International Decade of the World's Indigenous People¹⁰⁹

Goal

The goal of the Second Decade **is the further strengthening of international cooperation for the solution of problems faced by indigenous people** in such areas as culture, education, health, human rights, the environment and social and economic development, by means of action-oriented programmes and specific projects, increased technical assistance and relevant standard-setting activities.

Themes

Proposed mottos for the Second Decade are "Partnership for further action", "Human rights in practice", "Engagement for action" and "Agenda for life".

Objectives

The Program of Action for the Second Decade approves **five key objectives** for the Decade. These are:

- i. Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects.
- ii. Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.
- iii. Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples.
- iv. Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth.

108 This included an open invitation to all Governments as well as Indigenous organisations to submit proposals for inclusion in the Program in February 2005; discussion on this theme at the Permanent Forum in May 2005 and the Working Group on Indigenous Populations in July 2005; the circulation of a draft program for further comment to all governments as well as Indigenous organisations in May 2005; the revision of this following the Permanent Forum meeting in May 2005 and posting of a revised program on the internet, with further comments sought from all governments as well as Indigenous organisations. See further: United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, paras 5-7.

109 United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, paras 1, 8-10.



- v. Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

The five key objectives cut across the various areas of the goal for the Decade (health, human rights etc). The five objectives also cut across the means set by the General Assembly for the achievement of the goal, namely action-oriented programmes and specific projects, increased technical assistance and relevant standard-setting activities.

The adoption of these objectives and the Program of Action by consensus is significant. **Australia, for example, has agreed to work within this framework in its international cooperation activities as well as its domestic advancement of Indigenous issues.**

In the discussion in the General Assembly following the adoption of the Program of Action for the Decade, Australia made a statement clarifying its position on the Decade. The statement provides Australian Government's agreement to the Program of Action, while noting the following:

6. Ms. Nassau (Australia) said that, while her delegation supported the Second International Decade of the World's Indigenous People and initiatives to raise the profile of indigenous people internationally, such as the Permanent Forum on Indigenous Issues, it disagreed with some elements of the Programme of Action for the Second Decade (A/60/270). Her delegation could not agree to encourage States to ratify the draft convention on the protection of the diversity of cultural contents and artistic expressions, as stated in paragraph 14 of the Programme, as it had concerns that that might allow States to implement measures which conflicted with their obligations under other international agreements, particularly on trade and intellectual property. Her delegation was also concerned by the extensive references to the undefined principle of free, prior and informed consent.

7. She noted a factual error in paragraph 58 of the Programme of Action regarding the Convention on Biological Diversity and the Cartagena Protocol on Biosafety. The reference to "protection" should be amended to read "respect, preservation and maintenance" in keeping with article 8 (j) of the Convention. *Notwithstanding those points, Australia would join the consensus on the draft resolution, which reflected its commitment to advancing indigenous issues over the coming decade.*¹¹⁰

The Program of Action proposes a range of activities in relation to culture, education, health, human rights, the environment and social and economic development.¹¹¹ These are divided up into activities at the international and the national levels, as well as activities aimed at Indigenous Peoples Organisations. These are reproduced in **Appendix 4** of this report.

110 United Nations General Assembly, *Summary record of the 45th meeting: 3rd Committee*, held at United Nations Headquarters, New York, on Monday, 21 November 2005, General Assembly, 60th session, UN Doc: A/C.3/60/SR.45, 8 December 2005, available online at: <http://documents-dds-ny.un.org/doc/UNDOC/GEN/N05/611/94/doc/N0561194.DOC?OpenElement>. Emphasis added.

111 United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, paras 21-90.



The Program of Action also outlines a series of mechanisms for implementing and monitoring progress on the Second Decade.¹¹² These include that:

- All agencies (including UN agencies, governments, indigenous and non-government organisations) adopt plans of concrete activities with specific benchmarks to implement the goal, objectives and programme of action of the Second Decade, and to do so on a basis of gender equality.
- All activities should be undertaken on the basis of the full and effective participation of indigenous peoples. It is suggested that indigenous organizations should establish a council of indigenous peoples in each region or subregion at the international level with a mandate of evaluating on an ongoing basis the degree to which the goal, objectives and programme of action of the Second Decade are being realized.
- Similar Committees of indigenous peoples should be established at the national and local level to monitor the implementation of the programme of action domestically.
- It is recommended that Governments should establish national focal points on indigenous issues and on the Second Decade and intensify coordination and communication at the national level among relevant ministries, agencies and local authorities.
- It is recommended that tri-partite committees should be established at the country level composed of governments, indigenous peoples and United Nations country offices to promote implementation of the objectives of the Second Decade.

What should be clear from the Program of Action is that governments are expected to promote the achievement of the objectives of the Second Decade through both international means, as well as their domestic activities.

These objectives and agreed actions were ultimately adopted by consensus. **All** governments, *including Australia*, have taken on commitments to advance the Second Decade on the basis of mutual respect and in good faith.

Efforts by the Australian government since it made this commitment have been extremely poor. The new arrangements at the federal government level for the delivery of services to Indigenous peoples provides a vehicle for advancing the objectives and activities contained within the Second Decade's Program of Action in a coordinated manner (as proposed above). The current lack of engagement by the federal government on the Second Decade and proposed ways of addressing this are discussed later in this chapter.

Overall, the objectives and Program of Action of the Second Decade provide a focused framework for achieving the protection of the rights of indigenous peoples internationally and domestically over the coming decade.

It highlights important principles for the **process** of engaging with indigenous peoples (on a non-discriminatory basis, with recognition of the distinct cultures of indigenous peoples and on the basis of the full and effective participation of

112 United Nations, General Assembly, *Programme of Action for the Second International Decade of the World's Indigenous Peoples*, UN Doc A/60/270, 18 August 2005, paras 91-99.



indigenous peoples in decision making), as well as focusing on the achievement of **outcomes** for improving the currently parlous state of enjoyment of human rights by indigenous peoples (with targets and benchmarks for achievement, and strong monitoring and accountability mechanisms conducted in partnership with Indigenous peoples).

As noted above, there are also currently concerns about the lack of focus on the implementation of the MDGs in developed countries despite the clear application of these goals to the situation of indigenous peoples (and clear statements about the universality of the outcomes sought through the MDG process).

The timing for achievement of the MDGs aligns with the timing for the Program of Action for the Second Decade. The commitments made through the Second Decade provide a further opportunity to ensure that efforts to address the MDGs also specifically emphasise the particular concerns and issues faced by indigenous peoples.

The combination of these two frameworks – the MDGs and the Second Decade – provide a powerful tool to assist in policy development and program planning over the coming years.

3) Developments in recognition of the rights of Indigenous Peoples

The advocacy of indigenous peoples at the international level can broadly be categorised as addressing the following inter-related purposes:

- 1) *Ensuring processes exist at the international level for the direct engagement and effective participation of indigenous peoples, so that we have a direct role in determining priorities at the international level for the recognition and protection of our rights;*
- 2) *Ensuring that UN programs and existing human rights obligations are accessible to us, in other words, to ensure that we actually benefit from UN activity (such as through the implementation of the MDGs) and that governments faithfully implement their human rights obligations so that we are able to enjoy our rights on an equal basis to all other members of society; and*
- 3) *Ensuring that our distinct cultural characteristics as indigenous peoples are recognised and protected in international law.*

The first of these purposes is integral to the achievement of the other two – the direct participation of indigenous peoples plays a central role in ensuring that policies and programs are appropriately targeted and meeting the actual needs of indigenous communities.

The second of these purposes can be progressed through a focus on closing the implementation gap that exists between the situation of indigenous peoples and the application of existing standards and programs to this situation.

The third purpose, however, requires more than the application of existing programs and human rights standards to the situation of indigenous peoples. It requires the



identification and elaboration of specific forms of protection that are required for Indigenous peoples if we are to fully enjoy all of our human rights.

In other words, it requires the recognition of specific human rights standards for indigenous peoples.¹¹³

The recognition of human rights standards that are specific to indigenous peoples has been, and continues to be, controversial. There are, however, precedents for the recognition of specially elaborated human rights standards that should be remembered and which place this controversy into perspective.

As noted by Asbjorn Eide and Erica-Irene Daes, there are **four categories of human rights** that have emerged in the international human rights system to date. These are:

a) The general, [individual]... human rights to which everyone is entitled, found in the Universal Declaration on Human Rights and elaborated in subsequent instruments, such as the two International Covenants of 1966...

b) The additional rights specific to persons belonging to national or ethnic, religious or linguistic minorities, found in article 27 of the International Covenant on Civil and Political Rights (ICCPR), the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities (“Minority Declaration”), and in several regional instruments dealing with the rights of persons belonging to minorities. They are formulated as rights of persons and therefore individual rights. States (do, however,) have some duties to minorities as collectivities...¹¹⁴

Special minority rights can be claimed by persons belonging to national or ethnic, linguistic or religious minorities, but also by persons belonging to indigenous peoples. The practice of the Human Rights Committee under article 27 of the ICCPR bears this out...¹¹⁵

c) The special rights of indigenous peoples and of indigenous individuals, found in the ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169) and – if and when adopted – in the draft Declaration on the Rights of Indigenous Peoples, adopted by the Working Group on Indigenous Populations (WGIP) in 1993 and now

113 Note that there is a dynamic interchange between these objectives. For example, the standard-setting processes of the Declaration on the Rights of Indigenous Peoples and the elaboration of indigenous specific rights in the WGIP and Permanent Forum have had an impact on the interpretation of existing human rights standards, with a resultant broadening in the coverage of those provisions. This broadened coverage might not, however, have occurred *without* this emphasis on developing Indigenous specific rights.

114 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 2.

115 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 18.



before the Commission on Human Rights. They are mostly rights of groups (“peoples”) and therefore collective rights...¹¹⁶

The rights of indigenous peoples, which, under present international law, are found only under ILO Convention No. 169, can only be asserted by persons belonging to indigenous peoples or their representatives. Members of non-indigenous minorities cannot assert the(se) rights ...¹¹⁷

d) The rights of peoples as provided for in common article 1 to the two International Covenants of 1966. These are solely collective rights...¹¹⁸

There is still no consensus as to which collectivities are the beneficiaries of the right to self-determination under article 1.¹¹⁹

The specific rights of minorities and indigenous peoples in categories b) and c) above, are qualified by the requirement that their enjoyment shall not prejudice the enjoyment by all persons of the universally recognized human rights and fundamental freedoms (in category a) above).

In other words, while there are specific rights to protect the distinct cultural characteristics of minorities and indigenous peoples there is no scope for them to do so to the detriment of other people or to impede the rights of individuals within those groups.

Further, the International Council on Human Rights Policy has described the necessity for a particular group or category of people to have additional, specifically defined forms of recognition as due to the existence of ‘normative protection gaps’ in the international system. They explain this as follows:

A “normative gap” exists when a recurrent event (or act or structural factor) deprives human beings of their dignity. Even when existing instruments provide protection in certain respects, in many cases a new or more comprehensive instrument is required to frame the rights of an affected group more clearly or in human rights terms. Such standards enable members of the group to protect their rights more effectively and clarify the duties of states at the same time.

In this context, it is sometimes suggested that the first years of standard-setting generated foundation standards that applied to all human beings, whereas later standards provided more detailed protection to specific groups. The International Covenants adopted in 1966 protected women and children on the same terms as all people, for example. However, new instruments such as the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW, 1979) and the *Convention on the Rights of the Child* (CRC, 1989) subsequently became necessary to (a) identify principles specific to the group (e.g. the best interest of the child), (b) recognise new rights (e.g. the right of children not to be separated from their

116 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 2.

117 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 19.

118 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 2.

119 Eide, A and Daes, E, *Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*, UN Doc: E/CN.4/Sub.2/2000/10, 19 July 2000, para 21.



parents against their will, or the reproductive rights of women), and (c) specify duties of States that were not defined clearly in the general instruments (e.g. the duty to eliminate stereotyped roles for men and women or the duty to ensure that discrimination against women does not occur in the private sphere, in addition to the public sphere).

Disability might be an example of a current “normative gap” of this type. Existing human rights norms, notably the principle of non-discrimination, protect the rights of people with disabilities. However, welfare approaches to disability, combined with low awareness of human rights in public institutions, are so entrenched that it is reasonable to claim that the rights of people with disabilities are not properly protected. The *Draft Comprehensive and Integral International Convention on the Protection and Promotion of the Rights and Dignity of Persons with Disabilities* (Convention on the Rights of Persons with Disabilities) aims to fill this gap.¹²⁰

For many years, indigenous peoples have been arguing that they suffer from such a normative protection gap in the international human rights system.

Indigenous peoples have suffered discrimination as a result of colonisation and dispossession, yet continue to maintain their status as distinct peoples. While Indigenous peoples are fully entitled to and protected by existing human rights standards, the reality is that these have not fully addressed the consequences of the violation of indigenous peoples rights in the past and have not been successful in protecting the cultures of indigenous peoples.

The reason for this is that most human rights standards are individual in nature, and offer limited protection to the collective rights of indigenous peoples – such as to lands, territories and resources.¹²¹

Accordingly, a process began over twenty years ago to elaborate specific human rights norms that are applicable to indigenous peoples. The UN Declaration on the Rights of Indigenous Peoples is the product of this process.

An overview of the process leading to the creation of the Declaration is provided in the *Social Justice Report 2002*.¹²² The process by which the Declaration was negotiated is unique in that Indigenous peoples and States had an equal role in formulating the Declaration under the auspices of the Working Group on Indigenous

120 International Council on Human Rights Policy, *Human rights standards – learning from experience*, International Council on Human Rights Policy, Versoix, Switzerland 2006, pp7-9, available online at: www.ichrp.org/public/publications.php?id_proj=19&lang=AN.

121 As noted in section 1 of this chapter, there have been some positive developments in providing this recognition through the various human rights treaty committees in the past decade. These Committees have provided recognition to the rights of indigenous peoples to effective participation in decision-making that affects them. The treaty committees have recognised that the protection of the rights to land and resources of indigenous peoples is an integral component of obligations to ensure equality before the law and non-discrimination, as well as to protect the cultures of minority groups. The Committee on the Elimination of Racial Discrimination (CERD) has issued a General Recommendation on Indigenous People which emphasises in paragraph 4(a) that the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) places obligations on States to ‘recognise and respect indigenous peoples distinct culture, history, language and way of life as an enrichment of the State’s cultural identity and to promote its preservation’. This recognition through the existing human rights treaties is extremely important. It is not, however, sufficient to address the scope of the normative protection gap that currently exists for indigenous peoples, particularly due to the individual nature of existing human rights protections and also the requirement that a country has ratified the relevant treaty for these obligations to be enlivened (and therefore the protections available to apply universally to indigenous peoples).

122 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, HREOC Sydney 2002, pp185-189.



Populations. For the past eleven years the Declaration has been negotiated through a Working Group on the Declaration established by the Commission on Human Rights. Ensuring equal participation of indigenous peoples and States has been a consistent feature of this process.

The preamble of the Declaration identifies:

that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests.¹²³

And that there is an:

urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and for their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.¹²⁴

The Declaration on the Rights of Indigenous Peoples seeks to elaborate the rights of indigenous societies at a collective level (i.e. in addition to the rights of indigenous individuals to existing human rights standards). As the preamble to the Declaration also states:

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

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

The Declaration, as approved by the Human Rights Council, has 46 substantive articles and 23 preambular paragraphs.¹²⁵ It is divided into the following broad thematic areas:

- *Over-arching principles* (Articles 1-6): The rights of indigenous peoples to the full enjoyment of all human rights, non-discrimination, self-determination and autonomy, maintenance of Indigenous institutions, and the right to a nationality.
- *Life, integrity and security* (Articles 7-10): Freedom from genocide, forced assimilation or destruction of culture, forced relocation from land, right to integrity and security of the person, and right to belong to an indigenous community or nation.
- *Cultural, spiritual and linguistic identity* (Articles 11 – 13): Rights to practice and revitalize culture and the transmission of histories, languages etc; and

123 Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*, as adopted by the UN Human Rights Council on 29 June 2006, UN Doc: A/HRC/1/L.3, 23 June 2006, Annex, available online at: www.ohchr.org/english/issues/indigenous/docs/wgdd2006/18-rev1.doc.

124 Preamble, *United Nations Declaration on the Rights of Indigenous Peoples*, as adopted by the UN Human Rights Council on 29 June 2006, UN Doc: A/HRC/1/L.3, 23 June 2006.

125 The Declaration, as approved by the Human Rights Council, is available online at: www.ohchr.org/english/issues/indigenous/docs/declaration.doc.



the protection of traditions, sites, ceremonial objects and repatriation of remains.

- *Education, information and labour rights* (Articles 14-17): Right to education, including to run own educational institutions and teach in language; cultures to be reflected in education and public information; access to media (both mainstream and indigenous specific); and rights to protection of labour law and from economic exploitation.
- *Participatory, development and other economic and social rights* (Articles 18-24): Rights to participation in decision-making, through representative bodies; rights to their own institutions to secure subsistence and development; special measures to be adopted to address indigenous disadvantage and ensure non-discriminatory enjoyment of rights; guarantees against violence and discrimination for women and children; right to development; and access to traditional health practices and medicines.
- *Land, territories and resources rights* (Articles 25-32): rights to maintain traditional connections to land and territories; for ownership of such lands and protection of lands by State; establishment of systems to recognize indigenous lands; rights to redress and compensation for lands that have been taken; conservation and protection of the environment; measures relating to storage of hazardous waste and military activities on indigenous lands; protection of traditional knowledge, cultural heritage and expressions and intellectual property; and processes for development on indigenous land.
- *Indigenous institutions* (Article 33 – 37): Rights to determine membership and to maintain institutions (including judicial systems), to determine responsibilities of individuals to their communities, to maintain relations across international borders, and right to the recognition of treaties, agreements and other constructive arrangements with States.
- *Implementation of the Declaration* (Articles 38–42): States and UN agencies to implement the provisions of the Declaration, including through technical and financial assistance; access to financial and technical assistance for Indigenous peoples to implement the Declaration; and conflict resolution processes to be established that are just and fair.
- *General provisions of the Declaration* (Articles 43-46): The provisions of the Declaration are recognized as minimum standards and apply equally to Indigenous men and women; the standards recognized in the Declaration may not be used to limit or diminish indigenous rights, and must be exercised in conformity with the UN Charter and universal human rights standards; the provisions in the Declaration to be interpreted in accordance with principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.¹²⁶

126 For a detailed description of the Declaration's structure (prior to the changes accepted by the Human Rights Council) see: Pritchard, S., *An analysis of the United Nations Draft Declaration on the Rights of Indigenous Peoples*, ATSIC Canberra 1999. See also: Charters, C, 'The rights of Indigenous peoples', *New Zealand Law Journal*, October 2006, pp 335-337.



Text Box 8 below identifies the key features of the Declaration.

Text Box 8: Key features of the Declaration on the Rights of Indigenous Peoples¹²⁷

1. The Declaration affirms that indigenous peoples make a unique contribution to the diversity and richness of civilizations and cultures, which constitutes the common heritage of humankind. The Declaration promotes and enhances the plurality of societies.
2. The Declaration is of utmost importance to combat discrimination against indigenous peoples created by more than five centuries of racism, marginalization and exclusion. The Declaration explicitly encourages harmonious and cooperative relations between States and indigenous peoples. Every provision of the Declaration will be interpreted consistent with the principles of justice, democracy, respect for human rights, non-discrimination and good faith.
3. The Declaration is a reaffirmation of the commitment of the international community to respect cultural diversity and the right to be different.
4. The Declaration is based upon principles of partnership, consultation and cooperation between indigenous peoples and States. This is fully consistent with the theme of Second International Decade of the World's Indigenous People's "Partnership for Action and Dignity" adopted by the UN General Assembly in 2005.
5. The Declaration is an aspirational human rights instrument of great value for all. It establishes a valuable framework for resolving issues and achieving the common objectives of the international community and the UN Charter.
6. The Declaration does not create new rights. It elaborates upon existing international human rights norms and principles as they apply to indigenous peoples.
7. The Declaration promotes equality and non-discrimination for all. The Declaration is essential for the survival, dignity and well-being of indigenous peoples of the world.
8. The Declaration strengthens the international human rights system as a whole.
9. The Declaration recognizes the application of the right of self-determination to Indigenous peoples, exercised in conformity with international law and consistently with the Charter of the United Nations.
10. The Declaration is among the first international human rights instruments to *explicitly* provide for the adoption of measures to ensure that indigenous women and children enjoy protection and guarantees against all forms of violence.

Having initially been drafted by the five independent experts of the UN Working Group on Indigenous Populations, the Declaration had been approved by the Sub-Commission on the Protection and Promotion of Human Rights in 1994 (after 9

127 This Text Box is adapted (with some additions) from Global Indigenous Peoples Caucus, *Fact sheet – The Declaration on the Rights of Indigenous Peoples*, available online at: http://www.ipcaucus.net/IK_1.html.



years of consideration) and then sent forward for consideration by the Commission on Human Rights (CHR).¹²⁸

The CHR established a Working Group to consider the Draft Declaration in 1995. The Working Group on the Draft Declaration met for 11 sessions from 1995 – 2006, with a version of the Declaration ultimately adopted by the Human Rights Council (the replacement structure to the CHR) on 29 June 2006.¹²⁹ At present, the Declaration is to be considered for approval and subsequently entry into force by the UN General Assembly during its current session (due to end in approximately September 2007).

The conduct of the negotiation sessions of the Working Group on the Draft Declaration provides an important context to understand the current deliberations on the Declaration at the General Assembly level of the UN, and the position of the Australian government on the Declaration.

The process leading to the approval of the Declaration by the Human Rights Council was difficult. The Working Group on the Draft Declaration operated on a consensus basis. In the first 9 years of negotiations, consensus was reached on 2 out of 45 articles of the Declaration (with no consideration having been given to the preambular paragraphs of the draft Declaration).

There were, however, major advances in the six weeks of negotiations that comprised the 10th and 11th session of the Working Group held between September 2004 and February 2006.

At the 10th session, a group of countries (led by New Zealand and Norway) introduced an amended text for the Declaration for consideration in the negotiations. This text was intended to provide a ‘compromise’ that bridged the differing positions of governments and indigenous peoples into a revised version of the Declaration which they hoped would meet broad consensus. The introduction of this text, while of concern to most indigenous participants, provided a new dynamic in the negotiations to consider alternative wording for the Declaration.

There was a significant focus during the 10th session on reaching consensus on a range of articles of the Declaration to demonstrate to the CHR that the process was making positive progress towards finalisation. By the end of the session, ‘broad agreement’ had been reached on 13 preambular paragraphs and 14 articles of the Declaration.¹³⁰ Some of these provisions were in their original form in the Declaration whereas others involved some changes to the text that the negotiations had revealed were broadly acceptable to governments and Indigenous organisations.

128 For an overview of the history of the Declaration see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, pp 11-19, 210-215. See also: Calma, T, *Indigenous peoples and the right to self-determination*, Speech, International Law Association (Australian Division) and HREOC workshop: *Indigenous Peoples and Sovereignty – does sovereignty mean secession?*, HREOC, Sydney, 10 November 2004, available online at: www.humanrights.gov.au/speeches/social_justice/sovereignty_seminar.html.

129 Human Rights Council, *Resolution 2006/2 – Working group of the Commission on Human Rights to elaborate a draft Declaration in accordance with paragraph 5 of the General Assembly resolution 49/214 of 23 December 1994*, UN Doc: A/HRC/1/L.3, 23 June 2006, available online at: www.ohchr.org/english/issues/indigenous/docs/declaration.doc.

130 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session*, UN Doc: E/CN.4/2005/89, 28 February 2005, para 48, available online at: www.ohchr.org/english/issues/indigenous/groups/sessions-02.htm.



Despite this progress, these provisions were not able to be provisionally adopted prior to the conclusion of the 10th negotiation session.

As a consequence of this as well as the progress made on other provisions of the Declaration, the Chairman of the Working Group noted that significant progress had been made and differing positions were narrowing. On this basis, he stated that he was ready to make a contribution towards reaching consensus in the form of a 'Chairman's Text' to be considered by the working group. The intention was to 'capture the many good elements that had been brought forward during the session' and to utilise these proposals as a 'basis for further work'.¹³¹

The 'Chairman's Text' formed the basis of discussion at the 11th session in December 2005 and January/February 2006. This text compared the original text of the Declaration with all the proposals made during the negotiation sessions. It then included the Chairman's proposed text for each article based on his assessment of what was capable of meeting with consensus, as well as based on addressing the concerns of States in relation to the original provisions of the Declaration.

The Chairman's text was therefore comprised of a mixture of text from the original Declaration and new text based on the suggestions made during the negotiations (particularly at the 10th session). Discussions were focused on this text at the 11th (and final) session of negotiations in 2005 and 2006.

Consensus was reached on the majority of the Declaration by the end of the 11th session in February 2006. There were also numerous articles on which consensus was close, usually being prevented by only a few delegations.¹³²

The following provisions of the Declaration reached consensus:¹³³

- Preambular paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 11, 13, 16, 17, 18, 18bis, and 19; and
- Articles 1, 2, 4, 6, 7, 9, 14, 15, 16, 17, 18, 19, 22, 22bis, 23, 24, 37, 40, 41, 42 and 44.¹³⁴

The Chairman noted that the following provisions were also extremely close to consensus:

- Articles 12, 13 and 20;¹³⁵ and

131 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its tenth session*, UN Doc: E/CN.4/2005/89, 28 February 2005, para 59.

132 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, paras 11-26, available online at: www.ohchr.org/english/issues/indigenous/groups/groups-02.htm.

133 Note: the numbering of Articles and paragraphs refers to the existing ordering of the Declaration at the time of negotiations – these have varied slightly in the subsequent official version of the Declaration. The Articles are referred to in the thematic clusters in which they were considered.

134 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 25. Note: Articles 5 and 43 were provisionally adopted in earlier sessions of the Working Group and can be added to this list.

135 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 25.



- Articles 10, 21, 26 bis, 28 bis and 38.¹³⁶

He also noted that consensus was prevented on the following provisions due to concerns from usually one delegation in relation to the inclusion of just one word or phrase:

- **Articles 32 and 34 (concerning the word ‘collective’); Article 33 (concerning the word ‘spirituality’); and paragraph 2 of article 35 (concerning the phrase ‘border control laws’).**¹³⁷

The Chairman also noted that further negotiation was not required on the following provisions (although they were not finally agreed as some delegations would only accept these provisions if their concerns relating to other provisions were met):

- Preambular paragraphs 8 and 10,¹³⁸ 12, 14, 15 and 15bis¹³⁹; and
- Preambular paragraphs 6 and 13 and Article 36 (with the exception of one governmental delegation that did not agree to the consensus on these provisions).¹⁴⁰

The Chairman summarised the outcomes in relation to the remaining provisions of the Declaration as follows:

- Articles 3 and 31 (self-determination): ‘consensus could be reached (on Article 3) on the basis that article 31 be placed immediately after article 3’.¹⁴¹
- Article 45 (general provisions of the Declaration): the Chairman would provide ‘a compromise text on the basis of the proposal that emerged from the consultations’ during the session.¹⁴²
- Articles 25-30 (land and resources): the Chairman considered there was a ‘constructive outcome’ in the negotiations on Articles 28 and 29 and this would be reflected in the report; and ‘outstanding issues still remained regarding articles 25, 26, 27 and 30’.¹⁴³

136 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 24.

137 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 21.

138 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 24.

139 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 19.

140 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 23.

141 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 20.

142 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 22.

143 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 24.



This summary shows the substantial consensus reached on the Declaration during the session. It also shows that the provisions on which there remained a lack of consensus (even where such consensus was held up by a small group of governments) are the most controversial provisions of the Declaration. These relate to self-determination, land and resource rights and what are known as the 'general provisions' of the Declaration.

Notably, the Australian government was an active participant in the negotiations and was part of the consensus on the majority of the Declaration. The Australian government was also one of a handful of States that maintained objections to the proposed text of the provisions listed above (relating to self-determination, land and resource rights and the general provisions).

At the end of the 11th session of negotiations, the Chairman informed the working group that he would be preparing a revised version of the Chairman's Text which would reflect the consensus on provisions during the session, as well as including his revised 'proposals regarding articles that were still pending, based on the discussions held during the sessions'.¹⁴⁴ He further noted that his revised Chairman's Text 'would be presented to the Commission on Human Rights with the hope that it would be considered as a final compromise text' and be adopted accordingly.¹⁴⁵

It was indeed the revised Chairman's Text that was adopted by the Human Rights Council (which had replaced the Commission on Human Rights) on 29 June 2006.

On the adoption of the Declaration by the Human Rights Council, the Global Indigenous Peoples Caucus made the following comments:

The roots of the present Declaration go back to 1974. In 1977, the pivotal gathering of Indigenous peoples here at the United Nations prompted the world community to turn their attention to Indigenous Peoples in the Americas.

We persisted in our efforts and remained vigilant against some of the most formidable state forces in the world.

We relied upon our ability to engage in substantive debate, with positions that remain consistent with international law.

One of the most important outcomes has been that throughout all of our expressions, sometimes in our own languages, we have succeeded in educating the international community about the status, rights and lives of indigenous peoples in every corner of world.

The true legacy of the Declaration will be the way in which we, the indigenous peoples of the world, in partnership with States, breathe life into these words.

The real test will be how this will affect the lives of our people on a daily basis.

While these are distinct and fundamental individual and collective human rights, it is their implementation at the community level, which will have an impact and give our children hope for a future where their lives and identity will be respected globally.

144 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 28.

145 Commission on Human Rights, *Report of the working group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 on its eleventh session*, UN Doc: E/CN.4/2006/79, 22 March 2006, para 30.



We express our wish as Indigenous Peoples for harmony in accordance with the natural world and hope that our multiple futures as Indigenous Peoples and States are brought together to embrace the positive contribution that we make to humankind.¹⁴⁶

Text Box 9: The Declaration on the Rights of Indigenous Peoples is ‘a historic document, out of a historic process.’ Why the Declaration is important¹⁴⁷

The following comments are extracted from a presentation by the Office of the High Commissioner for Human Rights on the Declaration on the Rights of Indigenous Peoples at a seminar convened in New York on 4 November 2006.

This is an historic development. The adoption of this instrument (by the Human Rights Council) represents a lot of years of work, by a lot of people. It has been a process that involved representatives of the indigenous community, delegations of Member States and NGOs, all working together – as is often the case in a human rights realm – **to bring about some normative clarity on what is required.**

Kofi Annan, UN Secretary General, has made a point of his mission in the last two terms, to ‘democratize’ the way the UN goes about its work. That is, leadership is firmly in the hands of the Member States, as represented by their delegations, and that other voices – **non-governmental voices, specialist voices, indigenous voices** – **also contribute valuable information in the fora of this institution.** Here, in the development of this Declaration, is a case in point.

It is clear that the Declaration is not a treaty. One would be fair in asking the question ‘well if it is not a treaty with binding legal obligations, what is the value of this instrument?’ and I say these following points.

(1) It is an extremely useful tool for those of us who work in human rights. It is, in many ways, a ‘harvest’ that has reaped existing ‘fruits’ from a number of treaties, and declarations, and guidelines, and bodies of principle, but, importantly, also from the jurisprudence of the Human Rights bodies that have been set up by the UN and charged with monitoring the implementation of the various treaties.

(2) The rights contained in the Declaration are not new. There are no new rights in the Declaration from our perspective. They are rights that have been codified by the member States of this organization in countless treaties and have existed for the entire life of this organization since the adoption of the universal declaration of HR. But they are rights that have been violated – if we are to be frank, with impunity – vis-a-vis Indigenous Peoples for as long as these rights have existed. So the Declaration does something that is very useful.

146 Global Indigenous Peoples’ Caucus, *Closing statement – Human Rights Council*, 30 June 2006, available online at: www.humanrights.gov.au/social_justice/drip/closing.html.

147 Extracted from Mokhiber, C, *Declaration a historic document, out of a historic process*, Panel Presentation, New York, 4 November 2006, available online at: <http://www.ipcaucus.net/Mokhiber.html>. For further information on the panel discussion see: http://www.ipcaucus.net/Panel_061026.html.



It helps us to clarify what are the normative implications and the operational requirements of the existing catalogue of human rights standards that have been adopted by the UN over the years. This clarification occurs in a way that is 'situation-specific', explaining how these pre-existing rights apply to the very particular case of Indigenous peoples around the world.

(3) The Declaration is not just a re-statement of existing rights, although it does not create any new rights. It is a remarkably clear articulation of the nature of the obligations and entitlements that attach to those pre-existing rights in the case of Indigenous Peoples. If you look at the instrument you will see the practical value of language that is drawn from the jurisprudence and helps us to understand those rights better, language like 'free, prior and informed consent', language like 'just and fair compensation' and language like 'fair and independent process'. These are not new concepts but they are very well articulated in the declaration.

(4) The Declaration is a comprehensive standard on human rights. It covers the full range of rights of Indigenous Peoples – in fact, rights of all of us but as they relate to Indigenous Peoples. It catalogues the kinds of violations that have historically plagued and, sadly, continue to plague Indigenous Peoples around the world. In particular, there are attacks upon their culture, their land, their identity, and their own voice. The Declaration has remarkable detail on issues like 'cross-border' relations and discrimination suffered by indigenous groups. In short the Declaration lays out the minimum standards for the survival, dignity and well being of Indigenous Peoples. That, itself, is language taken from the Declaration and is proof enough of the practical value of the instrument.

(5) The Declaration does not take an 'either/or' approach that historically has been forced on Indigenous Peoples around the world. Indigenous Peoples, for example, were forced to either be restricted to 'reserves' or to suffer discrimination before official state institutions. This Declaration incorporates 'choice' as a fundamental element to which we are all entitled. You can see that the declaration looks both at respect for indigenous institutions, on the one hand, but also equality before official institutions on the other hand. It looks at both the recognition of Indigenous identity, on the one hand, but also the right to national citizenship on the other hand. It looks at respect for traditional justice systems, on the one hand, but also requires access to national justice systems on the other hand. This very balanced 'choice' approach to human rights is codified in countless instruments but now we have it very clearly laid out in regard to the long struggles of Indigenous Peoples.

The Declaration was adopted by the Human Rights Council with 30 votes in favour, 2 against, 12 abstentions and three voting countries absent.¹⁴⁸ The 2 votes against were by Canada and the Russian Federation.¹⁴⁹

The Canadian government had indicated in debates prior to the vote on the Declaration that its principle concern was the lack of time for consideration of the revised Chairman's Text of the Declaration. On 27 June 2006 they stated:

¹⁴⁸ Only the 47 elected members of the Human Rights Council can vote.

¹⁴⁹ For further information see: Statement by Ambassador Paul Meyer (Canada) to the 1st session of the Human Rights Council, 29 June 2006, available online at www.docip.org/Human%20Rights%20Council/Session1/Intervention%20avant%20le%20vote/5.Canada.pdf, accessed 22 November 2006.



The conclusions and proposals of the Chairperson-Rapporteur reflect (recent) progress. There are, however, some key issues, such as the section on lands, territories and resources, where the provisions are unclear and open to competing interpretations.

The Chairperson-Rapporteur has proposed language on several key issues that requires discussion among all parties. Such discussion on this latest draft has not taken place... As such, Canada would like some more time to work with other Member States and Indigenous peoples to arrive at a more workable document...

We are simply asking for more time.¹⁵⁰

Australia had presented its objections to the Declaration in a joint statement with the governments of New Zealand and the United States of America.¹⁵¹ It argued that the Chairman's text provides 'a basis for further consideration and work. But it does not enjoy consensus' and argued that 'the current text is confusing and would risk endless and conflicting interpretations and debate on its application'.¹⁵²

The government noted its principle objections to the Declaration were as follows:

- In relation to **self-determination** that 'the provisions for articulating self-determination for Indigenous Peoples inappropriately reproduce common Article 1 of the Covenants. Self-determination in the Chair's Text could be misrepresented as providing a unilateral right of self-determination and possible secession upon a specific subset of the national populace, thus threatening the political unity, territorial integrity and the stability of existing UN Member States'.¹⁵³
- In relation to **lands, territories and resources** that 'they ignore the contemporary realities in many countries with indigenous populations, by appearing to require the recognition of indigenous rights to lands now lawfully owned by other citizens, both indigenous and non-indigenous (Article 26). Such provisions would be both arbitrary and impossible to implement'.¹⁵⁴
- In relation to the **status of individual rights**, that 'important provisions of the Chair's Text are potentially discriminatory. It seems to be assumed that the human rights of all individuals, which are enshrined in international law, are a secondary consideration in this text. The intent of the Working Group is that was not that collective rights prevail over the human rights of individuals, as could be misinterpreted in Article 34 of the text and elsewhere'.¹⁵⁵ They also argued that the Chair's Text 'appears

150 Human Rights Council, *Statement to the Human Rights Council by the Canadian Delegation – Working Group on the Draft Declaration on the Rights of Indigenous Peoples*, 27 June 2006, pp1-2, available online at: www.docip.org/Human%20Rights%20Council/Session1/cddh1_2.pdf.

151 While none of these countries have been elected as members of the Human Rights Council, they will be able to vote on the Declaration at the General Assembly.

152 Human Rights Council, *Joint statement by Australia, New Zealand and the United States of America on the Chair's text on the Declaration on the Rights of Indigenous Peoples*, 27 June 2006, p1, available online at: www.docip.org/Human%20Rights%20Council/Session1/cddh1_22.pdf.

153 Human Rights Council, *Joint statement by Australia, New Zealand and the United States of America on the Chair's text on the Declaration on the Rights of Indigenous Peoples*, 27 June 2006, p1.

154 Human Rights Council, *Joint statement by Australia, New Zealand and the United States of America on the Chair's text on the Declaration on the Rights of Indigenous Peoples*, 27 June 2006, p2.

155 Human Rights Council, *Joint statement by Australia, New Zealand and the United States of America on the Chair's text on the Declaration on the Rights of Indigenous Peoples*, 27 June 2006, p2.



to confer upon a sub-national group, a power of veto over the laws of a democratic legislature (Article 20) ... One group in society (cannot) have rights that take precedence over those of others'.¹⁵⁶

These concerns are poorly argued and unjustified. They should be rejected outright as they do not interpret the Declaration according to principles of good faith, respect for human rights, equality and non-discrimination. To interpret in accordance with these principles would be consistent with principles of international law as well as consistent with Article 46 of the Declaration.

Some particular concerns with the views put by the Australian government are as follows.

- In relation to **self-determination**, the government freely admits in their statement that to interpret the right of self-determination for Indigenous peoples as providing a unilateral right of self-determination and possible secession would **misrepresent** the Chair's Text. That is, it would amount to a misinterpretation of the provisions of the Declaration. It is also unclear what the government means by the phrase a 'unilateral right of self-determination'. What is clear however, is that international law does not support a unilateral right to secession.
- Indigenous organisations and other governments have consistently pointed out that the Declaration also provides guarantees against secession, such as through the preamble where it notes that 'nothing in this Declaration may be used to deny any peoples their right of self-determination, exercised in conformity with international law' and Article 46(1) which provides that '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'.¹⁵⁷
- The debates on self-determination during the negotiations also demonstrated a high degree of consensus about the applicability of self-determination to indigenous peoples. The dispute about self-determination centres on the attempt by some States to limit the potential scope of this right, not whether it applies at all. Some States argued that the purpose in the Declaration is to affirm the existence of the right for indigenous peoples, not resolve broader issues on its application, which the Declaration makes clear, will be done in accordance with international law. The Declaration also provides, in Articles 40 and 46, that any disputes that subsequently arise between Indigenous peoples and States should be resolved through 'just and fair procedures for the

156 Human Rights Council, Joint statement by Australia, New Zealand and the United States of America on the Chair's text on the Declaration on the Rights of Indigenous Peoples, 27 June 2006, p2. See also the joint statement by Australia, New Zealand and the USA on free, prior and informed consent, delivered at the 5th session of the Permanent Forum on Indigenous Issues, 22 May 2006, available online at www.docip.org/Permanent%20Forum/pfi5_185.PDF, accessed 22 November 2006.

157 For a detailed analysis of this issue see further: Calma, T (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Indigenous peoples and the right to self-determination*, Speech, International Law Association (Australian Division) and HREOC workshop: *Indigenous Peoples and Sovereignty – does sovereignty mean secession?*, HREOC, Sydney, 10 November 2004, available online at: www.humanrights.gov.au/speeches/social_justice/sovereignty_seminar.html.



resolution of conflicts and disputes with States' as well as being resolved 'in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.' Compliance with these principles is expected from both States *and* indigenous peoples.

- Many States indicated their preference for **any concerns to be addressed** through positive language (that affirms both the existence of the right and highlights the value of establishing new partnership relationships between indigenous peoples and the State, which contributes to preserving territorial integrity and avoids confrontation) rather than by seeking to introduce limitations which may result in the future in discriminatory treatment.¹⁵⁸ This positive approach is reflected in the provisions of the Declaration, such as:
 - the principles in Article 46 outlined above;
 - the requirement also set out in Article 46 that the rights in the Declaration shall only be subject to limits that are non-discriminatory and which are 'strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others';
 - the preamble where it notes the right of indigenous peoples to 'freely determine their relationships with States in a spirit of coexistence, mutual benefit and full respect' and that the recognition of the rights of indigenous peoples in this declaration (including recognition of their right to self-determination) will 'enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith'.
- In relation to the concerns on **lands, territories and resources**, the specific concern outlined above cannot be seen as a reasonable or good faith interpretation of the provisions of the Declaration (as is expected in international law and as outlined in other provisions of the Declaration). The provisions of the Declaration must be read in the context of other provisions relating to land which provide for just and fair processes to be established to delineate indigenous land (Article 27) as well as for processes for redress and compensation (Article 28) which enable such concerns to be addressed on the basis of mutual respect and good faith.
- It has also been noted that there are 'precedents in international law and abundant arguments in doctrine and in practice (ILO Convention 169, decisions of the Inter-American Court of Human Rights and others)

158 For an overview of this debate see further: Commission on Human Rights, *Conference Room Paper – 11th session of the Working Group on the Declaration on the Rights of Indigenous Peoples: International workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples, Patzcuaro, Michoacán, Mexico, 26 – 30 September 2005*, UN Doc: E/CN.4/2005/WG.15/CRP.1, 29 November 2005, pp4-5, available online at: www.ohchr.org/english/issues/indigenous/docs/wgdd2005/crp1.doc.



which are sufficiently clear' that the terminology used in the Declaration does not jeopardize the territorial integrity of the State.¹⁵⁹

- In relation to the **status of individual rights**, this argument is patently absurd and incorrect. The Declaration notes in the preamble, for example, that 'indigenous individuals are entitled without discrimination to all human rights recognized in international law'. Article 1 of the Declaration also states that 'Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law'. **The collective rights of indigenous peoples are to be applied consistently with individual rights and on a basis that does not impede the rights of indigenous individuals.**

On these issues, I agree fully with the comments of Professor Rodolfo Stavenhagen, the United Nations Special Rapporteur on Indigenous Issues, when he stated to the Human Rights Council that:

In response to the concerns of some States regarding issues of sovereignty and territorial integrity, the Special Rapporteur considers that **no country has ever been diminished by supporting an international human rights instrument; rather the contrary is the case.**¹⁶⁰

A joint intervention at the Permanent Forum on Indigenous Issues in May 2006 and at the Human Rights Council in June 2006 was made by approximately 100 Indigenous organisations. It noted the following critical points on the Declaration in relation to the position of Australia, New Zealand and the United States of America:

17. To date, we have heard dissent from only a few States – generally those countries who possess dismal human rights records relating to indigenous peoples. For example, in regard to the United States, New Zealand and Australia, all of these States are either now or have been the subject of "early warning and urgent action" procedures by the Committee on the Elimination of Racial Discrimination.
18. Regrettably, key positions that are advanced by these States regarding the collective human rights of Indigenous peoples are most often discriminatory. They are not consistent with the Purposes and Principles of the *U.N. Charter* or with international law and its progressive development. Nor are these positions compatible with their existing international obligations.
19. We strongly urge the United Nations not to accommodate such discriminatory voices by delaying the adoption of the *Declaration*. In the

159 See further: Commission on Human Rights, *Conference Room Paper – 11th session of the Working Group on the Declaration on the Rights of Indigenous Peoples: International workshop on the draft United Nations Declaration on the Rights of Indigenous Peoples, Patzcuaro, Michoacán, Mexico, 26-30 September 2005*, UN Doc: E/CN.4/2005/WG.15/CRP.1, 29 November 2005, pp6-7.

160 Emphasis added. As quoted in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Commissioner praises United Nations Human Rights Council for adopting the Declaration on the Rights of Indigenous Peoples*, Statement, 30 June 2006, available online at: www.humanrights.gov.au/media_releases/2006/47_06.htm.



Programme of Action for the Second International Decade of the World's Indigenous People, the General Assembly has stipulated that the “draft [Declaration] shall not fall below existing international standards”.

20. In the March 2006 General Assembly resolution that creates the Human Rights Council, it is specified that the Council is “responsible for promoting universal respect for the protection of all human rights ... for all, without distinction of any kind”. The discriminatory and lesser standards being proposed by a few States would thus be inconsistent with the mandate of the Council.¹⁶¹

The Declaration was sent by the Human Rights Council to the General Assembly of the UN for adoption.

On 28 November 2006, the Third Committee of the General Assembly decided to defer consideration of the Declaration ‘to allow time for further consultations’. It noted, however, that the General Assembly would ‘conclude consideration of the Declaration before the end of (the General Assembly’s) sixty-first session’ (in approximately September 2007).¹⁶²

The Australian Government supported delaying consideration of adoption of the Declaration.

At the time, I noted that:

It is frustrating that countries such as Namibia (who introduced the resolution in the Third Committee) have raised concerns about the Declaration that have been debated ad nauseum in the working group negotiations over the past decade (Namibia chose not to participate in those negotiations).

I am concerned that the Declaration has been stalled on the basis of arguments that have been roundly rejected by indigenous peoples over 11 years of negotiations. For example, Indigenous delegations have previously stated that any recognition of a right to self-determination in the Declaration should be done in accordance with international law and pose no threat to the territorial integrity of nation States. There is a triple guarantee of this in the Declaration.¹⁶³

I also expressed my concern that any further discussions on the Declaration should be conducted with the full participation of Indigenous peoples. As I noted:

Let us remember that we are currently in the second International Decade for the World’s Indigenous People. The resolution adopting the Decade was adopted unanimously and is based on a theme of partnership with Indigenous peoples. The Program of Action for the Decade also recognises the status of Indigenous peoples as ‘peoples’ in international law – again, something that was adopted by general consensus.

161 Joint intervention by numerous Indigenous organisations at the Permanent Forum on Indigenous Issues under Agenda item 4(b), *The Draft U.N. Declaration on the Rights of Indigenous Peoples and Millennium Development Goals: Importance of a Human Rights-Based Approach*, 22 May 2006, available online at http://www.hreoc.gov.au/social_justice/drip/joint_statement.html, accessed 6 March 2007.

162 UN Doc: A/C.3/61/L.57/Rev.1, 21 November 2006, available online at: www.un.org/Docs/journal/asp/ws.asp?m=A/C.3/61/L.57/Rev.1. For an overview of the debate in the Third Committee see: www.un.org/News/Press/docs/2006/gashc3878.doc.htm.

163 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Statement on the Declaration on the Rights of Indigenous Peoples*, 29 November 2006, available online at: www.humanrights.gov.au/media_releases/2006/97_06.htm.



Given this recognition, it would be inconceivable and completely inappropriate for any future discussions on the Declaration to exclude indigenous peoples.

I also call on the Australian Government to actively engage with Indigenous peoples in Australia in relation to the Declaration. We know that the majority of the Declaration is supported by our government – as they joined in the consensus agreement on over two thirds of the Declaration’s provisions in the final session of the working group negotiations earlier this year.

However, the Australian Government’s objections to the Declaration need to be laid out publicly – article by article – so they can be debated with Indigenous peoples and tested against Australia’s existing international human rights obligations.¹⁶⁴

That is the current status of the Declaration. It awaits decision in the latter part of 2007 by the General Assembly. The outcome of that decision will be critical for indigenous peoples.

4) Summary of international developments – the current situation

This chapter has highlighted the large scope of activities taking place within the UN system that relate to the recognition of the rights of indigenous peoples.

• UN Reform processes

The United Nations reform process sets the broader framework within which to consider the level of protection that is provided for the human rights of indigenous peoples worldwide.

The *In larger freedom* report, by the Secretary-General of the UN, sets out the ‘implementation challenge’ for governments to make commitments such as the Millennium Development Goals meaningful. It challenges governments to no longer treat the Millennium Development Goals as ‘floating targets, referred to now and then to measure progress’. Instead, they must inform, on a daily basis, national strategies and international assistance alike.

It also challenges governments ‘to be held to account for respect of the dignity of the individual, to which they too often pay only lip service’ and to ‘move from an era of legislation to an era of implementation’.

The UN World Summit in September 2005 responded with all governments agreeing to integrate the promotion and protection of human rights into national policies and to support the further mainstreaming of human rights throughout the United Nations system.

The World Summit also highlighted the ongoing importance of addressing indigenous peoples’ human rights and for maintaining processes for the participation of indigenous peoples. It reaffirmed the commitment of all governments to continue advancing the human rights of the world’s indigenous peoples at the local, national, regional and international levels, including through consultation and collaboration with them.

¹⁶⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, *Statement on the Declaration on the Rights of Indigenous Peoples*, 29 November 2006, p1.



The Summit ultimately agreed to structural reforms to the UN which recognise the equal importance of human rights alongside development and security. Principally, this involved agreement to the upgrading of the Commission on Human Rights into a full-fledged Human Rights Council.

The creation of the Human Rights Council provides opportunities for indigenous peoples to further promote their human rights, particularly through the new universal periodic review mechanism.

The modalities of how the Human Rights Council will operate, and the continuation of various subsidiary and advisory bodies remains to be determined.

Indigenous peoples have advocated that any future arrangements should enhance and not diminish the existing functions provided by the Working Group on Indigenous Populations, the Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples and the United Nations Permanent Forum on Indigenous Issues.

Further, indigenous peoples have argued that the UN should lay to rest any insecurities among indigenous peoples that the United Nations reform process and ongoing reorganization of the United Nations human rights structures could lead to the diminution or disappearance of existing positive functions which are central to the advancement of the rights of indigenous peoples.

The challenge that has emerged through the current human rights reform process is therefore to maintain the capacity for direct participation of and engagement with indigenous peoples on human rights issues within the structures of the newly created Human Rights Council.

This is particularly crucial as there remain many issues that require the further elaboration of indigenous rights through the international human rights system. These include guidelines on the protection of indigenous heritage, the application of the principle of free, prior and informed consent, and the guidelines and monitoring for the implementation of the Declaration on the Rights of Indigenous Peoples.

- **The mainstreaming of human rights across the UN and participatory development practices**

Accompanying these reforms to the UN structure have been sustained efforts to mainstream human rights across the UN by integrating them into all policies and programs.

This has occurred through the increased recognition of the right to development and the entrenchment within the UN of a human rights based approach to development and poverty eradication.

The Declaration on the Right to Development (DRD) provides the platform that 'The human person is the central subject of development and should be the active participant and beneficiary of the right to development'.

The UN agencies have committed to ensuring that all their policies and programming are consistent with the right to development through the adoption in 2003 of the *Common Understanding of a Rights Based Approach to Development Cooperation*. This ensures that active participation is central to the development, implementation and monitoring of all development programs.



This has been accompanied by an increased recognition, including under human rights treaties, of the right of indigenous peoples to effective participation in decision making that affects them and to the applicability of the right of self-determination to indigenous peoples.

These developments have in turn begun to crystallise into a growing acceptance of the emerging concept of free, prior and informed consent. This principle is increasingly emerging as a practical methodology within the UN system for designing programs and projects, which either directly or indirectly affect indigenous peoples. It is also a mechanism for operationalising the human-rights based approach to development.

Both the Permanent Forum and the WGIP have emphasised that the principle of free, prior and informed consent is not a newly created right for indigenous peoples. Instead, it brings together, or synthesises, the active legal obligations of States under existing international law (such as the provisions relating to self-determination, cultural and minority group rights, non-discrimination and equality before the law).

Procedurally, free, prior and informed consent requires processes that allow and support meaningful and authoritative choices by indigenous peoples about their development paths.

In relation to development projects affecting indigenous peoples' lands and natural resources, the respect for the principle of free, prior and informed consent is important so that:

- Indigenous peoples are not coerced, pressured or intimidated in their choices of development;
- Their consent is sought and freely given prior to the authorization and start of development activities;
- Indigenous peoples have full information about the scope and impacts of the proposed development activities on their lands, resources and well-being;
- Their choice to give or withhold consent over developments affecting them is respected and upheld.

The principle of free, prior and informed consent has recently received important international endorsement by the United Nations General Assembly. The Program of Action for the Second International Decade of the World's Indigenous People includes the objective of 'promoting the full and effective participation of Indigenous peoples in decisions which directly or indirectly affect them, and to do so in accordance with the principle of free, prior and informed consent'.

These developments in international law (through binding treaty obligations) and UN policy and practice demonstrate the increased acknowledgement and reliance on human rights as providing a framework for proactively addressing existing inequalities within society and for recognising and protecting the distinct cultures of Indigenous peoples. And there are increasing expectations that this be done on the basis of full and effective participation of affected Indigenous peoples.



• Global commitments to action: The MDG's and Indigenous peoples

The Millennium Development Goals, as agreed in 2000, are intended to apply and to benefit *all* people. This is in accordance with the understanding that human rights are universal, inalienable and indivisible.

Concerns remain that after 5 years of implementation, there is insufficient focus on the application of the MDGs to indigenous peoples and also to within developed countries.

The Inter-Agency Support Group on Indigenous Issues (IASG) has noted that it appears from the available evidence that indigenous and tribal peoples are lagging behind other parts of the population in the achievement of the goals in most, if not all, of the countries in which they live, and indigenous and tribal women commonly face additional gender-based disadvantages and discrimination.

There are also concerns that the effort to meet the targets laid down for the achievement of the Millennium Development Goals could in fact have harmful effects on indigenous and tribal peoples, such as the acceleration of the loss of the lands and natural resources on which indigenous peoples' livelihoods have traditionally depended or the displacement of indigenous peoples from those lands.

While the Millennium Development Goals carry a potential for assessing the major problems faced by indigenous peoples, the Millennium Development Goals and the indicators for their achievement do not necessarily capture the specificities of indigenous and tribal peoples and their visions. Efforts are needed at the national, regional and international levels to achieve the Millennium Development Goals with the full participation of indigenous communities without interfering with their development paths and their holistic understanding of their needs. Such efforts must take into account the multiple levels and sources of the discrimination and exclusion faced by indigenous peoples.

The Permanent Forum have identified that the next step in redressing these concerns is to facilitate processes for indigenous peoples 'to identify gaps in existing indicator frameworks, examine linkages between quantitative and qualitative criteria, and propose the development of indicators that are culturally-specific, measure exclusion, and reflect the aspirations of indigenous peoples'.

A preliminary series of indicators for consideration at the national and international level, and application in developed countries, has been suggested based on the two key themes of **Identity, Land and Ways of Living; and Indigenous Rights to, and Perspectives on, Development.**

For Indigenous peoples in Australia, there remains insufficient recognition that there are challenges for meeting the MDGs. Australia treats the MDGs as a matter of foreign policy, relevant only to Australia's international aid programme.

There is currently an absence of mechanisms in Australia for Indigenous peoples to be active participants in the planning, design, implementation, monitoring and evaluation of policies, programmes and projects. This is particularly the case with the absence of Indigenous representative structures at a national and regional level.



There is a need for Australian governments to adopt a human rights based approach to development to underpin poverty eradication strategies. This requires recognition of Indigenous peoples as distinct peoples and the respect for their individual and collective human rights.

- **Global commitments to action: The Second International Decade of the World's Indigenous People**

On 20 December 2004, the UN General Assembly proclaimed the Second International Decade of the World's Indigenous People. The Decade commenced on 1 January 2005 and runs until 2015. The Decade provides a focal point for all UN activity on indigenous peoples over the next decade, as well as the efforts of governments through international cooperation and within countries.

The focus in the preliminary stages of the Decade has been on ensuring that the commitments made by governments and the UN are action-oriented and focused on implementation.

The goal of the Second Decade is the further strengthening of international cooperation for the solution of problems faced by indigenous people in such areas as culture, education, health, human rights, the environment and social and economic development

The Program of Action for the Second Decade approves **five key objectives** for the Decade. These are:

- i. Promoting non-discrimination and inclusion of indigenous peoples in the design, implementation and evaluation of international, regional and national processes regarding laws, policies, resources, programmes and projects.
- ii. Promoting full and effective participation of indigenous peoples in decisions which directly or indirectly affect their lifestyles, traditional lands and territories, their cultural integrity as indigenous peoples with collective rights or any other aspect of their lives, considering the principle of free, prior and informed consent.
- iii. Redefining development policies that depart from a vision of equity and that are culturally appropriate, including respect for the cultural and linguistic diversity of indigenous peoples.
- iv. Adopting targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks, and particular emphasis on indigenous women, children and youth.
- v. Developing strong monitoring mechanisms and enhancing accountability at the international, regional and particularly the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

The Program of Action proposes a range of activities in relation to culture, education, health, human rights, the environment and social and economic development. These are divided up into activities at the international and the national levels, as well as activities aimed at Indigenous Peoples Organisations.



The Program of Action also outlines a series of mechanisms for implementing and monitoring progress on the Second Decade. These include that:

- All agencies (including governments, Indigenous and non-government organisations) adopt plans of concrete activities with specific benchmarks to implement the programme of action of the Second Decade;
- All activities be undertaken on the basis of the full and effective participation of indigenous peoples, with Indigenous organizations establishing mechanisms in each region to evaluate on an ongoing basis the degree to which the programme of action of the Second Decade is being realized;
- Committees of Indigenous peoples should be established at the national and local level to monitor the implementation of the programme of action domestically;
- Governments should establish national focal points on indigenous issues and on the Second Decade and intensify coordination and communication at the national level among relevant ministries, agencies and local authorities; and
- Tripartite committees should be established at the country level composed of governments, indigenous peoples and United Nations country offices to promote implementation of the objectives of the Second Decade.

Overall, the objectives and the Program of Action of the Second Decade provide a focused framework for achieving the protection of the rights of indigenous peoples internationally and domestically over the coming decade.

It highlights important principles for the **process** of engaging with indigenous peoples (on a non-discriminatory basis, with recognition of the distinct cultures of indigenous peoples and on the basis of the full and effective participation of indigenous peoples in decision making), as well as focusing on the achievement of **outcomes** for improving the currently parlous state of enjoyment of human rights by indigenous peoples (with targets and benchmarks for achievement, and strong monitoring and accountability mechanisms conducted in partnership with indigenous peoples).

International efforts over the past two years have sought to ensure that the MDG process and the Second International Decade are mutually reinforcing and complementary in their focus, in order to maximise the opportunities to advance the situation of indigenous peoples.

The Permanent Forum has stated its intention to use its coordination role within the UN to promote an integrated approach to the Second Decade and the MDGs, so that they are complementary and mutually reinforcing.

• **Recognition of Indigenous specific rights**

Indigenous peoples have advocated the need for additional, specifically defined forms of recognition due to the existence of a 'normative protection gap' in the international system.



The reason for this is that most human rights standards are individual in nature, and offer limited protection to the collective rights of indigenous peoples – such as to lands, territories and resources.

The process of elaborating specific human rights norms that are applicable to indigenous peoples began over 20 years ago. The outcomes of this advocacy are reflected in the UN Declaration on the Rights of Indigenous Peoples.

The Declaration is of utmost importance to combat discrimination against indigenous peoples. It explicitly encourages harmonious and cooperative relations between States and indigenous peoples. Every provision of the Declaration has been designed to be interpreted consistent with the principles of justice, democracy, respect for human rights, non-discrimination and good faith.

The Declaration is also:

- a reaffirmation of the commitment of the international community to respect cultural diversity and the right to be different;
- based upon principles of partnership, consultation and cooperation between indigenous peoples and States; and
- an aspirational human rights instrument that establishes a valuable framework for resolving issues and achieving the common objectives of the international community and the UN Charter.

The Declaration does not create new rights. It elaborates upon existing international human rights norms and principles as they apply to indigenous peoples. The Declaration was adopted by the Human Rights Council on 29 June 2006 and is currently being considered by the General Assembly of the UN.

There exists substantial consensus on the vast majority of the provisions of the Declaration, with a small group of States maintaining objections.

Notably, the Australian government was an active participant in the negotiations and was part of the consensus on the majority of the Declaration. The Australian government was also one of a handful of States that maintained objections to the proposed text of the provisions relating to self-determination, land and resource rights and the general provisions.

The Australian government concerns have been poorly argued at the international level and are unjustified. They should be rejected outright as they do not interpret the Declaration according to principles of good faith, respect for human rights, equality and non-discrimination. The government's interpretation is not in accordance with principles of international law or consistent with Article 46 of the Declaration.

In relation to these objections, the United Nations Special Rapporteur on Indigenous Issues has argued that no country has ever been diminished by supporting an international human rights instrument; rather the contrary is the case.



Closing the 'protection gap' – Implementing a human rights based approach to Indigenous policy and service delivery in Australia

The outline of international developments in this chapter shows that the human rights of indigenous peoples have received extensive consideration in recent years.

Through a range of processes and mechanisms, States have entered into a broad range of commitments relating to the human rights of indigenous peoples. Some of these emerge through commitments to action – such as through the World Summit outcomes, the Millennium Development Goals and the Program of Action for the Second International Decade of the World's Indigenous People – whereas others relate to human rights obligations and international law, such as the developments through the UN human rights treaty committees, and the standard setting work of the Special Rapporteur, WGIP and Permanent Forum on Indigenous Issues.

Through these processes, governments of the world have agreed to actively engage with indigenous peoples locally to promote and implement the commitments they have made at the international level. As an example and as outlined in detail above, governments have committed to:

- achieve the Millennium Development Goals by 2015;
- adopt plans of concrete activities with specific benchmarks to implement the goal, objectives and programme of action of the Second Decade;
- establish national focal points within government on indigenous issues and on the Second Decade, as well as establish consultative processes (such as tri-partite committees with indigenous peoples and the UN) to promote implementation of the objectives of the Second Decade;
- adopt targeted policies, programmes, projects and budgets for the development of indigenous peoples, including concrete benchmarks; and
- develop strong monitoring mechanisms and accountability at the national level, regarding the implementation of legal, policy and operational frameworks for the protection of indigenous peoples and the improvement of their lives.

In addition, the human rights based approach to development has come to the fore of international discussion (with the World Summit outcomes emphasising achievement of the right to development as an essential component of the universality and inter-dependence of human rights).

In practical terms, there are clear commitments by governments to adopt a participatory approach to development, with active engagement of indigenous peoples, and through the negotiation of benchmarks and targets.



• The 'protection gap' in Australia

The previous chapters of this report have outlined in detail concerns about domestic policy making and program delivery. There is a clear lack of consistency between existing policies and approaches to Indigenous issues with these international legal obligations and developments.

It is clear to me that there is limited consideration of the government's human rights obligations in the settling of policy and delivery of programs as they affect indigenous Australians. As noted in previous chapters, there is a fundamental lack of processes for engagement with Indigenous peoples at the regional and national level. State wide processes also rely on bilateral agreements between the states and territories and the Commonwealth, which see no role in priority setting for Indigenous peoples. Previous tri-partite processes at the state level have by and large been discontinued in the absence of the Aboriginal and Torres Strait Islander Commission (ATSIC).

It is totally unacceptable for any government participating in UN processes to stand up, hand on heart, and pledge to undertake a range of actions in their domestic activities and then to comprehensively fail to act. In the Australian situation, there has been no observable and/ or transparent attempt to consider the implications of the commitments entered into at the UN General Assembly (such as through the Program of Action for the Second International Decade or the MDGs). These commitments are made to the citizens of Australia and to other States in good faith. They are intended to form a basis for action at all levels.

How can it be acceptable for Australia to commit to contributing to the achievement of the Millennium Development Goals by 2015 in Africa, and to not commit to doing the same within our borders in relation to a small percentage of the total population? It is a policy absurdity.

As I argued in the introduction to this report, the lack of consideration of a human rights based approach to Indigenous affairs and the failure to explicitly ensure consistency with Australia's human rights obligations, amounts to bad policy.

This situation is not unique to Australia. A major concern at the international level is the lack of implementation of human rights in domestic situations. As the then Secretary General of the United Nations, Kofi Annan puts it, 'the time has come for Governments to be held to account for respect of the dignity of the individual, to which they too often pay only lip service' and to do so by moving 'to an era of implementation'.

In his first report to the General Assembly, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples also noted that:

Violations of the human rights of indigenous people occur for a variety of reasons... Although in some cases they are being tackled through specific programs and proposals, in many other cases rhetoric is failing to result in action, and needs are being neglected, particularly when it comes to protection.¹⁶⁵

¹⁶⁵ General Assembly, *The situation of human rights and fundamental freedoms of indigenous peoples – Report of the Special Rapporteur*, UN Doc: A/59/258, 12 August 2004, para 66, available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N04/458/74/PDF/N0445874.pdf?OpenElement>, accessed 6 March 2007.



The Special Rapporteur has also stated that:

the problem of a 'protection gap' between existing human rights legislation and specific situations facing indigenous people is indeed of major significance and presents a challenge to international mechanisms for the effective protection of human rights.¹⁶⁶

And further, that:

A matter of crucial importance... is the growing gap between legislation on indigenous rights... and the real, day-to-day situation of indigenous people in their communities.

All the indicators suggest that the main problem is not a lack of suitable legislation (although much remains to be done in that regard), but shortcomings in terms of implementation, the efficiency of institutions and the procedures and mechanisms for the full realization of human rights.¹⁶⁷

As noted throughout this chapter, the implementation gap has been highlighted as one of the most significant challenges for the UN and the international human rights system to address into the future.

What is the reasoning for this lack of implementation of Indigenous rights domestically in Australia and what are its implications?

One reason has to be the coordinating role of the Office of Indigenous Policy Coordination (OIPC). While OIPC does have a section with responsibilities relating to indigenous rights, reconciliation and repatriation of human rights, it is not active in promoting awareness of indigenous rights developments or the commitments of government across the bureaucracy. As a consequence, OIPC does not utilise its role as the coordinator of whole of government activity to ensure that a proactive approach is adopted to recognising Indigenous human rights and to implementing the commitments of the government undertaken within international fora.

While the delegate representing the Australian government will transmit a 'cable' at the conclusion of an international forum, there is no other mechanism known to be taking place domestically where all departments and agencies working with Indigenous peoples are provided with advice and directions that elaborate on the rights to development and other emerging human rights standards. Consequently, the disconnect between the domestic and international systems is not being addressed. To this end, it may be of benefit for the Secretaries of the Department of Foreign Affairs and/or AusAid to participate in the Secretaries Group on Indigenous Affairs to ensure greater consistency between international and domestic processes.

Further, there is a clear scepticism or even unwillingness from senior bureaucrats with OIPC to implement Australia's human rights obligations. In a recent meeting,

166 Commission on Human Rights, *Human rights and indigenous issues – Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples*, UN Doc: E/CN.4/2002/97, 4 February 2002, para 102, available online at [http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/fe67856bf0a29aac1256ba000566817/\\$FILE/G0210629.pdf](http://www.unhcr.ch/Huridocda/Huridoca.nsf/e06a5300f90fa0238025668700518ca4/fe67856bf0a29aac1256ba000566817/$FILE/G0210629.pdf), accessed 6 March 2007.

167 General Assembly, *The situation of human rights and fundamental freedoms of indigenous peoples – Report of the Special Rapporteur*, UN Doc: A/60/358, 16 September 2005, paras 69-70, available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N05/513/14/PDF/N0551314.pdf?OpenElement>, accessed 6 March 2007.



a senior bureaucrat described obligations relating to effective participation and obtaining consent (in relation to 99 year leasing – an issue that has the potential to impact significantly on generations of Indigenous communities) as ‘touchy feely’ stuff. The clear impression was that it was unimportant and a distraction. He went so far as to say that what Indigenous peoples need is for governments to come in and ‘shock them’ into action through extreme (punitive and non-participatory) measures as they have done in Balgo (WA) and Wadeye (NT).

While this view is patently absurd, it reflects a broader problem within government. This is that human rights are seen as a prescriptive framework that is focused on *what you can't do* and on a compliance mentality. The limited efforts to engage with human rights principles are at the most crude and basic level, such as crafting measures so that they can avoid or limit accusations of racial discriminatory treatment.

Clearly this is an essential component of the human rights system. But it is much more than this. It is also a system for States to encourage the adoption of proactive measures to create an enabling framework for active participation and engagement of all citizens, and particularly for those who are disadvantaged or powerless.

Human rights as an enabling framework promotes active engagement through partnerships, shared decision making and ultimately shared responsibility for outcomes. This is emphasised by a motto for the Second International Decade; ‘partnership for action’.

By comparison, the current approach of the federal government pre-determines the priorities without engagement of Indigenous peoples, and therefore provides a *passive* system for service delivery and policy design. The irony of this approach is that it is a system which constantly attacks Indigenous peoples for being passive recipients, and yet it is in itself, resistant to any form of active engagement.

Ultimately, this domestic view of human rights is increasingly out of step with international developments on human rights standards. It is an increasingly untenable approach and will continue to be the subject of international scrutiny and concern.

We can, for example, expect that Australia will continue to be subject to concerns of non-compliance with human rights obligations by various treaty committees. Such scrutiny will intensify as human rights standards relating to Indigenous peoples become more widely accepted and common practice through international cooperation.

We can also expect that over time it will become a source of scrutiny through the universal periodic review mechanisms of the Human Rights Council – at which point it should be clear to the government that the concerns are objectively based and applied equally to all countries.

Indigenous peoples in Australia are in a particularly invidious position. Unlike other settler states such as Canada, New Zealand and the USA, who entered into treaties with Indigenous peoples, we have no formalised basis for engagement with Indigenous peoples. This makes the situation in Australia particularly disadvantageous towards Indigenous peoples and automatically creates a gap between principles of international law and domestic legal practice.



But Indigenous peoples in Australia are also disadvantaged because we exist in a so-called developed country – meaning that UN activity and international cooperation is directed outwards and not towards the existence of substantial inequality and poverty within our borders.

When we examine the developments in UN policies and programs we see that most are directed towards developing nations, with less scrutiny of the inequality and absence of a rights based approach to development within developed nations. This makes building on the widespread reforms in UN practice difficult; as there is no UN presence within Australia through which to operationalise a rights based approach to development, to focus on the implementation of the MDGs, or to implement the Second International Decade's Programme of Action.

This is not to say that the principles don't apply – clearly they do. And they are *intended* to apply. But it places increased emphasis on the role of government and leaves it less susceptible to alternative approaches through international cooperation.

- **Bridging the 'protection gap' – the role of NGOs and the Indigenous community sector**

Somehow we need to break this 'protection gap' by holding the government to implementing its obligations in good faith. But we can also break the 'protection gap' by focusing the efforts of civil society, the non-government and Indigenous community sectors, on adopting a rights based approach and learning from best practice frameworks, such as those that we export or experience through our international development work.

I am convinced that a primary barrier to achieving this is the existence of an information gap within civil society on human rights. There is a lack of understanding about human rights by Indigenous peoples and of how to apply them in advocacy and policy.

This is difficult to redress when government has closed off options for Indigenous participation in policy making processes and for representative structures. Government currently provides only limited support to Indigenous communities to build their capacity to understand and advocate for their rights. This limitation exists based on the misguided and fundamentally flawed view expressed to me by senior bureaucrats that if this information is provided it would empower Indigenous individuals and communities and see them challenge approaches adopted (often unilaterally) by government.

This places greater responsibilities on Indigenous organisations and non-government organisations to facilitate access to information and capacity building for Indigenous communities if Indigenous peoples are to have the capacity to be truly self-determining.

The Second International Decade provides us with an opportunity and the framework to focus our efforts to address this issue.

As noted earlier in the chapter, the Program of Action for the Second Decade establishes a series of objectives to be met through adopting partnerships between governments, civil society and Indigenous peoples. It also recommends:



- The adoption by governments and Indigenous peoples of plans of concrete activities with specific benchmarks to implement the goal, objectives and programme of action of the Second Decade;
- The establishment of Committees of Indigenous peoples at the national and local level to monitor the implementation of the programme of action domestically;
- The establishment of national focal points on indigenous issues and on the Second Decade within government departments, with improved coordination at all levels of government; and
- The establishment of tri-partite committees at the country level composed of governments, indigenous peoples and United Nations country offices to promote implementation of the objectives of the Second Decade.

Clearly, the government should designate a central focal point to coordinate governmental activities on the Second Decade. This focal point should be utilised to increase awareness of Indigenous rights and to bridge the gap between commitment and implementation that currently exists. This focal point should also consult with Indigenous organisations on proposed activities for the Second Decade, consistent with the requirements for full and effective participation that are outlined in the Program of Action for the Second Decade.

However, we should not wait for government. To do so would not demonstrate the active participation of Indigenous peoples.

There is much to be gained through partnerships between Indigenous organisations, research institutes and universities, Indigenous legal and medical services and the broader non-government sector (for example through those development, aid and human rights organisations who are members of the Australian Council For International Development).¹⁶⁸

HREOC has commenced with a process to build such partnerships, through the re-convening of what used to be known in ATSIC as the Indigenous Peoples Organisations Network (IPO Network).

In 2006, the federal government confirmed the receipt of limited funding for HREOC to administer for 'the purpose of funding Indigenous participation in relevant international deliberations', and which could include 'educative and capacity building initiatives'.¹⁶⁹ The funding is administered by the Aboriginal and Torres Strait Islander Social Justice Commissioner.¹⁷⁰

In accepting the funding, which is of such a limited amount that it is not possible to replicate the level of engagement and support previously provided by ATSIC, I noted that:

I see a need for any project on international engagement by Indigenous peoples to create a stronger connection between activities at the international level and

168 Information available online at: www.acfid.asn.au/.

169 Attorney-General, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Funding for Indigenous Participation in International Deliberations*, 6 December 2005.

170 The activities to which funding is allocated is discussed annually in the Annual Report of the Human Rights and Equal Opportunity Commission, available online at: www.humanrights.gov.au/publications/index.html#annrep.



engagement with Indigenous communities domestically. This includes through facilitating domestic consultations to inform international participants and to engage with government prior to international dialogues taking place, as well as providing mechanisms for feedback and disseminating information on the outcomes of international deliberations back to Indigenous organisations and communities.

Accordingly, I place much importance on conducting educative and capacity building initiatives domestically as part of any process for international engagement. I will seek to ensure this balance between domestic engagement and international participation is met through the funding available.¹⁷¹

I also noted that:

... in addition to seeking further funding being transferred on an ongoing basis (by the government)... HREOC will also (seek) to build partnerships with NGOs and discuss funding on an ad-hoc basis with the relevant departments which now have ongoing responsibility for various international processes through the new service delivery arrangements for Indigenous affairs at the federal level.¹⁷²

The government responded by stating that they 'agree with you that a balance must be struck between Indigenous engagement in international events, and the domestic educational and capacity building measures necessary to make this engagement effective.'¹⁷³

They also noted that 'under the new arrangements... the departments with policy responsibility for international events will be responsible for providing the necessary assistance to facilitate appropriate Indigenous attendance at international events.' In other words, that responsibility for funding Indigenous participation lies with the relevant department who was allocated the relevant program previously administered by ATSIC.

At the same time as providing this funding, the Government also made a contribution to the United Nations Voluntary Fund for Indigenous Populations to assist the participation of Indigenous peoples from the Pacific region in UN fora. The contribution was a one off payment of \$5,000.

In the first year of this funding to HREOC, I decided to provide funding contributions towards attendance at the UN Permanent Forum on Indigenous Issues and to convene the IPO Network for consultations prior to that meeting. It is the intention that the IPO would then meet twice annually, with occasional meetings on specific, urgent issues.

Accordingly, I am seeking to undertake a facilitation and coordination role to link international engagement and domestic processes. Over time, I intend to:

- Demonstrate that international engagement is of mutual benefit for the government, with the consequence that increased funding is contributed by the government to a more appropriate and sustainable level. The IPO

171 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Correspondence with Attorney-General on Indigenous Participation in International Deliberations*, 3 March 2006.

172 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Correspondence with Attorney-General on Indigenous Participation in International Deliberations*, 3 March 2006.

173 Attorney General, *Correspondence with Aboriginal and Torres Strait Islander Commissioner – Response to the Aboriginal and Torres Strait Islander Commissioner's letter regarding Funding for Indigenous Participation in International Deliberations*, 31 March 2006.



Network would meet prior to major international events, and so provide an opportunity for government engagement with Indigenous groups prior to them attending meetings. This will provide the opportunity to engage with Indigenous peoples and understand Indigenous positions on particular issues, and where there are differences in position, to create a space for dialogue and the realisation of common ground. There is not a culture of this type of engagement and so this will take time.

- Identify the responsible line agencies for funding within government and to make these channels known to Indigenous organisations so that government does not avoid its funding responsibilities by having no clear process or mechanism in place for considering funding applications.
- Build an Indigenous network based on partnership to engage in Indigenous rights issues and developments, and to disseminate this information through their networks.
- Seek an active partnership, including financial, with the non-government and corporate sectors for international participation.
- Build a strategic alliance with the NGO sector. There is an extensive range of human rights NGOs who are interested in Indigenous issues and who would welcome input from Indigenous organisations as to priorities and approaches to Indigenous human rights issues.
- Utilise these mechanisms to disseminate information to improve the linkages between the international and domestic arenas. Already, my office maintains a detailed website which is updated semi-regularly with international developments on Indigenous rights as a resource.

The IPO Network process is in a formative stage. It is hoped that over time it will provide an effective forum for the dissemination of information about international developments, as well as an opportunity for direct participation of Indigenous organisations in advocating for their rights and promoting implementation of their rights within Australia.

Conclusion and recommendations

We have much to learn from international experience and a distance still to travel to ensure that our domestic policy frameworks are consistent with our human rights obligations. The Second International decade for the World's Indigenous People provides a pathway for advancing discussions on these issues and also to map a way forward to ensure that the 'protection gap' that presently exists within Australia can be eliminated.

To advance the issues raised in this chapter, I make the following recommendations for action. I have included reference to which departments and agencies should take the lead in the implementation of these recommendations.

**Recommendation 6: Directed to the Office of Indigenous Policy Coordination**

That the federal government identify a focal point to coordinate, on a whole of government basis, its Program for the Second Decade of the World's Indigenous Peoples. The focal point should consult with Indigenous organisations in determining the activities to be undertaken for the Decade, in accordance with the goal, objectives and Program of Action for the Decade. The Government's Program should specifically respond to the items identified in the Program of Action for the Second Decade, rather than being a general thematic response. The Program should also be operational within this financial year.

Further, that the government allocate specific funding for the conduct of activities for the Second Decade, as determined through the consultations with Indigenous peoples.

Recommendation 7: Directed to the Office of Indigenous Policy Coordination and Department of Foreign Affairs and Trade

That the federal government specify the process for consideration of funding for engagement in international deliberations and identify focal points within each federal department or agency (for example, the relevant contact point within the Department of the Environment and Heritage for engagement on issues relating to the Convention on Biological Diversity).

Recommendation 8: Directed to the Indigenous Peoples Organisations Network and Australian Council for International Development

That the non-government sector, led by members of the Australian Council for International Development as appropriate, engage with Indigenous organisations and the IPO Network to build partnerships for the implementation of the Second International Decade (as well as highlighting the relevance of the Millennium Development Goals to the situation of Indigenous peoples in Australia).

**Recommendation 9: Directed to the Department of Foreign Affairs and Trade, AusAid and Office of Indigenous Policy Coordination**

That the Department of Foreign Affairs, in conjunction with the Social Justice Commissioner, conduct regular briefings for all agency heads on developments on the rights of Indigenous peoples, including the right to development (including the human rights based approach to development), Millennium Development Goals and Second International Decade for the World's Indigenous People. The Secretaries Group on Indigenous Affairs would be the appropriate body to receive these briefings.

Further, that AusAid be invited to contribute to the Secretaries Group on Indigenous Affairs to identify lessons that can be learned from Australia's international development activities for policy-making on Indigenous issues within Australia.