

## II. Sovereignty, Independence, and Self-Determination

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### Self-Determination — Australian View

On 1 February 1995, in Geneva, the Australian Delegation made a statement to the Fifty-First Session of the United Nations Commission on Human Rights in relation to the right of peoples to self-determination. The following are extracts from the statement:

Self-determination, as a distinct concept of international law, first arose following World War I and was influential in determining the shape of Eastern Europe following the disintegration of the Austro-Hungarian and Russian empires. Among the purposes of the United Nations outlined in its Charter is the development of “friendly relations among nations based on respect for the principle of equal rights and self-determination”. That general principle was, during the period of decolonisation, properly used to support the granting of independence to colonised territories. Its status was recognised in a number of General Assembly Declarations and, more significantly in international law terms, in common Article 1 of the human rights covenants, which state:

All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

There are differences of opinion as to whether the right of self-determination, once exercised through the attainment of independence from colonial domination, continues or has been extinguished. There is no doubt that the content of the right of self-determination remains somewhat uncertain. However, Australia believes that the international community should view self-determination as a comprehensive human rights concept, the implementation of which is particularly important in an uncertain and transitional world situation. Peoples’ rights and international security will be diminished if the international community adheres to the view that the right of a country’s people to self-determination is extinguished on its gaining independence. The right to self-determination remains with a people after national independence, although other aspects will then come to the fore. In Australia’s view, self-determination includes not only “external” self-determination but also “internal” self-determination. Equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs (relevant both to indigenous peoples and national minorities). In our view, this proposition finds support in the words of the Article 1 of the covenants referred to earlier, together with Article 21 of the Universal Declaration on Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

However, the content of that continuing right of self-determination can not, and does not, normally entail a right of secession from independent states by peoples. As the Declaration on Principles of International Law on Friendly Relations and Co-operation Among States in accordance with the Charter of the United Nations ("the Friendly Relations Declaration" of 1970) states:

[The principles of self-determination shall not] be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.

In relation to the "external" aspect of self-determination, then, the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people generally exhausts that aspect of the right. The Friendly Relations Declaration makes it clear the right of self-determination can not be used to justify the endless splintering of multi-ethnic states into smaller and smaller units, or campaigns by minority peoples within such sovereign and independent states for secession.

Sovereign independence for every self-defined "group" is not feasible. The great majority of the world's states are ethnically diverse: indeed, only 20 percent are relatively ethnically homogenous. A large number of states have at least five sizeable ethnic populations. The ideal of ethnically pure states is therefore, in Australia's view, clearly unrealistic, and also contrary to the repeated statements of the international community in, for example, the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), the Friendly Relations Declaration and the Vienna Declaration.

Australia believes that attempts to actively pursue such exclusive political arrangements lead only to the bloodshed and ethnic cleansing we have seen recently in the former Yugoslavia, the Caucasus and parts of Africa. Rather, the demands by peoples for internal self-determination, generally expressed as the maintenance of their cultural identity, including their language and spiritual beliefs, should be capable of accommodation by national governments. States such as Australia are striving to do so by way of policies of multiculturalism and of self-management for our indigenous peoples.

Australia's strong position is that the right of self-determination, although important, is not a right above and beyond those other central rights set out in the Declaration and the Covenants. The right of self-determination can therefore not be used to justify the abuse of other rights such as the right to life, the right to freedom of conscience and expression or the right to an adequate standard of living.

### **Self-Determination — Palestinians and Israel — Australian View**

On 29 September 1995, the Acting Minister for Foreign Affairs, Senator McMullan, issued a media release welcoming the signature that day in Washington of an agreement between Israel and the PLO which extended

Palestinian autonomy in the West Bank. In the course of the release, Senator McMullan said the following:

(Senator McMullan) reaffirmed Australia's commitment to Israel's security within internationally recognised borders and the right of the Palestinians to self-determination and independence alongside a secure Israel.

### **Palestinian Liberation Organisation — Middle East Peace Process — Australian View**

On 28 March 1995, in the Senate, the Minister for Foreign Affairs, Senator Evans, answered a question without notice from Senator Loosley (NSW, ALP), concerning the visit to Australia of the head of the Palestinian Liberation Organisation Political Affairs Department, Farouk Kaddoumi. Senator Evans had discussions with Mr Kaddoumi on 27 March 1995. During the course of his answer, the Minister said the following (Senate, *Debates*, vol 170, p 2228):

Since the signing of the historic Israel-PLO accord in September 1993, the PLO has assumed a recognised and absolutely crucial role on behalf of Palestinians in the negotiations toward Palestinian autonomy on the West Bank and the Gaza. Despite the various difficulties, some of them quite severe, which have arisen between parties since 1993, particularly in the last few months, both sides have continued to work through their differences with a view to making the accord work. In the course of these negotiations, the PLO's role has not been questioned by the international community...

The main point of the meeting was really to communicate clearly to Mr Kaddoumi Australia's views on the matters in issue in the Middle East peace process. I certainly took that opportunity to convey Australia's very strong support for the peace process and for the Oslo accords and our absolute opposition to political objectives ever being pursued by violent means.

The opportunity was taken to emphasise our support for democratic elections and respect for human rights by the Palestinian authority...

I advised Mr Kaddoumi that the Australian government will continue to stand behind those parties which have the courage and commitment to go on with the search for peace, which began with the Oslo accords. We do, of course, continue to support very strongly the right of the Palestinian people to self-determination and, if they wish, to an independent state alongside a secure Israel...

### **Self-Determination — East Timor — Australian View**

On 7 February 1995, in the Senate, the Minister for Foreign Affairs, Senator Evans, answered a question without notice from Senator Bourne (NSW, Australian Democrats) concerning East Timor. For a full discussion of the Australian position on this matter, see the Australian submissions to the International Court of Justice in the East Timor case, set out at p 672 of Chapter XIV. The following is the text of the question and answer (Senate, *Debates*, vol 169, p 574):

Senator Bourne—My question is directed to the Minister for Foreign Affairs. How does he explain the obvious inconsistency between a position recognising Indonesia's annexation of East Timor while at the same time continuing to

profess support for a process of self-determination for the people of East Timor? Does the Minister believe that Australia has ever really pursued or campaigned for a process of self-determination for the people of East Timor? Will Australia now move to repeal the 1989 Timor Gap treaty, to genuinely work towards a process of self-determination for the people of East Timor and, when that is achieved, to negotiate a Timor Gap treaty which would give a fair share of the profits back to the Timorese people?

Senator Gareth Evans—There is a lot of misunderstanding about the concept of the right to self-determination, which it might be helpful for me to clarify at the outset. The right of self-determination of peoples is recognised in general terms in the UN Charter in Articles 1 and 55, but I think it is fair to say that it has always been a very imprecise concept. It is presently subject to quite a lot of international rethinking, particularly because of the proliferation of claims to self-determination by national entities within larger sovereign states, as distinct from the more familiar colonial context. It is worth acknowledging that at the outset.

The question of what self-determination means in any particular case and how it might be exercised in any particular context is a matter to be pursued by the United Nations. There are a number of UN resolutions on this subject, and they make it clear that self-determination can involve a number of quite different outcomes, including of course the emergence of an independent state, but also integration, or some form of association within or with another state, or a degree of autonomy within another state. I think that is important background.

In the case of East Timor, Australia recognises that the people of East Timor do have a right of self-determination—to choose, in effect, how they are governed. This has been Australia's position since before the events of 1975, and it has never been reversed. The UN, in relation to East Timor, has certainly recognised that there can be no solution to self-determination and related issues without the cooperation of the Indonesian government; thus the consultations with Indonesia which are now being conducted under the auspices of the UN Secretary-General and which Australia fully supports, and has done since their inception.

As to the question about inconsistency, Portugal argues that Australia cannot both recognise Indonesian sovereignty over East Timor and, at the same time, say that the East Timorese have a right to self-determination. Senator Bourne seems to want to embrace that Portuguese claim of inconsistency. The situation is that before 1975, Australia recognised Portuguese sovereignty over East Timor while, at the same time, simultaneously recognising the right to self-determination of the Timorese people. There is no difference between the situation then and now. A claim of a right to self-determination can exist with a recognition of sovereignty. We recognised Indonesian sovereignty, but we have also recognised right through that period the right to self-determination by the people of East Timor.

As to the Timor Gap treaty, which Senator Bourne wants us to repeal, it is important to realise, because this too has got lost in the argument about this case, that Australia negotiated the Timor Gap treaty not to gain access to anyone else's resources but to our own share of the resources of the Timor Gap area. Australia could not do that before the treaty because there was no agreed international boundary line in that area. As Indonesia was in control of East Timor, Australia

had to negotiate with Indonesia to settle the boundary issue. Portugal cannot seriously pretend that it is now, or has been since 1975, in a position to give effect to an agreement on the Timor Gap. I have to say that generally, whatever might have been the situation before 1975 or before 1979, we simply do not accept that, in 1995, Portugal, the colonial power which governed that territory so lamentably and ultimately abandoned the territory, continued to have any right whatsoever over East Timor...

### **Self-Determination and Minority Rights — Greece, Macedonia, Bulgaria and Albania — Sudan — Former Yugoslavia — Australian Views**

On 29 November 1995, the Minister for Small Business, Customs and Construction, Senator Schacht, tabled in the Senate the Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade (JSCFADT) Report entitled *A Review of Australia's Efforts to Promote and Protect Human Rights*. Extracts from the response concerning minority rights and self-determination in a number of nations follow (Senate, *Debates*, vol 176, pp 4246–4281), and further extracts are to be found throughout this volume:

#### **Chapter Thirteen—Minority Rights and Self-Determination**

##### **Recommendation 57**

*The Committee suggests that the Australian Government make representations to the Governments of Greece, Macedonia, Bulgaria and Albania concerning the rights of minorities within their states, to freedom of speech and association, rights to use their own language, practice their own religion, preserve their culture and rights to full participation in educational and employment opportunities within the state.*

##### **Response**

Accept in principle.

##### **Comment**

The Government will continue to monitor human rights issues in these countries and to make representations as appropriate. Since the period covered by the Committee's report, the Government has made specific representations on the rights of minorities, to the governments of Greece and Albania. While inter-ethnic tensions between the various communities remain of concern, there are some positive signs that the respective governments are making efforts to address these issues. The Australian Government will continue to encourage them further in this regard...

##### **Recommendation 59**

*The Committee believes the situation in Kosovo requires urgent attention from the international community, both in identifying human rights abuses and in seeking negotiations between the government of Serbia and the representatives of the majority of the people of Kosovo. The Australian Government should urge the European Union and the United Nations towards these processes.*

##### **Response**

Accept.

**Comment**

The human rights situation in Kosovo is a specific and long-standing area of concern. It pre-dates the conflict in former Yugoslavia and is expected to continue to be a major concern in the foreseeable future, notwithstanding recent progress towards a negotiated settlement to the armed conflict.

The JSCFADT will hold a hearing in late October on the Australian response to the situation in the former Yugoslavia, including ethnic cleansing. This will provide a forum for consideration of broader human rights concerns in all the territories of the former Yugoslavia...

**Recommendation 61**

*The Committee asks the Australian Government to make representations to the Government of Sudan concerning the treatment of the people of southern Sudan and to urge the United Nations to provide monitors in the Sudan, to maintain an effective ceasefire and to encourage either the resumption of negotiations on a peaceful settlement to the civil war or to encourage the United Nations to hold a referendum on the status of the south and in the interim to place an arms embargo on the Sudan.*

**Response**

Accept.

**Comment**

... The Government continues to make representations to the Government of Sudan through both bilateral channels and multilateral forums regarding the continuing human rights abuses in Sudan. Our Ambassador in Cairo, who is accredited to Khartoum, maintains a dialogue on this important issue with the Sudanese Government on his regular visits to Sudan.

In November 1994, the Australian Government delivered a statement to the Third Committee of the United Nations General Assembly (UNGA 49) in New York calling on the Government of Sudan to abide by its international human rights obligations and to negotiate a solution to the civil conflict.

Australia also co-sponsored the resolution on the human rights situation in Sudan at UNGA in 1994. This resolution urged all parties to the conflict to agree to an immediate cease fire and called on the Government of Sudan to cease immediately all aerial attacks on civilian targets in Southern Sudan.

At present the Government of Sudan does not allow entry into the country of the United Nations Commission on Human Rights Special Rapporteur on the Human Rights situation in Sudan, Mr Gaspar Biro. The resolution passed at UNGA 49 called on the Government of Sudan to extend its cooperation to the Special Rapporteur and recommended the continued monitoring of the human rights situation in Sudan.

Australia supported a similarly worded resolution at the 51st session of the UN Commission on Human Rights in March 1995. At a meeting in January 1995, the heads of government of the member countries of the Intergovernmental Authority on Drought and Development, which sponsors the current peace negotiations, agreed to the placement of a United Nations observer in Nairobi to monitor the peace initiative.

## **Native Title — Rights of Native Title Holders**

The Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Dodson, is required by s 209 of the Native Title Act 1993 to report to the Minister for Aboriginal and Torres Strait Islander Affairs. The following is extracted from the Parliamentary Report of April 1995 entitled *Native Title Report: January–June 1994*, p 52:

### **Native Title and International Law**

The standards enunciated in international instruments assist in defining the minimum standard of protection which native title holders are entitled to enjoy. These instruments include the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination. In addition to these are the more specific standards relating to the human rights of Indigenous peoples that are evolving at an international level. In particular, the International Labour Organisation Convention No: 169 (ILO 169) (while not yet ratified by Australia) and the Draft Declaration on the Rights of Indigenous Peoples, (while not yet considered by the United Nations Commission on Human Rights or General Assembly) are equally important in gauging the conformity of the operation of the Native Title Act 1993 (Cth) with international standards. The Draft Declaration on the Rights of Indigenous Peoples is particularly relevant in providing a clear indication of what the international Indigenous community perceives as the appropriate standards.

The rights set out in these instruments are human rights. As such they are rights which cannot be taken away. The Australian Government's stated commitment to human rights is consistent with this approach. The Preamble to Australia's *National Action Plan* provides:

In seeking to advance human rights through its foreign and domestic policies, the Australian Government subscribes to the view that human rights are inherent, that is, they are the birthright of all human beings; inalienable, insofar as they cannot be lost or taken away; and universal in that they apply to all persons, irrespective of nationality, status, sex or race. Australia rejects the view that there is any hierarchy of human rights.

The willingness and commitment of Australian governments to respond to the High Court's recognition of native title in a manner consistent with the full protection of our human rights, will be a significant test of Australia's commitment to human rights and a guide to the integrity of our nation at an international level. That the Native Title Act 1993 (Cth) operates in practice in a manner consistent with international standards must be a primary goal of those concerned with the operation of the Act. The extent to which this occurs will only be determined over time.

## **Indigenous Peoples — International Day of the World's Indigenous People — Australian Recognition of Rights and Aspirations**

On 9 August 1995, a Joint Statement was issued by the Minister for Foreign Affairs, Senator Evans, and the Minister for Aboriginal and Torres Strait

Islander Affairs, Mr Tickner, to mark the first International Day of the World's Indigenous People. The following is an extract of the text:

The Australian Government welcomes the first International Day of the World's Indigenous People as a positive move towards greater international recognition of issues of concern to indigenous peoples, particularly their human rights.

Today commemorates the first meeting of the United Nations Working Group on Indigenous Populations which was held in 1982. This Working Group has successfully drawn international attention to concerns of indigenous peoples around the world.

Australia values this forum as an opportunity to strengthen international activity aimed at overcoming the difficulties facing indigenous peoples. Australia takes seriously its obligation to inform the international community of relevant developments within Australia and is interested to learn from the experiences of others. Australia also welcomes participation in the Working Group of organisations representing Aboriginal and Torres Strait Islander people.

Redressing the dispossession and disadvantage suffered by Australia's indigenous peoples in the past is a major human rights objective of the Government. The existing range of international human rights instruments does not cover the scope of legitimate aspirations of indigenous peoples and the Government considers that these aspirations should be enshrined in a new UN instrument. For this reason, Australia supports the work underway on a draft Declaration on the Rights of Indigenous Peoples.

The proclamation by the UN of an International Decade of the World's Indigenous People provides an important opportunity for the international community to take up issues of concern to indigenous peoples. The celebration of World Indigenous People's Day is one of the principal activities of the decade. The Australian Government strongly supports the International Decade as a means of promoting the rights of indigenous peoples and of focusing the attention of the world community on their situations.

The work of the UN in moving to recognise the human rights of indigenous peoples is playing an important role in raising broader community awareness of the need for individual governments to address the human rights and aspirations of indigenous peoples. We are confident that in future years this international day will be increasingly recognised and respected within Australia

The Government and indigenous people in Australia are engaged in a positive process of reconciliation, including through participation of representatives of indigenous people in the development of Government policies and initiatives. The Australian Government will complement this by continuing its support for the work of the United Nations on the rights of indigenous peoples.

### **Draft Declaration on the Rights of Indigenous Peoples — Australian Approach**

Following are extracts from a paper entitled *The United Nations Draft Declaration On The Rights Of Indigenous Peoples* which was prepared by Bill Barker, Director of the Human Rights and Indigenous Issues Section of the Department of Foreign Affairs and Trade, for the First National Conference of

Legal and Policy Officers from Human Rights Organisations, Darwin, 11 August 1995 (for further extracts from the paper, see p 484 of this volume):

### **The United Nations Human Rights System**

It is useful to have some understanding of the architecture of the UN's human rights system. The most important UN human rights body is the Commission on Human Rights (CHR), which meets annually for a six-week session and is composed of 53 member states, elected for three year terms. Australia is currently a member of the Commission. The Commission reports to the Economic and Social Council (ECOSOC), though the latter body focuses on process and regulation in the human rights area and rarely gets involved in substantive issues. At the top of the hierarchy is the General Assembly (UNGA), which meets annually from September to December and which provides the final endorsement of proposals for additions to the UN human rights system.

Subordinate to the Commission on Human Rights is a range of other bodies and mechanisms. The most important of these is the Sub-Commission on Prevention of Discrimination and Protection of Minorities, which despite its name, does not primarily address itself to discrimination or minority issues. The Sub-Commission is a so-called "expert" body: that is, it is composed of individuals not governments, and it is supposed to function as a "think tank" for the Commission. It meets annually for four weeks in August. The Sub-Commission has its own subordinate bodies, chief among which is the Working Group on Indigenous Populations (WGIP), which meets for one or two weeks immediately prior to the Sub-Commission's session.

The United Nations human rights agenda is a very full one, encompassing civil and political rights, economic, social and cultural rights and so-called "third generation" rights such as the right to development. Issues as diverse as the racism, apartheid, the environment, terrorism, poverty, peace and mercenarism have all been discussed in UN human rights forums over the years.

### **The Working Group on Indigenous Populations**

Indigenous issues have only recently come on to this agenda. The Sub-Commission began to give attention to the rights of indigenous peoples in the seventies and eventually set up the Working Group on Indigenous Populations, which first met in 1982. The Working Group is composed of five members of the Sub-Commission, one representing each of the five geographical regions the UN uses for deciding electoral matters. The Chairperson of the Working Group is Mme Erica Daes of Greece. Currently, the other experts are from Cuba, the Ukraine, Japan and Tunisia...

A feature of the Working Group's procedures has been its very open attitude to the participation of non-government organisations. Normally, the UN permits the participation of NGOs only on the basis of formal status granted by ECOSOC. This requires a rather elaborate and protracted application process. It was recognised from the beginning that to insist on formal ECOSOC status in relation to WGIP would not only disadvantage indigenous people, it would probably make its proceedings meaningless. It was decided, therefore, to open WGIP to participation by any indigenous person and to individuals, such as academics, who have special expertise in the field. There are no criteria for participation...

There have been two main issues on the Working Group's agenda. The first has been the "Review of Developments", which provides an opportunity for indigenous people and their representatives to draw attention to issues of concern and for governments to present their views of developments...

The second major item is "Standard Setting", which has focused on the draft Declaration on the Rights of Indigenous Peoples, to which I will turn in a moment.

The WGIP agenda is expanding. Other issues of interest to the Working Group and its participants are:

A study of treaties, focusing on those entered into by colonial governments and indigenous peoples in North and South America;

Arrangements for and content of the International Year for the World's Indigenous People in 1993 and the Decade of the World's Indigenous People, which began in 1994;

The cultural heritage and intellectual property of indigenous peoples; and

The possibility of a "Permanent Forum" for indigenous peoples within the UN system...

#### **The Draft Declaration on the Rights of Indigenous Peoples—History**

It is of the utmost importance that those interested in the draft should clearly understand the difference between an instrument of treaty status and a declaration. An instrument of treaty status, such as the International Covenant on Civil and Political Rights or the Convention on the Elimination of All Forms of Racial Discrimination is legally binding on states that are parties to it. As such, Australia has to ensure that it complies with the obligations undertaken in a treaty. Where a change in domestic law is required to ensure compliance with a treaty obligation the Commonwealth may use the external affairs power in the constitution to enact the necessary legislation. A declaration on the other hand, such as the proposed Declaration on the Rights of Indigenous Peoples has no legally binding effect. The value of a declaration derives from its moral force and this can be considerable. But a declaration should not be confused with a treaty. If it is so confused, productive discussion can become rather difficult.

At its fourth session in 1985, the Working Group decided, after discussion of various options, that it should aim to produce "a draft declaration on indigenous rights" for eventual adoption and proclamation by the General Assembly. At the Working Group's sixth session in 1988, the Chairperson tabled a working paper containing a draft "Universal Declaration on Indigenous Rights". In 1989 a revised draft "Universal Declaration on the Rights of Indigenous Peoples" was published for discussion. Partly at the instigation of Australia, the Working Group extended its meeting time from 1990 onwards from one to two weeks in order to devote five days rather than one day each session to consideration of the draft. After some difficulties in 1990 in settling down to an effective working method for considering the draft, the Working Group began to accelerate its work. In 1991, the preamble and the first three operative paragraphs of the draft were submitted by the members of the Working Group at first reading. During the 1992 session, a first reading of all paragraphs was completed and a second

reading commenced. At its 1993 session, members of the Working Group agreed upon a text of the draft Declaration...

In 1994, the Working Group submitted the text to its parent body, the Sub-Commission on Prevention of Discrimination and Protection of Minorities. This in turn submitted it to the Commission on Human Rights. The Commission considered the matter at its session earlier this year. The Australian delegation took the lead on this and worked for an outcome in which the Commission took a procedural decision to set up a Working Group to give further consideration to the draft. The Commission also set up a procedure which opened the way for indigenous peoples organisations to participate in the drafting work at the Commission level on a more open basis than has ever before been possible.

### **The Draft Declaration on the Rights of Indigenous Peoples—Process**

It may be useful at this point to review the steps by which a human rights instrument, such as the draft Declaration, is adopted by the United Nations. Usually, it is the Commission on Human Rights that plays the central role. It is a common practice for the Commission to set up an open-ended drafting group, composed of all interested governments and NGOs with ECOSOC consultative status, to elaborate an instrument. This process of working on a draft at the Commission level often takes several years and sometimes takes many years. When it has completed its work, the drafting group will then submit its draft to the Commission which, if satisfied, will submit it to ECOSOC, which will then submit it to the General Assembly for final adoption and proclamation.

You will by now appreciate that the draft Declaration is still at a very early stage of consideration in UN terms. The Commission's Working Group (which it should be noted is entirely distinct from the WGIP) will hold its first session later this year. The Commission has set as a general target the end of the Decade of the World's Indigenous People—that is, 2004—for the adoption of the Declaration, and this can only be an indicative target. The deliberations will inevitably be difficult. The challenge will be to produce a declaration that is substantive and responsive to the aspirations of those whom it is intended to benefit, while still taking account of the concerns of governments around the world...

### **Draft Declaration on the Rights of Indigenous Peoples—Content**

I now turn to the content of the draft Declaration as it presently stands. The text contains nine parts:

#### Part I: Rights to self-determination, participation in the life of the State, freedom from discrimination and nationality

Part I of the draft Declaration deals with the right of indigenous peoples to self-determination, as well as to equality, freedom from adverse discrimination, participation in the life of the State and to nationality. Article 3 provides:

*Indigenous peoples have the right of self-determination. By virtue of this right, they freely determine their political status and freely pursue their economic, social and cultural development.*

Article 4 recognises the right of indigenous peoples to maintain and develop their distinct characteristics and legal systems, while participating fully in the life of the State.

### Part II: Threats to the survival of indigenous peoples as distinct peoples

In Part II, Article 6 proclaims the collective right of indigenous peoples to live in freedom, peace and security as distinct peoples, and to full guarantees against genocide (including the removal of children).

Articles 7 and 8 proclaim collective and individual rights:

- not to be subjected to ethnocide and cultural genocide (including prevention of and redress for dispossession, imposed assimilation and integration); and
- to maintain and develop distinct identities and characteristics (including the right of self-identification).

Articles 9 to 11 address rights of indigenous peoples:

- to belong to an indigenous community or nation;
- not to be forcibly removed from their lands or territories; and
- to special protection and security in periods of armed conflict.

### Part III: Cultural, religious and spiritual and linguistic identity of indigenous peoples

Articles 12–14 proclaim rights connected with the cultural, religious and linguistic identity of indigenous peoples. These include rights:

- to practise and revitalise cultural traditions and customs (including the right to restitution of cultural, intellectual, religious and spiritual property);
- to practise and develop spiritual and religious traditions (including the rights to religious and cultural sites and to the repatriation of human remains); and
- to the revitalisation, use and transmission of histories, languages, oral traditions, writing systems and literature (including the right to designate own names for communities, places and persons).

### Part IV: Education, information and labour rights

Article 15 proclaims the right of indigenous children to all forms and levels of education and recognises the right of indigenous peoples to establish and control their educational systems and institutions as well as providing education in their own languages.

Articles 16–17 proclaim the rights of indigenous peoples to have the dignity and diversity of their cultures and aspirations reflected in all forms of education and public information, and to establish their own media in their own languages.

Article 18 refers to international labour law and national labour legislation.

### Part V: Participatory rights, development and other economic and social rights

Article 19 affirms the right of indigenous peoples to participate fully at all levels of decision-making and implementation in matters affecting their rights, lives and destinies as well as to maintain their own decision-making institutions.

Article 20 affirms the right of indigenous peoples to participate fully in devising legislative and administrative measures that may affect them and requires States to obtain their consent before adopting and implementing such measures.

Article 21 recognises the right of indigenous peoples to maintain and develop political, economic and social systems, to engage freely in traditional and other economic activities and to compensation where they have been deprived of their means of subsistence and development.

Pursuant to Articles 22 to 24, indigenous peoples have rights:

- to special measures for the improvement of their economic and social conditions;
- to determine and develop priorities and strategies for exercising their right to development (including the right to administer programs affecting them through their own institutions); and
- to their traditional medicines and health practices.

#### Part VI: Land and resource rights

Part VI addresses rights connected with the distinctive spiritual and material relationship of indigenous peoples with their lands, territories, waters and coastal seas and other resources.

Article 26 proclaims the right of indigenous peoples to own, develop and control the lands and territories, air, water, coastal seas, sea-ice, flora and fauna and other resources they have traditionally occupied or otherwise used. This includes the right to the recognition of their laws, customs, land-tenure systems and institutions for the development and management of resources.

Articles 26 to 28 affirm rights to restitution of or compensation for lands, territories and resources confiscated or used without consent, and to the conservation and protection of the environment and productive capacity of indigenous lands, territories and resources.

Article 29 entitles indigenous peoples to recognition of the ownership, control and protection of their intellectual and cultural property and to special measures to control, develop and protect their sciences, technologies and cultural manifestations.

Article 30 affirms the right of indigenous peoples to require that States obtain their free and informed consent prior to the approval of projects affecting their lands, territories and other resources, particularly in connection with the development, utilisation or exploitation of mineral and water resources.

#### Part VII: The exercise of self-determination, indigenous institutions

Article 31 provides that, as a specific form of exercising their right of self-determination, indigenous peoples have the right to autonomy or self-government in matters relating to their internal and local affairs.

Articles 32–36 affirm the rights of indigenous peoples:

- to determine their citizenship in accordance with their customs and traditions;
- to develop and maintain their institutional structures and juridical customs, procedures and practices;
- to determine the responsibilities of individuals to their communities;
- to maintain and develop relations and cooperation with other peoples across borders; and
- to the recognition and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors.

Parts VIII and IX contain provisions relating to the effective implementation of the Declaration and general concluding provisions.

### **Major issues in the draft Declaration**

...I propose here simply to highlight some of the more significant provisions, particularly those likely to be contentious. I would stress also that while the Government views the present text as a comprehensive and useful basis for further work, the Government has not yet taken final positions on either the broad concepts or the detail, except insofar as these are covered in existing positions on relevant issues.

The key provision and the one likely to provoke the greatest controversy internationally is Article 3, on self-determination. Article 3 in the draft Declaration is couched in terms identical to those of the two human rights covenants and has aroused concern that it will open the way for acts of self-determination similar to those that have characterised the process of decolonisation. In particular the two covenants provide that "all peoples have the right of self-determination".

The way in which self-determination is treated in the Declaration will be crucial to its credibility among indigenous peoples, who are concerned first to ensure their right to make decisions on matters affecting them and second to ensure that they are not placed in a position of lesser status than other peoples of the world. This was made clear in draft principles prepared at a strategy meeting attended by ninety indigenous representatives and submitted to the Working Group at its 1985 session as part of the fundamental principles to be addressed in the exercise.

Self-determination for Australia's indigenous peoples has been government policy since 1972 and was endorsed by all Australian governments, both State and Federal in their response to the Royal Commission into Aboriginal Deaths in Custody. It has recently been asserted by the Aboriginal and Torres Strait Islander Commission and by the Social Justice Commissioner as crucial to the achievement of social justice...

For several years, Australia has been urging, internationally, a new approach to the concept of self-determination. Australia views it not as a static concept but as an evolving one, which encompasses the continuing right of peoples to decide how they should be governed and to participate in the political process. Australia sees this as particularly important in the present world phenomenon of intra-state conflict. Clearly, sovereign independence is not feasible for every self-defined "people". Attempts to pursue such exclusive political arrangements lead too often to bloodshed and fragmentation. Australia distinguishes between "internal" and "external" self-determination and holds that according self-determination to peoples within Australia's territory does not involve secession...

Many other concerns about the draft are conceptually associated with self-determination, in that they involve questions of the relationship of indigenous peoples, their societies, institutions and cultures, with mainstream society. Thus, it will be necessary to give careful consideration to issues such as aboriginal legal systems, the institutions and processes whereby indigenous decision-making may be provided for, the protection of cultural heritage and access to sacred sites. Issues of citizenship and national defence also present problems...

### **Conclusion**

The draft Declaration on the Rights of Indigenous Peoples is an innovative proposal for an important human rights instrument. Its particular feature is its attempt to address collective rights to a degree unprecedented in human rights law. Perhaps the best way to approach this is to see the rights articulated in the draft as those that are generally taken for granted in dominant societies—rights to survival, political and cultural identity, control over resources and so on.

While estimates vary, there may be 300 million indigenous people in the world. They are the inheritors and practitioners of unique cultures and ways of interacting with other people and the environment. They are among the most disadvantaged and vulnerable groups of people today. No one can credibly argue the fact of this disadvantage or that the rights of indigenous people are not endangered. Australia considers that the existing range of international human rights instruments does not cover the full range of legitimate aspirations of indigenous peoples and that it is right that these aspirations should be enshrined in a new instrument. For this reason Australia supports the work under way on the draft Declaration. As work develops on the draft, the challenge will be to ensure that the aspirations of indigenous peoples are not disappointed while at the same time providing assurance to governments and other interest groups that national objectives of unity and development are not compromised...

It is important that human rights standards be elaborated and acknowledged. But improvements in human rights observance depend ultimately on changes in community attitudes, on greater tolerance and better understanding of the views of others. The process of discussing the concepts in the draft Declaration over the coming years in Australia and internationally will make an important contribution toward achieving changed attitudes...

### **Draft Declaration on the Rights of Indigenous Peoples — Australian Statements**

The Working Group of the Commission on Human Rights to elaborate a Draft Declaration on the Rights of Indigenous Peoples met in Geneva from 20 November to 1 December 1995. The following is an extract from a statement made on behalf of the Australian delegation on 21 November 1995:

The completion of the Draft Declaration by the Working Group on Indigenous Populations and the Sub-Committee was an important achievement and all those who participated in that task are to be congratulated. Australia regards the present Draft as a comprehensive and useful basis for our present work.

The Draft has of course now moved from consideration at the expert level to consideration at the inter-governmental level. As a result, the Draft will come under close scrutiny by governments in a way that has not occurred before. This is both necessary and desirable. If the eventual Declaration is to be of value it will be crucially important for governments to be fully committed to its observance. That commitment will depend on governments understanding, contributing to and accepting the content of the Declaration. The constructive approach that has characterised the opening day of this Working Group's deliberations gives us hope that, despite the difficulties, we can and will make solid progress.

Your opening statement, Mr Chairperson and that of Assistant Secretary-General Fall have reminded us that, while working through the substance of the Draft Declaration, we should all keep firmly in mind its underlying purposes:

- first, to recognise the serious difficulties and abuses of human rights faced by indigenous peoples, and
- second, to propose a set of standards that will clearly and unambiguously set forth the rights of these peoples, both as individuals and as groups.

Our general discussion should help us to identify the major issues, particularly the areas of difficulty and complexity. Governments and organisations of indigenous peoples need to know the positions of others in order that they can work cooperatively together to produce a useful Declaration.

Mr Chairperson, as we move through the Draft Declaration, it will be important to keep the provisions of General Assembly Resolution 41/120 firmly in mind. It will also be important to ensure clarity and avoidance of duplication. At the same time, Australia recognises that this Draft Declaration breaks new ground in a number of ways, most particularly by the place it gives to collective rights. While agreeing that the assertion of rights in a declaration should give rise to identifiable moral obligations, my delegation does not consider that this implies that such obligations must in all cases be capable of immediate implementation. This is particularly so with respect to economic, social and cultural rights, where the relevant covenant explicitly provides for implementation over time. But it also applies to civil and political rights, whose observance in at least some respects also depends on the allocation of appropriate resources.

The issue of self-determination will be one of the more difficult in the Draft. My delegation acknowledges that the way in which self-determination is treated will be crucial to the credibility of the Draft among indigenous peoples, who are concerned to ensure both their right to make decisions on matters affecting them and that they are not placed in a position of lesser status than other peoples of the world.

Self-determination for Australia's indigenous peoples has been government policy since 1972. Since 1991, Australia has made statements in WGIP in favour of the use of the term "self-determination" in the Draft Declaration. We have done so on the basis that the principle of the territorial integrity of states is sufficiently enshrined internationally that a reference to self-determination in the Draft would not imply a right of secession. In the Australian context, self-determination will be worked out within national boundaries and through the establishment of representative indigenous bodies, such as the Aboriginal and Torres Strait Islander Commission.

Australia considers that self-determination encompasses the continuing right of peoples to decide how they should be governed, the right to participate fully in the political process and the right of distinct peoples within a state to participate in decisions on, and to administer, their own affairs. This approach is particularly relevant in the present world situation of frequent conflict within states. Clearly, sovereign independence is not feasible for every self-defined "people". Attempts to pursue exclusive political arrangements lead too often to bloodshed and fragmentation. A concept of self-determination within existing state boundaries, involving the full observance of individual and group rights,

holds out a better hope of ensuring stability, human development and human security. It follows from this that Australia does not have difficulty with the use of the word “peoples” and a reference to “self-determination” in the Draft.

Other important substantial issues include land and resources and customary law. The issue of land has been of major importance over recent years in Australia, with legislation on native title and on a land fund. These developments in Australia accord with the spirit and intent of many of the Draft Articles. However, some of the Articles are drafted in terms which leave their full import unclear, and my delegation will wish to comment further on the detailed wording at the appropriate time in our deliberations. Similarly, we wish to look closely at the Articles detailing with customary law and practices, as this issue presently is the subject of government consideration in Australia.

While flagging the areas of particular difficulty, it is important also to identify the less difficult elements of the Draft Declaration, so that the Working Group can adopt some text at first reading at this session. This will be of value in itself, but it will also create momentum for more purposeful work on the Draft and will provide a good platform for future sessions. In my delegation’s view, the Working Group should consider the adoption, in substantially their present form, of Article 1 on the enjoyment of universal human rights, Article 2 on freedom from discrimination, Article 5 on the right to a nationality, Article 8 on indigenous identity and Article 43 on the equality of women.

Commission on Human Rights Resolution 1995/32 enjoins this Working Group to consider all aspects of the Draft Declaration including its scope of application. Several delegations have alluded to this question and my delegation agrees that it is important that it be addressed. However, some delegations have interpreted this to mean that the Working Group should consider the inclusion of a definition of the concept of “indigenous peoples” in the Declaration. In the view of my delegation, this would be misconceived. In its work on human rights, the community of nations has generally refrained from attempting tight definition, for the good reason that this would limit the flexibility of governments and peoples to apply relevant instruments to their own national circumstances.

Central concepts in international human rights instruments—especially non-binding declarations—are often not defined. This has not prevented these instruments from being applied. In the history of the UN’s work on minorities, for example, no definition of “minorities” has ever been generally agreed. This applies not only to the Minorities Declaration, but also the International Covenant on Civil and Political Rights and to the work within the Sub-Commission from Capotorti to Deschenes and subsequently. With regard to indigenous peoples, the absence of an official UN definition has not prevented the Working Group on Indigenous Populations from accomplishing much useful work.

My delegation recognises the concerns of countries with complex ethnic and historical circumstances, but this is precisely why any attempt to arrive at a definition is likely to be futile. The world is simply too complex a place to attempt to use words to divide its inhabitants into two groups, the indigenous and the non-indigenous. Whatever the form of words chosen, it will be found to be inadequate to cover all situations, because different countries will wish to approach their own unique circumstances in different ways.

At the same time, there are broad principles and techniques that can be used. The Martinez Cobo working definition is perhaps the best known of these. Another is the reference, to which China has drawn our attention, to the definition in the UN Fact Sheet on the Rights of Indigenous Peoples. These will not resolve all grey areas, though they will help us make clear what we mean when we refer to indigenous peoples. There is also the definition in Convention 169 of the International Labour Organisation.

Central to conceptions of indigenous peoples is the notion of self-identification. This is the starting point in deciding whether or not a particular group or individual is indigenous. This is supported by existing work within the United Nations on the concept of "indigenous". Self-identification is inherent in the Martinez Cobo definition. It is also explicit in the definition in Convention 169 of the International Labour Organisation. In a closely related area, the jurisprudence of the Committee on the Elimination of All Forms of Racial Discrimination makes it clear that self-identification, rather than government edict, shall be the primary factor in determining whether or not a person belong to a group that is suffering discrimination.

Self-identification is not, however, the whole story. It is not enough for anyone to walk in the door and proclaim themselves to be indigenous. It then becomes a matter for the governments and peoples concerned to establish whether or not they are prepared to recognise a group or individual as indigenous. Other factors that can be taken into account include descent and recognition by the indigenous community concerned. It is here that working definitions such as those I have mentioned can be useful.

To those delegations that have expressed concern about the question of a definition, my delegation would join others that have stressed the universality of this instrument and would urge that a process of consultation at the national level would be appropriate to determine its scope of application in particular national circumstances...

The following is extracted from the statement given on behalf of the Australian delegation on 24 November 1995:

Article 3 raises the important and sensitive issue of self-determination. Australia would be prepared to accept Article 3 as presently drafted, subject to the understanding that the exercise of this right should be within existing state boundaries, that is not giving a right to secession.

Australia has given careful consideration to the issue of self-determination, as an issue relating not only to indigenous peoples, but to all peoples worldwide, particularly in contemporary circumstances.

There are differences of opinion as to whether the right of self-determination, once exercised through the attainment of independence from colonial domination, continues or has been extinguished. There is no doubt that the content of the right of self-determination remains somewhat uncertain. However, Australia believes that the international community should view self-determination as a comprehensive human rights concept, the implementation of which is particularly important in an uncertain and transitional world situation.

Peoples' rights and international security will be diminished if the international community adheres to the view that the right of a country's people to self-determination is extinguished on its gaining independence. The right to self-determination remains with a people after national independence, although

other aspects will then come to the fore. In Australia's view, self-determination includes not only "external" self-determination but also "internal" self-determination. That is, equal rights, the continuing right of peoples to decide how they should be governed, the right of people as individuals to participate fully in the political process (particularly by way of periodic free and fair elections) and the right of distinct peoples within a state to make decisions on and administer their own affairs (relevant to both indigenous peoples and national minorities). In our view, this proposition finds support in the words of the Article 1 of the Covenants, together with Article 21 of the Universal Declaration on Human Rights and Article 25 of the International Covenant on Civil and Political Rights.

However, the content of that continuing right of self-determination cannot, and does not, normally entail a right of secession from independent states by peoples. As the Declaration on Principles of International Law on Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations ("the Friendly Relations Declaration" of 1970) states:

[The principles of self-determination shall not] be construed as authorising or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinguishing as to race, creed or colour.

In relation to the "external" aspect of self-determination, then, the establishment of a sovereign and independent state, the free association or integration with an independent state or the emergence into any other political status freely determined by a people generally exhausts that aspect of the right. The Friendly Relations Declaration cannot be used to justify the endless splintering of multi-ethnic states into smaller and smaller units, or campaigns by minority peoples within such sovereign and independent states for secession.

Australia believes that attempts to actively pursue such exclusive political arrangements lead only to the bloodshed and ethnic cleansing of the kind we have witnessed recently.

Rather the demands by peoples for internal self-determination, generally expressed as the maintenance of their cultural identity, including their language and spiritual beliefs, should be capable of accommodation by national governments. States such as Australia are striving to do so by way of policies of multiculturalism and of self-management for our indigenous peoples.

It is worth emphasising that this conception of self-determination has been emphatically endorsed by the United Nations, in the Declaration on the Occasion of the Fiftieth Anniversary of the United Nations, adopted on 24 October 1995 in the presence of Heads of State and Government, and which appears in document A/50/48...

The way in which self-determination is treated in the Declaration will be crucial to its credibility among indigenous peoples, who are concerned first to ensure their right to make decisions on matters affecting them and second to ensure that they are not placed in a position of lesser status than other peoples of the world.

In Australia's view, the concept of self-determination I have outlined applies to all peoples of the world and this does not discriminate against indigenous peoples. Australia considers that the Declaration, when adopted, must contain a reference to the right of self-determination...

### **Indigenous and Tribal Peoples — International Labour Organisation Convention 169 — Question of Australian Ratification**

On 29 November 1995, the Minister for Small Business, Customs and Construction, Senator Schacht, tabled in the Senate the Government Response to the Joint Standing Committee on Foreign Affairs, Defence and Trade Report entitled *A Review of Australia's Efforts to Promote and Protect Human Rights*. Extracts from the response concerning ILO Convention 169, Indigenous and Tribal Peoples, 1989, follow (Senate, *Debates*, vol 176, pp 4246–4281), and further extracts are to be found throughout this volume:

#### **Recommendation 9**

*The Committee draws the attention of the Government to ILO Convention 169 which it has not yet ratified.*

#### **Response**

Accept in principle.

#### **Comment**

The Government is taking the necessary steps towards ratification of Convention 169, the Indigenous and Tribal Peoples Convention, 1989.

It is the normal practice for Australia not to ratify an ILO Convention until the law and practice in all relevant jurisdictions (Commonwealth, State and Territory) comply with its provisions and all State and Territory governments that have an interest in the Convention have formally agreed to ratification.

The upholding of the validity of the Commonwealth's Native Title Act 1993 by the High Court has enabled the Government to proceed with finalisation of the Commonwealth law and practice report on the Convention. Once this report is available, it will be forwarded to the States and Territories to assist them in preparing their law and practice reports. This course has been agreed with State and Territory governments.

Full consultation with indigenous communities is also necessary. In December 1993, the Aboriginal and Torres Strait Islander Commission (ATSIC) Board of Commissioners agreed to support ratification following consultation with indigenous communities. However, it has become apparent that further consultation with the Aboriginal and Torres Strait Islander community is desirable and the Government is currently determining how this can best be achieved.