

THE NEW UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: WHAT IS IT AND WHY IS IT IMPORTANT?

Last year, 143 countries of the world adopted, in the United Nations General Assembly, the UN Declaration on the Rights of Indigenous Peoples (“Declaration”), an international human rights instrument that for the first time in history formally recognized the world’s indigenous peoples as “peoples” under international law, with the same human rights and freedoms as other “peoples”. The Declaration, which is the fruit of some twenty years of labor, represents a new norm of indigenous/state relations best described as a partnership agreed to by about ¾ of the world’s states.¹ The document has been described also as a global commitment to move in certain directions, and a significant tool towards eliminating human rights violation against the planet's 370 million indigenous people and assisting them in combating discrimination and marginalization.

The Declaration is informed by a comprehensive set of values including dignity, diversity, non-discrimination, equality, self-determination, environmental integrity, and non-militarization. The Declaration enshrines the human rights, fundamental freedoms, and self-determination right of indigenous peoples. The Declaration protects indigenous peoples against ethnocide, genocide, forcible relocation and assimilation. It assures their right to practice and transmit their culture, which is a concept conceived broadly and progressively. It safeguards their access to non-discriminatory employment as well as to education and to media that honor their culture and language. It establishes their right to participate fully in decision-making processes that affect them, to obtain special measures required by them, to determine their own development, to be secure in the enjoyment of their own means of subsistence, and to access institutions of the state. It recognizes their comprehensive control of their traditional lands, territories, and resources, including the right that countries obtain their “free, prior, and informed consent” for action affecting these. It also recognizes their entitlement to the recognition and enforcement of treaties they have concluded with states, and to have disputes settled by international bodies. The Declaration further requires states to give full effect to it, the U.N. system to implement it, and both to provide access to indigenous peoples for its effective realization. Finally, the rights contained within the Declaration constitute the “minimum standards” for the survival, dignity, and wellbeing of the indigenous peoples of the world.

Though the Declaration is technically a non-binding document (meaning it lacks the authority

¹ In the international context, “states” are countries or nations.

to compel countries to grant to indigenous peoples within their jurisdiction the rights contained within it), it has normative² implications that can change (and, in already one case, has changed) the structure of power between indigenous peoples and states. Until now, many countries have used their domestic law to legitimize the oppression of indigenous peoples.

The U.S. government, for example, has legitimized its oppression of American Indians through its judiciary. In a series of U.S. Supreme Court cases known as “The Cherokee Cases,” the U.S. laid out the legal theory it has used for more than a hundred years to subjugate American Indians: that is, Indians were—by their “character and religion” and diminished property interests—more like “children” or “wards” of the government, with “necessarily ... impaired” rights. The legal fiction that Indians were like children enabled the U.S. government to justify control over their lands, which was the main reason for the U.S.’ interest in playing parent. To justify the U.S. government’s near total power over American Indians, the U.S. judicial branch denominated Indian tribes as “domestic dependent nations,” yet another legal fiction that has had devastating consequences for American Indians, who, under it, flounder in their fight to preserve their already limited measure of self-governance against the arbitrary and typically oppressive plenary power of the U.S. Congress.

In the case of Ka Pae ‘Aina, the U.S. Supreme Court has legitimized the oppression of the Kanaka Maoli people by inaccurately framing legal issues involving Native Hawaiians as issues of “race” and “special treatment” and “constitutionality” (e.g. whether or not a state program aiming to remedy disadvantages suffered by the Kanaka Maoli people within contemporary Hawai‘i is consistent with the U.S. Constitution). In reality, Kanaka Maoli issues are of an essentially international legal character involving unresolved violations of international law such as: the U.S.’ illegal overthrow of the Hawaiian Kingdom in 1893, an action for which the U.S. has apologized but has provided neither redress nor any mechanism for redress; and the U.S.’ failure to adhere to its international obligations as the Administering Power of Hawai‘i to ensure that the people of Hawai‘i exercise their right to self-determination in accordance with Chapter XI of the U.N. Charter.³

² This term generically means *relating to an ideal standard or model*. In law, the term "normative" is used to describe the way something ought to be done according to a value position.

³ Hawai‘i was on the UN list of non-self-governing territories from 1946 to 1959, but the U.S. took Hawai‘i off this list in 1960, after a 1959 plebiscite that, notwithstanding U.S. reports to the contrary, failed to meet the international legal standard for an exercise of self-determination.

The Declaration represents a bold and emerging norm of customary international human rights law. Customary international law is recognized, along with treaty-based law, as a source of binding international law. Customary international law is created through general and consistent practice of states undertaken in recognition of a legal obligation. The Declaration is a product of more than two decades of open, inclusive and mostly transparent consultation between U.N. member-states and indigenous peoples themselves, including many non-governmental organizations and others that support and/or represent their interests. This, coupled with the fact that an overwhelming majority of the world's countries have adopted it and that specialized U.N. human rights bodies are turning to it as *the* interpretive document on the rights of indigenous peoples worldwide, strengthen the argument that the Declaration constitutes at least emerging customary international law—an especially important legal argument for the indigenous peoples living within the jurisdiction of those countries that did not adopt the instrument.

Indigenous peoples engaged in community organizing and activism should consistently submit to their own governments and societies (in domestic courts, in the halls of the legislature, at public hearings, etc.) that progressive, as opposed to reactionary, countries recognize the legal import of the Declaration, and take concrete steps to implement the rights contained in it. Two examples involve Belize and Bolivia.

In October 2007, the Supreme Court of Belize invoked legal norms contained in the Declaration to recognize the property rights of two groups of indigenous Maya peoples in southern Belize. While agreeing that the Declaration is technically non-binding, the judge in *Aurelio Cal, et al. v. Attorney General of Belize* determined that principles of general international law contained in the declaration “should be respected,” taking special notice that an overwhelming number of countries adopted it, thus reflecting “the growing consensus and the general principles of international law on indigenous peoples and their lands and resources.” Citing the Declaration and other international legal precedents, he ordered the government of Belize to recognize Maya communities’ property rights to those lands they have traditionally used and occupied and to abstain from any logging, mining or other resource exploitation projects on them. Even bolder, in November 2007, the government of Bolivia passed National Law 3760, a piece of legislation that is an exact copy of the Declaration—making Bolivia the first country to adopt the Declaration as national law.

This year, the Inter-American Court on Human Rights ruled on a case filed by indigenous peoples of Suriname against the government. The court likewise cited the Declaration in its

decision to side with the people.

These global developments are working to establish the Declaration as customary international law. If indigenous peoples invoke these rights regularly and insistently, states such as the United States, Australia, Canada, and New Zealand, will find it increasingly difficult to repudiate them. The following section addresses some key human right issues involving the Kanaka Maoli people and illustrates how the Declaration informs them.

USING THE DECLARATION IN KA PAE ‘AINA: HOW THE DECLARATION INFORMS AND SUPPORTS KANAKA MAOLI EFFORTS FOR SELF-PRESERVATION

The Declaration enshrines the human rights, fundamental freedoms, and self-determination right of the Kanaka Maoli people. In contemporary Hawai‘i, the Kanaka Maoli people struggle for a number of causes including, but not limited to, the demilitarization of the Hawaiian archipelago; the return of traditional lands and resources, and an end to the non-productive use of those lands by non-indigenous government; an end to the desecration of the graves and bones of their ancestors, which remains legally tolerated; and end to the disproportionate—and escalating—rate of homelessness among the Kanaka Maoli people in Hawai‘i; and, the exercise of their right to self-determination, which affects all of these. The following is a brief illustration of how the Declaration informs some of these issues.

Demilitarization

Many in the Kanaka Maoli community throughout Hawai‘i have struggled and/or are struggling to demilitarize their homeland. The fight for Kaho‘olave, Makua and Kahana valleys, and the struggle over the Stryker Brigade and UARC are but some examples. There are a number of provisions in the Declaration that potentially touch and concern the issue of militarization including preambular paragraphs 1, 6, 10, and 12, and articles 29, 30, 32, 7, 8, 18, 19, 20, 24, and 25. Among the most important are:

Article 7

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person ... Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence.

Article 18

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

Article 19

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

Article 25

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

Article 29

Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources ... States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent ... States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30(2)

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

Article 32

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

Iwi / Human Remains

The frustration of the Kanaka Maoli people's desire to protect the bones of their ancestors from desecration injures their psychological health and wellbeing. This issue is often tied to other issues related to control over the development of Hawai'i (e.g. hotels, golf courses, department stores, and highways being built over the remains of the ancestors of the Kanaka Maoli)—development that remains out of indigenous control. There are a number of provisions in the Declaration that can support the issue of protection for ancestral remains, including preambular paragraphs 2, 3, 4, 5, 6, 7, 10, 11, 12, 22, and 23, and articles 32, 1, 2, 7, 8, 9, 11, 12, 18, 19, 20, 24, 25, 31, 33, 34, and 35. Among the most important are:

Article 1

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

Article 2

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

Article 7

Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person ... Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence.

Article 11

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

Article 12

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

Article 18

Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture ... States shall provide effective mechanisms for prevention of, and redress for ... [a]ny action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities.

Article 20

Indigenous peoples have the right to ... engage freely in all their traditional ... activities.

Article 24

Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health.

Article 25

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

Article 31

Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources ... In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources ... States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 34

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

Article 35

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

SELF-DETERMINATION

The right of the Kanaka Maoli people to self-determination is likely the most fundamental and important of all their human rights and directly relates to issues of Hawaiian independence and sovereignty; past, present and future claims over lands, territories, and resources in what is now the state of Hawai'i; and to arguments at the local, national, and international levels that Hawai'i is not lawfully part of the United States due to a series of illegal U.S. actions stretching back to 1893. There are a number of provisions in the Declaration that are relevant here including preambular paragraphs 2, 3, 4, 6, 7, 8, 10, 12, 14, 15, 17, 18, and 22, and articles 1, 2, 3, 6, 26, 28. It should also be noted that international law experts generally consider the right to self-determination as the paramount human right, which necessarily touches and concerns the other human rights. Among the most important provisions of the Declaration relating directly to self-determination are:

Article 1

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

Article 2

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

Article 3

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

Article 6

Every indigenous individual has the right to a nationality.

Article 26

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

Article 28

Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent ... Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

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In their community organizing and activism, however, indigenous peoples must be aware of certain aspects of the Declaration that may be problematic and that pose potential hurdles for them. The following section addresses those aspects of the Declaration that may present challenges to indigenous peoples, especially as compared to an earlier version of the Declaration agreed to overwhelmingly in 2006 in the Human Rights Council in Geneva by both indigenous peoples and states. The present version of the Declaration, passed in the General Assembly, inappropriately tips the balance of the indigenous/state relationship in favor of states in a few key areas.

CRITICAL LIMITATIONS OF THE DECLARATION THAT INDIGENOUS PEOPLES MUST BE AWARE OF

There are a few key provisions of the Declaration that indigenous peoples must pay attention to because they carry potentially adverse legal implications for indigenous peoples. It is important to be aware that less progressive states and other international actors may use these to limit the practical effect and reach of the rights contained in the Declaration. These negative provisions, however, should not deter indigenous peoples and their allies from invoking the many more favorable provisions of the Declaration. Indeed, the Declaration, being a normative rather than a strictly legal document, leaves room for a certain degree of selectivity as well as interpretative development that indigenous peoples should exploit to their advantage.

1. **Preambular paragraph 16.** This paragraph makes a reference to the 1993 Vienna Declaration and Programme of Action—an international document that failed to recognize indigenous peoples' status as "peoples" and further incorrectly classed them as "minorities", thereby arguably reinscribing that document's lack of due respect for the special status of indigenous peoples. It is

critical that indigenous peoples insist that they are among the “peoples” the 1966 Human Rights Covenants speak of, and are not the “indigenous people” or “minority” that the 1993 Vienna Declaration calls them.

2. **Article 4.** This article potentially limits indigenous peoples’ right to self-determination inasmuch as it may be read to qualify Article 3’s unconditional recognition of indigenous peoples’ right to the classical right to self-determination for all peoples enshrined in the two 1966 international human rights covenants. Article 4 reads:

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

Under international law, self-determination is esteemed as the highest of all human rights, which belong to all “peoples” according to the U.N. Charter, but which has been denied to indigenous peoples until the passage of this Declaration. For no other “peoples” has the right to self-determination been so qualified and it is inappropriate to limit this right only in the case of indigenous peoples, especially in light of the international obligation of UN member-states to give full effect to the Charter and to act in good faith with respect to the full realization of fundamental rights and freedoms.

3. **Article 30.** This article guts the already minimal protection that the 2006 text of the UN Human Rights Council's Declaration on the Rights of Indigenous Peoples offers indigenous peoples against military activities on their territories. In the present 2007 G.A. Declaration text, this article does not permit outside military activities on indigenous peoples’ territories “unless justified by a relevant public interest,” as opposed to the 2006 text’s higher standard of “unless justified by a significant threat to a relevant public interest.” The new language is problematic because “relevant” offers little to nothing in the way of genuine protection of indigenous peoples’ right to maintain a demilitarized homeland. “Relevant” sets a lower standard, enabling governments to quite easily justify their military activities in indigenous peoples’ territories.

4. **Article 46.** International law, since the UN Charter was adopted in 1945, has maintained a careful balance between the principles of the self-determination of peoples on the one hand and the territorial integrity of states on the other. This article, which is the final “caveat” article in the

Declaration, inappropriately upsets this balance by highlighting only the second principle and by placing the duty to respect states' territorial integrity on “peoples” for the first time in an international law instrument. Until now, that duty had only been imposed on states. Here, indigenous peoples can argue that international law continues to impose the duty to respect states’ territorial integrity (authoritatively set out in the 1970 Declaration on Friendly Relations and Co-Operation Among States) only on states vis-à-vis other states, and that the Declaration lacks the authority or mandate to change the existing international law framework on this matter.

This informational pamphlet aims to provide indigenous peoples, especially the Kanaka Maoli people of Ka Pae ‘Aina, some understanding of the new United Nations Declaration on the Rights of Indigenous Peoples, which, however imperfect, is the first international human rights instrument created to restore the dignity of indigenous peoples worldwide by recognizing in them fundamental human rights. But, as the oppressed have long understood, rights are, at least in part, what we make them. The analysis contained herein is a synthesis of various sources, and is not necessarily an expert summation of the legal issues involved, though it borrows heavily from expert sources such as documents of the American Indian Law Alliance.