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Indigenous Peoples and International Law: Examples of Engagement and Guidance on Application in Australia

**National Association of Community Legal Centres
Conference, Melbourne, Victoria, 26 October 2010**

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Outline

- 1. Introduction to Indigenous Peoples and International Law**
- 2. EMRIP & UNPFII**
- 3. Declaration on the Rights of Indigenous Peoples**
- 4. Practical activity – interpreting the Declaration as a way forward**



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Indigenous Peoples and International Law



Why international law?

- Indigenous peoples denied a voice in their own nations and as nations within the UN
- Oppression meant Indigenous individuals had little opportunity to advance to a position of seniority which would enable them to advocate at the UN and little chance to advocate with regards to their specific issues.
- Individual human rights sometimes conflicted with Indigenous peoples collective rights.



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A voice denied...

**1923, Haudenosaunee
Chief Deskaheh**



**1925 Maori religious
leader T.W. Ratana**



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| Year | Event |
|--------------|--|
| 1957 | International Labour Organisation (ILO) Convention 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries |
| 1970s | UN Special Rapporteur on Minorities José Martínez Cobo provides information on the state of the world's indigenous peoples and asks the United Nations to protect indigenous peoples' rights. |
| 1982 | UN established Working Group on Indigenous Populations (later Peoples) |
| 1985 | Working group decided to start work on a Declaration on the Rights of Indigenous Peoples |
| 1989 | ILO Convention 169 on Indigenous and Tribal Peoples replaced ILO 107 |
| 1989 | 9 August declared 'International Day of World's Indigenous Peoples'. |
| 1993 | International Year of Indigenous Peoples declared by UN |
| 1994 | Decade of World's Indigenous Peoples declared by UN |
| 2000 | Permanent Forum on the Rights of Indigenous Peoples (UNPFII) created |
| 2001 | OHCHR established Special Rapporteur on human rights and fundamental freedoms of indigenous peoples |
| 2004 | Second Decade of World's Indigenous Peoples declared by UN |
| 2007 | UN GA adopts the Declaration on the Rights of Indigenous Peoples |
| 2008 | Human Rights Council creates Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) |



The Special Rapporteur on the human rights and fundamental freedoms of indigenous peoples



Prof James Anaya (USA)
[Dr. Rodolfo Stavenhagen,](#)
Mexican (2001-2008)

Special Rapporteur in Australia

- First visit to Australia in August 2009.
- Meetings in Adelaide, Perth, Alice Springs, Darwin, Groote Island, Cairns, Brisbane, Sydney and Canberra.
- ALSWA hosted a meeting in Perth.



Special Rapporteur Prof James Anaya at ALSWA Community Forum in Perth 18 August 2009



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Report on Australia

- Released report in March 2010.
- Annexure to report regarding NTER released in advance to coincide with Senate Inquiry. Largely ignored.
- Comprehensive report highlighting concerns with history, health, education, employment, housing, women and children and the administration of justice.



**Prof James Anaya, Special
Rapporteur attends ALSWA
Community Forum in Perth 18
August 2009**



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United Nations Permanent Forum on Indigenous Issues (UNPFII)



What happens at the UNPFII?

- Theme
- Expert Reports
- Agenda
- Interventions
- Caucus Meetings (e.g. Pacific v Aboriginal)
- Side Events
- Recommendations



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UNPFII 2010

- Approximately 40 Aboriginal and Torres Strait Islander people in Australian delegation
- 22 Interventions (includes Pacific interventions)
- 6 side events

ALSWA involvement:

- Dialogue with the Special Rapporteur
- Doctrine of Discovery
- Juveniles in Detention



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2010 Agenda

First week

Monday, 19 April

11 a.m.-1 p.m.

Opening of the session

Item 1 Election of officers

Item 2 Adoption of the agenda and organization of work

Item 3 Discussion on the special theme for the year: "Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples"

- Report of the expert group meeting on the special theme
- Report of the Inter-Agency Support Group on the special theme

3 p.m.-6 p.m.

Item 3 (continued)
Dialogue with agencies

Tuesday, 20 April

10 a.m.-1 p.m.

Item 3 (continued)
Dialogue with indigenous peoples

3 p.m.-6 p.m.

Item 3 (continued)
Dialogue with Governments

Wednesday, 21 April

10 a.m.-1 p.m.

Closed meeting

3 p.m.-6 p.m.

Item 4 Human rights:
(a) Implementation of the United Nations Declaration on the Rights of Indigenous Peoples
• Follow-up summary report and recommendations of the Permanent Forum mission to the Plurinational State of Bolivia
• Follow-up summary report and recommendations of the Permanent Forum mission to Paraguay

Thursday, 22 April

10 a.m.-1 p.m.

Item 4 (continued)
• Introductory remarks by James Anaya, United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
(b) Dialogue with the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people and other special rapporteurs

3 p.m.-6 p.m.

Item 5 Half-day discussion on North America

Friday, 23 April

10 a.m.-1 p.m.

Item 6 Comprehensive dialogue with six United Nations agencies and funds
• Secretariat of the Convention on Biological Diversity
• Report of the annual session of the Inter-Agency Support Group on Indigenous Issues

3 p.m.-6 p.m.

Closed meeting

Monday, 26 April

10 a.m.-1 p.m.

Item 7 Future work of the Permanent Forum, including issues of the Economic and Social Council and emerging issues

Presentation and discussion of the following reports

- Study on the impacts of the global economic crisis on indigenous peoples
- Report on indigenous peoples and corporations
- Study on indigenous fishing rights in the seas
- Study to determine the impact of climate change adaptation and mitigation measures on reindeer herding
- Study on consideration and recognition of Mother Earth rights

3 p.m.-6 p.m.

Item 7

Tuesday, 27 April

10 a.m.-1 p.m.

Item 7
• Report on indigenous peoples and boarding schools
• Study to determine whether climate change policies and projects adhere to the standards in the Declaration on the Rights of Indigenous Peoples
• Preliminary study on the impact on indigenous peoples of the international legal construct known as the "doctrine of discovery", which has served as the foundation of the violation of their human rights
• Report of the expert group meeting on indigenous youth and children in detention
• Consideration of issues relating to Beijing +10

3 p.m.-6 p.m.

Closed meeting

Wednesday, 28 April

10 a.m.-1 p.m.

Item 7 (continued)

3 p.m.-6 p.m.

Item 7 Half-day discussion on indigenous peoples and forests (E/2008/43-E/C.19/2008/13, para. 123)

Thursday, 29 April

10 a.m.-1 p.m.

Item 7 (continued)

3 p.m.-6 p.m.

Item 8 Draft agenda for the tenth session of the Forum

Friday, 30 April

10 a.m.-1 p.m.

Item 9 Adoption of the report of the Forum on its ninth session

3 p.m.-6 p.m.

Item 9 (continued)
Closing of the session



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Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)



EMRIP 2010

- **Smaller Australian Delegation than UNPFII (11 delegates) representing NNTC, NSWALC, NACCHO, AHRC and Janine Gertz.**
- **Theme was a Study on 'Indigenous Peoples' Right to Participate in Decision Making', looking specifically at international best practice and challenges faced.**
- **I presented two interventions. First was endorsed ALSWA, VALS, ALRMS and all IPO organisations present. Intervention was about law and justice and how we are often not consulted by government when drafting laws that affect us. We called for constitutional reform, dedicated seats in Parliament and Parliamentary scrutiny of Bills.**
- **Second intervention on behalf of the IPO concerned the implementation of UNDRIP. We discussed the positive advances made by the Government, including the human rights framework and National Congress of Australia's First Peoples. However, we expressed our dissatisfaction at the decision not to proceed with a Human Rights Act and warned the Commonwealth Government against making the National Congress a sole form of consultation with Aboriginal and Torres Strait Islander peoples.**



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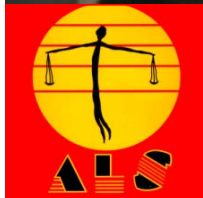
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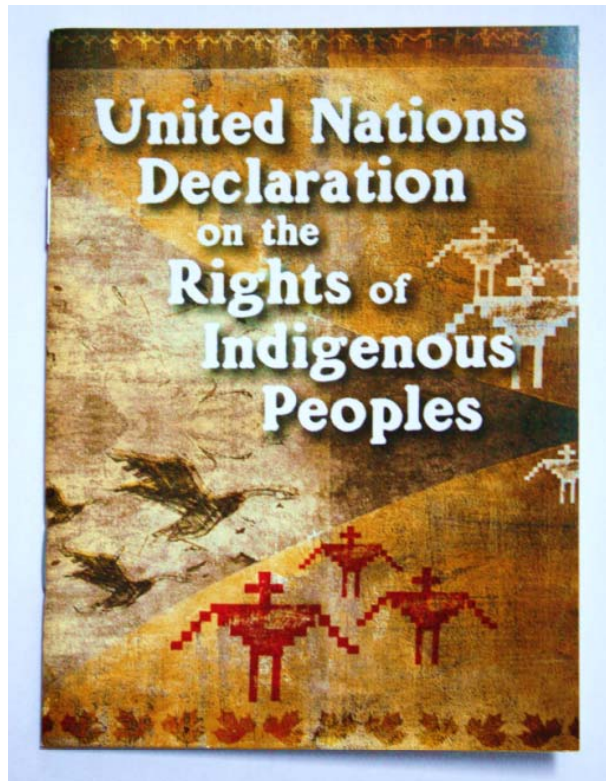
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Declaration on the Rights of Indigenous Peoples



"The Declaration does not represent solely the viewpoint of the United Nations, nor does it represent solely the viewpoint of the Indigenous Peoples. It is a Declaration which combines our views and interests and which sets the framework for the future. It is a tool for peace and justice, based upon mutual recognition and mutual respect."

*Les Malezer, Chair of Indigenous Peoples
Caucus*

The legal effect of the Declaration

Internationally:

- Non binding (a declaration not a treaty).
- Qu: Do its provisions reflect existing customary international law (and thus, bind states regardless) or simply suggest its likely development?

Domestically:

- Non binding (would not be binding even if it was a treaty).
- Needs to be implemented into domestic law through legislation (e.g. *Racial Discrimination Act*).



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The rights to...

- self-determination (Article 3);
- self-governance (Articles 4 and 5);
- nationality and citizenship (Article 6);
- free, prior and informed consent (Articles 10, 11, 19, 28, 29 and 32);
- security and freedom from genocide and assimilation (Articles 7 and 8);
- not be forcibly removed from their lands (Article 10);



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The rights to (continued)...

- practise and revitalise their cultural traditions, customs, spirituality, religions, histories, languages, philosophies, writing and literature (Articles 11, 12 and 13);
- establish and control their educational systems (Article 14);
- establish their own media (Article 15);
- participate in decision-making in matters that affect their rights, through representatives chosen by themselves (Article 18);



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The rights to... (continued)

- maintain and develop political, economic and social systems (Article 20);
- improve their economic and social conditions (Article 21);
- develop priorities and strategies for their right to development (Article 23);
- use and develop traditional medicines and health practices (Article 24);
- occupy and develop their lands, territories and resources (Article 25);



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The rights to... (continued)

- redress, restitution or just, fair and equitable compensation for their lands, territories and resources which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent (Article 28);
- conserve and protect the environment and the productive capacity of their lands, territories and resources (Article 29);
- refuse military activity on their land and territories (Article 30);



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The rights to... (continued)

- determine their own identity (Article 33); and
- determine the responsibilities of individuals to their communities (Article 35).
- Article 38: “States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.”



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Unique aspects

- Drafted and negotiated by Indigenous peoples
- Language has a resonance and particular meaning
- Provides further elaboration of the specific meaning and content of human rights for Indigenous peoples
- Recognition of collective rights



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Despite its legal status...

- Significant moral force
- Powerful mobilising instrument
 - Universal
 - Comprehensive
 - Rights / obligations



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Strategies and tips

- Incorporate DRIP into all aspects of our work
- Use in all programs, advocacy, casework, submissions, letters, education
- Don't just rely on the allure of human rights
- Know your audience...
- DRIP is about cultural change... so be patient



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Group Exercise

- Split into groups
- Case studies:
 1. What rights in the Declaration are relevant?
 2. How could you use the Declaration in this situation?
- Group presentation of issue and the application of the Declaration



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Summary

This seminar has endeavoured to:

- ✓ Give historical and contemporary context to Indigenous peoples participation in international law;
- ✓ Provide a practical reflection of an Aboriginal person's interaction at the 2010 UNPFII and EMRIP;
- ✓ Discussion of how the Declaration can be used in real life examples



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