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## Introduction

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## INTRODUCTION

Jonathan A. Franklin<sup>†</sup>

### I. FRAMING THE ISSUES: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The year 2012 marks the fifth anniversary of the United Nations Declaration on the Rights of Indigenous Peoples (“UNDRIP”).<sup>1</sup> The UN General Assembly adopted the declaration on September 13, 2007 after decades of negotiation.<sup>2</sup> The UNDRIP’s completion and broad ratification was a notable achievement: it enshrined the collective and individual rights of indigenous peoples in addition to declaring their right to self-determination.

A procedural cornerstone of the UNDRIP is the requirement that relevant indigenous peoples give their “free, prior, and informed consent”<sup>3</sup> regarding changes that will affect their physical and spiritual environment.<sup>4</sup> This standard is far broader than what would be recognized in the Western legal tradition, which has historically created separate bodies of law for the environment, religion, and property. In contrast, many indigenous peoples have articulated a broader understanding in communal stewardship over land and an interconnection between spirituality and land.<sup>5</sup>

This can be seen in relation to the story of Ayahuasca, a traditional medicine from the Amazon basin. It is used by indigenous peoples there as a treatment for a variety of conditions and in spiritual rituals. As such, its use combines medicinal and spiritual qualities in a single plant. In 1981, International Plant Medicine Corporation patented Ayahuasca in the United States based on a sample one of its employees bought back from a trip to

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<sup>1</sup> Declaration on the Rights of Indigenous Peoples, G.A., Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter U.N. Declaration], *available at* [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf).

<sup>2</sup> U.N. Declaration, *supra* note 1.

<sup>3</sup> Article 19 of the Declaration is particularly important for protecting the indigenous worldview. *See* U.N. Declaration art. 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.”).

<sup>4</sup> U.N. Declaration art. 11(2), 19

<sup>5</sup> JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 141 (Oxford Univ. Press, 2004).

South America.<sup>6</sup> The patenting of Ayahuasca symbolizes the tension between what indigenous peoples see as bio-piracy and foreign companies term bio-prospecting. Removing a single plant sample would not appear to affect the physical or spiritual environment in the Western tradition and so would not require consent. However, for many indigenous peoples, removing a plant can and does have spiritual, in addition to economic, implications. The UN designed the “free, prior and informed consent” requirement of the UNDRIP to protect such interests of indigenous peoples.

It is, of course, important to acknowledge indigenous peoples hold a wide variety of beliefs and pursue varied goals when engaging in this discussion. These goals are further altered by their relationship with the state(s) within which they live. For example, the Australian Aborigines have no historical basis for formal legal negotiations with Australian government bodies until recently,<sup>7</sup> while the Maori of New Zealand have had the Treaty of Waitangi since 1840, which formalized the relationship between the Maori and the British.<sup>8</sup>

Indigenous peoples do not unanimously favor the UNDRIP. Notably, some indigenous peoples are concerned that reliance on the Declaration implies acceptance of the member-state based United Nations as a lawmaking body. Indigenous peoples argue that because their communities existed before these states, they should not need to rely on international law to validate their rights.<sup>9</sup> In addition, since the policies of member states are dependent on the government in power, a state’s interest in adhering to the UNDRIP can increase or decrease suddenly, as administrations change. This limits the ability of indigenous peoples to rely on consistent enforcement of indigenous rights protected by the UNDRIP.

Some member states are also concerned with the UNDRIP due to the language it contains. Specifically, states are concerned with the Declaration’s enforceability.<sup>10</sup> While it was clearly negotiated and ratified as

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<sup>6</sup> Leanne M. Fecteau, *The Ayahuasca Patent Revocation: Raising Questions About Current U.S. Patent Policy*, 21 B.C. THIRD WORLD L. J. 69-104 (2001). For another example, see Jamie Mayer & Ragavan Srividhya, *Has India Addressed Its Farmers' Woes? A Story of Plant Protection Issues*, 20 GEO. INT'L ENVTL. L. REV. 97-127 (2007).

<sup>7</sup> *Mabo v. Queensland (No. 2)* (1992) 175 C.L.R. 1 (Austl.).

<sup>8</sup> Treaty of Waitangi, [1840] (Austl.).

<sup>9</sup> JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 6 (2004).

<sup>10</sup> Australian Human Rights Commission, *Questions and answers on the UN Declaration on the Rights of Indigenous People*, April 2009, available at [http://humanrights.gov.au/social\\_justice/declaration/declaration\\_QA\\_2009.html](http://humanrights.gov.au/social_justice/declaration/declaration_QA_2009.html); US Department of State, *UN Declaration on the Rights of Indigenous Peoples Review*, <http://www.state.gov/s/tribalconsultation/declaration/>

soft law,<sup>11</sup> future courts or other bodies could use it as the basis for creating hard law in the future. Because it is considered soft law, some states choose to acknowledge the UNDRIP without adhering to it. In so doing, they often frame it as an “aspirational” document that provides minimum standards, rather than maximalist goals. At the same time, some member states consider those standards to be impractically high and worry about the challenges attendant to meeting them.<sup>12</sup>

In addition to indigenous peoples and member states, numerous authors have addressed the complicated issues surrounding the rights of indigenous peoples in international, domestic, and customary law. Domestic laws directly affecting indigenous peoples are often in direct conflict with internationally recognized rights.<sup>13</sup> In such cases, some indigenous peoples have resorted to non-legal remedies, such as starting media campaigns or engaging in protests. The UNDRIP sets out a method for dealing with the tension between the indigenous peoples’ right to self-determination and the economic interests of member states through the requirement that indigenous peoples give “free, prior and informed consent” before a state intrudes upon their land. Unfortunately, there are far too many instances when this does not occur, particularly in the context of unilateral agreements between states and third parties regarding the extraction of natural resources from their lands.

## II. AN OVERVIEW OF THE ARTICLES

The four articles in this issue all contribute to the dialogue surrounding the intersection of indigenous people’s rights within international law and domestic actions that conflict with those rights. While the UNDRIP and other international law instruments are explicit about how states should act towards indigenous populations, in many cases these international instruments conflict with domestic law. There are several reasons for this discrepancy, including states’ self-interest, paternalism, and lack of resources needed to address both national concerns and the rights of indigenous peoples.

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<sup>11</sup> Andrew T. Guzman & Timothy L. Meyer, *International Soft Law*, 2 J. LEGAL ANALYSIS 171, (2010) (“soft law is most commonly defined to include hortatory, rather than legally binding, obligations.”).

<sup>12</sup> Four countries initially voted against the Declaration: Australia, New Zealand, the United States, and Canada. Although all four have more recently supported it, all four countries have substantial indigenous populations and continue to be concerned about the fallout from demands for self-determination commercial redress.

<sup>13</sup> See, e.g., Megan Davis, *Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples*, 9 MELB. J. INT’L L. 439, 469 (2008).

Anna Cowan's article addresses the challenge to indigenous people's right of self-determination posed by Australian state action. She analyzes the context and issues surrounding the Northern Territories National Emergency Response, commonly called the Intervention, in which the Australian Government responded to concerns of child abuse among the Aborigines of the Northern Territories by implementing a broad array of intrusive programs without prior consultation, let alone consent. Facets of the Intervention were in direct contravention of the UNDRIP, including suspension of Australia's Racial Discrimination Act. Because this suspension removed protections preventing discrimination against the Aborigines in the context of the Intervention, it drew the ire of a wide array of groups. The article raises the important question of what states can do within the intent of the Declaration to address an issue specific to a racially distinct group, assuming some action is justified. A stated objective of the Intervention was "to reduce the amount of money finding its way towards alcohol and drugs in indigenous communities during the emergency period."<sup>14</sup> It is then relevant to ask what methods are acceptable, if any, and how a government should proceed under the UNDRIP while remaining responsive to the situation.

The Intervention poses particular challenges in both the policymaking process it represents and its substance. For example, how can a state respect the right of participation, defined as "no decision directly relating to their rights and interests and taken without their informed consent" under UNDRIP Article 19,<sup>15</sup> in the context of state action without abrogating its responsibilities to its citizens? The word "consent" is quite strong, which is a cause of concern for some states. This is one of the important reasons that state actors tend to use the word "aspirational" when describing the UNDRIP and the Indigenous and Tribal Peoples Convention, ILO 169.<sup>16</sup>

While Cowan discusses participation, non-discrimination, and self-determination in the context of state action, Jacinta Ruru addresses those

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<sup>14</sup> Anna Cowan, *UNDRIP and the Intervention: Indigenous Self-Determination, Participation, and Racial Discrimination in the Northern Territory of Australia*, 22 PAC. RIM L. & POL'Y J. 247 (2013).

<sup>15</sup> United Nations Declaration on the Rights of Indigenous Peoples United Nations Declaration on the Rights of Indigenous Peoples art. 19, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) [hereinafter UNDRIP], available at [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf)

<sup>16</sup> Indigenous and Tribal Peoples Convention 1989 (entered into force Sept. 5, 1991); Indigenous and Tribal Peoples Convention, International Labor Organization ("ILO"), Convention No. 169 (1989), available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100\\_ILO\\_CODE:C169](http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_ILO_CODE:C169). This is an international legally binding document supporting indigenous rights. However, it is only legally binding for the states that ratify it. Few major countries outside South America have ratified ILO 169. See ILO, Ratifications of C169, available at [http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO).

same issues in the context of ownership of a natural resource: water. She brings a sharp focus to New Zealand's allocation of water from natural bodies that have spiritual and economic value to indigenous peoples.

Maori have a holistic worldview that finds life force, *mauri*, in many things and places, including rivers. Due to this cosmovision, Maori law finds "it is abhorrent to mix waters with waters of another catchment and to mix waters with human sewage."<sup>17</sup> Since Article 25 of the UNDRIP states that "[i]ndigenous people have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, water, and coastal seas,"<sup>18</sup> the combination of the UNDRIP and the Treaty of Waitangi give the Maori a strong ground for involvement in water allocation issues. The Aotearoa New Zealand government has addressed the issue by arguing in front of the Waitangi Tribunal that the water and the river it comes from belong to no one. On one level, this facilitates co-management of resources, because it removes ownership as a possibility. On another level, it disenfranchises those who seek redress for the water and river they once owned.

Ruru goes on to explore three different ways the State has addressed the Maori desire for redress in cases of water allocation: acknowledging ownership of a lakebed without ownership of the water or air above, permitting co-management of the river system, and considering the river to be an independent legal entity, appointing a guardian for it. Ruru analyzes each of these approaches in-depth, with a central observation that they permit cultural redress in that all three are designed to preserve the spiritual importance of the water source, rather than its economic value. She then goes on to address the much thornier water issue of how the state addresses the desire for commercial redress. In this context, Ruru poses one of the hardest questions: can there be reconciliation without commercial redress? If not, is reconciliation doomed? If so, what is a path forward that gets beyond apologies and minor concessions framed as cultural redress?

Elizabeth Salmón addresses the relationship between indigenous peoples and the Peruvian state. She examines instances of social conflict when a state permits natural resource use and indigenous peoples are not consulted. In response to indigenous social protests, the Peruvian government took steps to "redress historical injustices of indigenous peoples and to pacify the social demonstrations."<sup>19</sup> Although international human

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<sup>17</sup> Cowan, *supra* note 14.

<sup>18</sup> UNDRIP art. 25.

<sup>19</sup> Elizabeth Salmón G., *The Struggle for Laws of Free, Prior, and Informed Consultation in Peru: Lessons and Ambiguities in the Recognition of Indigenous Peoples*, 22 PAC. RIM L. & POL'Y J 353 (2013).

rights instruments require consultation with indigenous peoples, at a minimum, this has not been a priority for Peru.<sup>20</sup> In the balancing of interests, the administration determined economic development took priority over free, prior, and informed consultation of indigenous peoples. After an uprising in Bagua related to the government's decision to move forward with the project, the Peruvian government suspended and abolished certain decrees and entered into discussions with the indigenous peoples of the area. After the consultations, the government continued to prioritize economic development over the wishes of indigenous peoples, raising the question of whether consultation should mean more than holding a discussion, such as requiring an agreed understanding between the parties, arriving at a mutually acceptable plan for future action.

Although violence continued following the Peruvian adoption of a free, prior, and informed consultation law, Salmón convincingly argues that the law has had beneficial long-term effects. These include establishment of requirements that government ministries consult with relevant indigenous peoples, as well as the development of a database of contacts for indigenous peoples. In the meantime, there has been national debate about whether indigenous peoples affected by a hydroelectric dam have to consent to the dam or merely be consulted. Even with the benefits of the law, it remains to be seen whether social protests will diminish if consultations increase.

Unlike the other articles, which address land and real property issues, Michael Blakeney addresses the rights of indigenous peoples in spiritual expressions in Australia. His central concern is whether there is a way to prevent the misuse by non-indigenous peoples of spiritual images, songs, and other cultural expressions. Examples of misuse include derogatory cartoons, perpetuation of false stereotypes, and depictions of sacred imagery out of context. He investigates several alternatives, including the intellectual property system. Unlike most jurisdictions, Australia has a substantial body of jurisprudence addressing the nexus of indigenous peoples' expressions and intellectual property law. These cases often address instances of misuse, characterized as "unauthorized and derogatory treatment of works that embody community images or knowledge."<sup>21</sup> Some of the challenges of legislating in this area include conflicts with policies favoring free speech as well as whether, if protected by the intellectual property system, such expressions would ever become part of the public domain.

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<sup>20</sup> *Id.* at § II.A.4.

<sup>21</sup> Michael Blakeney, *Protecting the Spiritual Beliefs of Indigenous People—Australian Case Studies*, 22 PAC. RIM L. & POL'Y J. 391 (2013).

One of the most interesting aspects of Blakeney's article is how he traces the jurisprudential approach of these intellectual property cases back to disputes that deal with the Native Title Act and real property concerns. His analysis includes one minority opinion that argues for the application of the Native Title Act to cultural expressions even though it has historically only applied to real property. Using real property analysis to inform cultural property disputes reflects the more holistic worldview of many indigenous peoples.

The authors presented here offer timely insights on the developing body of law concerning indigenous rights and implementation of the UNDRIP. These articles, which primarily address control over real and intellectual property, raise two fundamental questions: how should states deal with past wrongs and prevent future ones; and, how can indigenous peoples effectively advocate for their rights in disputes with states?