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WORKING GROUP ON INDIGENOUS POPULATIONS

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NEW ZEALAND STATEMENT UNDER ITEM 5

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Madam Chairperson, Ladies and Gentlemen of the Working Group, Tena Koutou, Tena Koutou, Tena Koutou Katoa. My delegation appreciates the opportunity given us each year to address this important UN body and to observe its proceedings. New Zealand has always welcomed the work of the WGIP in focussing on the situation of indigenous peoples and in evolving standards for the protection of their rights.

In an earlier statement, the New Zealand delegation reported on recent developments in New Zealand. In particular we outlined developments, including the establishment of the Iwi Transition Agency, aimed at restoring and strengthening the operational base of iwi (Maori tribes). These are challenging and exciting developments. They are however in their early stages and accordingly it would be premature for my delegation yet to submit any definitive written statement of our approach to the draft Universal Declaration on which the Working Group is working. We need first to take these developments a little further down the track. And we need too to consult the Maori people, the tangata whenua, as to the terms of the Government's response.

Instead, Madam Chair, at this session of your Working Group I would propose under agenda item 5 to give a general overview of the draft Declaration conveying my Government's preliminary impressions of some of its major themes.

As an initial point, I would stress again that the New Zealand Government's domestic policy on indigenous issues is still evolving as the Government continues to devise improved mechanisms for the delivery of government programmes and services to Maori communities. However, New Zealand's existing laws and policies ensure that New Zealand is able to support the intent of many of the draft principles. Many, indeed, are reflected in long-established New Zealand law and practice.

My comments today will be amplified by subsequent more detailed statements of the New Zealand position as the WGIP continues its work and following consultations between the New Zealand Government and the Maori people.

Before turning to the text of the draft Declaration before us, Madam Chair, I should like first to make some observations about the process of standard-setting by the United Nations.

General Comments — Draft Declaration.

In all standard-setting exercises, certain requirements must be borne in mind. Firstly, care must be taken to ensure compatibility with existing human rights instruments. This requirement was of course spelled out in UN Resolution 41/120 which adopted guidelines for the setting of international standards in the field of human rights. My delegation would like to see these guidelines more clearly reflected in the draft Declaration. The Declaration now being drafted by the Working Group must also be consistent with existing international law by making it clear that indigenous peoples are entitled to the protection of all the human rights provisions already adopted by the United Nations (and in particular to those enshrined in the UN Charter, the two International Covenants and the International Convention on the Elimination of All Forms of Racial Discrimination) and, equally, that the principles in the Declaration do not derogate from existing human rights standards.

Another of the guidelines adopted in Resolution 41/120 refers to the need, in the setting of international standards, to be "sufficiently precise to give rise to identifiable and practicable rights and obligations". There may be some who are inclined to view the call for precision as a device to concentrate attention on the hard

issues and thereby to stall developments in the standard-setting area. The reality is very different. Afterall, it is difficult to persuade Governments to subscribe to vaguely worded texts. If they do, it will be equally hard to monitor their subsequent compliance. A precise articulation of rights and obligations may be thin on rhetoric but it will provide the essential basis for the effective monitoring and implementation of those rights. (Specific comment on the application of this requirement to the draft Universal Declaration on Indigenous Rights is included under Parts I and II below.)

Resolution 41/120 also requests the drafters of new instruments to ensure that their texts are capable of attracting broad international support. It is essential, then, that the standards set by new human rights instruments reflect a very high degree of international consensus. This argues in favour of a realistic and practical approach to standard-setting. It also suggests that the standards set be universal in their scope and capable of applying to a broad range of differing legal and factual situations. In the particular context of the WGIP's work, then, account needs to be taken of the diverse factual situations of indigenous peoples. The Declaration must be capable, too, of applying to countries with very different constitutional and legal systems. It must not, for instance, be directed in the main at countries with a federal division of powers nor be capable of effective implementation only in those states which have set aside distinct areas or "reserves" for the indigenous peoples within their borders. My delegation finds some evidence in the draft principles of an inappropriate concentration on situations that pertain to reservations and would strongly urge the WGIP in keeping with 41/120 to adopt a wider scope.

The Preamble and Part I

Within the general framework I have outlined above, I should like now to make a number of more specific comments on the revised text presently put forward by the WGIP. Firstly, I would note that the text of the draft Declaration uses the term "indigenous peoples" rather than the more familiar "indigenous populations". This is a matter of some contention. New Zealand is able to support the reference to "peoples" instead of "populations" (as we did recently in the context of the ILO's revision of Convention 107) provided it is made clear - as it was in the text adopted by the ILO - that the use of the term "peoples" does not import the same connotations which are associated with the term under certain other international instruments. The draft Declaration needs therefore to incorporate a proviso along the following lines: "The particular use of the term "peoples" in this Declaration shall not affect the use or interpretation of this term at international law."

It would also be desirable to incorporate within the text of the Declaration a definition of "indigenous peoples". This is particularly necessary given that it is our understanding that this term has not previously been defined in the general United Nations context (a definition of the term was however recently adopted by the ILO for the purposes of Convention 107). The inclusion of such a definition here would also be consistent with the terms of Resolution 41/120. It would ensure that the scope of the WGIP Declaration was apparent to all and, in particular, it would preclude any given state from being able to deny the existence of an indigenous people within its borders.

As noted above, it is important that the Declaration not appear to imply that indigenous peoples are not already entitled to protection under existing human rights instruments and the UN Charter. In this regard, the opening preambular paragraph should establish a more direct linkage with the existing international human rights instruments. (The initial preambular paragraphs of both the Declaration and Convention on the Elimination of All Forms of Discrimination Against Women provide a useful analogy. By way of example, I note that the second preambular paragraph of the Convention reads as follows: "noting that the Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex".) Equally draft Principle 1 also needs some redrafting so that it does not appear to carry the implication just referred to.

There should be explicit recognition in the text that nothing in the draft Declaration is intended to derogate from existing human rights instruments. This is a principle of major importance, not only to countries such as New Zealand but also to the United Nations system as a whole. 41/120 was predicated on this principle and if it is not explicitly reflected the necessary consensus which the Declaration will require is unlikely to be forthcoming.

New Zealand further believes that the formulation of the draft principles should be cast in such a way as to reflect the greatest individual freedom of choice for indigenous peoples so that the options open to individuals are not limited. Accordingly, the freedom of individuals to choose to identify or not to identify with the rights and responsibilities of membership of the indigenous group should be explicitly recognised (in the preamble or in Part I of the text).

In the New Zealand context, such an option is indeed

recognised in the Treaty of Waitangi. As noted by the Waitangi Tribunal in its report on the Muriwhenua Fishing Claim:

> "The Treaty provided an effective option to the Maori to develop along customary lines and from a traditional base, or to assimilate into a new way. Inferentially it offered a third alternative, to walk in two worlds. That same option is open to all people, is currently much in vogue and may represent the ultimate in partnership. But these are options, that is to say, it was not intended that the partner's choices could be forced." (Muriwhenua Fishing Report, page 195).

Part II

Draft principle 5 deals with the "right to protection against ethnocide. This protection shall include, in particular prevention ... of any form of forced assimilation or ... imposition of foreign life-styles and of any propaganda derogating their dignity or diversity". New Zealand fully supports the underlying concept of this principle which addresses an important aspect of the right to the protection of cultural characteristics and identity. However, there are some problems with the actual wording in the draft. In line with the comment made earlier about the importance of a precise identification of rights and obligations, this principle should either be redrafted to provide a definition of "ethnocide" or, alternatively, the list of acts enumerating the concept should be an exhaustive one. The terms "propaganda" and "foreign lifestyles" are also unsatisfactory in the absence of more precise definition. It should be clearly established for instance that the requirement to prevent propaganda cannot be interpreted as limiting the legitimate exercise of the right of freedom of speech, a right which is guaranteed under other human rights instruments. One solution would be to restrict the scope of this principle to action by Governments.

Draft principle 9 relates to "the right to develop and promote their own languages, and to use them for administrative, juridical, cultural and other purposes". New Zealand supports the objective of draft principle 9. With reference to New Zealand's own situation, the Maori Language Act 1987 declares Maori to be an official language and establishes a Commission to promote the Maori language as an ordinary means of communication. A principle which is far-reaching as regards the use of indigenous languages for administrative and juridical purposes is excellent as an objective to be worked towards. Perhaps it could be better framed using the kind of language in the ECOSOC Covenant which would provide for progressive implementation.

Draft principle 10 appears to refer in one sentence to three separate rights: the right to all forms of education, the right to education in the indigenous language and the right to control of their own educational systems and institutions. Again there are problems of precision. These issues need to be addressed separately. With regard to the first issue, there is already in the International Covenant on Economic, Social and Cultural Rights a non-discriminatory right of access to education for all.

With regard to the second aspect covered in draft principle 10, we assume that it is not envisaged that each and every educational institution within a country must offer education in the indigenous language or languages. Some clarification is called for. It would also be useful to expand the scope of this second aspect of draft principle 10 to cover not simply access to education in the indigenous language but access to education in the cultural traditions and heritage. There is a further question which relates to whether the right of access to such education should be limited simply to children. In New Zealand's view it is desirable that adults also have access to education in their own language.

With regard to the final issue raised in draft principle 10, an unqualified right to absolute control of education systems or institutions as this one appears to be is surely not what is intended. Again greater precision is desirable. In this regard, it is worth recalling that Article 13.4 of the International Covenant on Economic, Social and Cultural Rights requires separate educational institutions always to "conform to such minimum standards as may be laid down by the state".

Part III

Principle 12 deals with the right to "ownership, possession and use of the land or resources which they have traditionally occupied or used". As an initial point, given the widely differing laws relating to land tenure in many parts of the world and also given that legal regimes applicable to land often differ from those applicable to resources, it would seem desirable to deal with land and resources in separate principles. (In this regard, in various countries, ownership of mineral resources is not in some instances vested in the owner of the land surface. Mineral rights have in certain cases - eg over gold and silver, and in relation to certain other minerals and certain land areas - been reserved to the Government.)

There is however a further difficulty with this particular principle which makes its meaning very unclear. As currently drafted, it refers to the

possession of lands in the past tense. By contrast, ILO Convention 107 refers to the rights of indigenous peoples to "ownership and possession of those lands which they traditionally occupy". Accordingly, the language of draft principle 15 should be clarified. (A corresponding change should be made to the language of draft principle 14).

As I have said this is not the time or place for the representative of the New Zealand Government to make definite statements on issues of such domestic controversy as land claims. I would simply note the terms of the Principle of Self-Management (the Rangatiratanga Principle) as contained in the set of "Principles for Crown Action on the Treaty of Waitangi" recently adopted by my Government. This is in the following terms: "The second Article of the Treaty guarantees to iwi Maori the control and enjoyment of those resources and taonga which it is their wish to retain. The preservation of a resource base, restoration of iwi self management, and the active protection of taonga, both material and cultural, are necessary elements of the Crown's policy of recognising rangatiratanga."

Draft principle 16 refers to "the right to protection of their environment". It would appear that this principle is predicated on the reserve system, ie it envisages a situation of indigenous peoples living on separate and quite distinct areas or territories within a country. The particular language of draft principle 16 would appear to create a rather farcical requirement in a country such as New Zealand where the indigenous peoples in general live and work as part of the wider community. A better balance is required. Alternative wording could include "the right to protection of the environment" or "the right to measures to protect their traditional habitat".

Draft principle 17 concerns the right to be consulted before the commencement of large-scale mining activities. There is a question as to the scope of this provision. We assume (although this is not stated) that it is intended to apply to projects or exploration to be carried out on lands owned by indigenous peoples. (If this is not so, then the potential scope of the draft principle is unacceptably wide.) If it does, then it would seem that the requirement for states simply "to consult" is too weak.

Part IV

Draft principle 18 refers to the right to maintain traditional economic structures and ways of life. We assume that this right relates to the same land area referred to in draft principle 12, that is that it should extend to "lands which they traditionally occupy". Some clarification in the drafting is necessary. We would also

make the point that this principle must take into account legitimate environmental protection and conservation requirements. This is of vital importance at a time in history when very small scale activity could result in the extinction of whole ranges of endangered species.

Part V

Draft principle 23 would give indigenous peoples the "right to autonomy in matters relating to their own internal and local affairs, including education, information, culture, religion, health, housing, social welfare, traditional and other economic activities, land and resources administration and the environment, as well as internal taxation for financing these autonomous functions". It seems to New Zealand that, as with some other principles included in the Declaration, this principle presupposes a system of indigenous reserves or separate areas. There is an implication or presumption of segregation which New Zealand finds unhealthy. We would strongly hope that better wording could be found.

My delegation would like to express very clearly, however, that New Zealand's policies are designed to promote decision making in the machinery of government in areas of importance to Maori communities and to provide opportunities for Maori people to actively participate on jointly agreed terms in policy formulation and service delivery. The Government's proposals for restructuring the Maori Affairs portfolio are designed to ensure that Maori people will have the opportunity to use their traditional institutions and structures for designing and delivering their own programmes and services. There can be no absolute right, however, to determine the nature of policies to be implemented in the areas outlined in draft principle 23. In terms of the "Kawanatanga Principle" (the Principle of Government) contained in the set of Principles previously referred to which were recently adopted by my Government: "the first Article of the Treaty [of Waitangi] gives expression to the right of the Crown to make laws and its obligation to govern in accordance with constitutional process". I would also note as a further point that there is no provision in New Zealand law for separate systems of taxation.

Draft principle 25 talks of the "right to determine the responsibilities of individuals to their own community". The meaning of this phrase is rather unclear and we would appreciate clarification in the text. New Zealand could not support this principle if it could be seen as sanctioning legal pluralism - ie as requiring a system of separate laws for indigenous peoples. Existing

human rights standards and the Treaty of Waitangi have enshrined a guarantee of legal equality for Maori and all other citizens of New Zealand. This means that all New Zealand citizens are both equal before the law and subject to the same laws. In the words of the "Equality Principle" of the Treaty of Waitangi contained in the set of Principles for Crown Action referred to above: "The third Article of the Treaty constitutes a guarantee of legal equality between Maori and other citizens of New Zealand. This means that all New Zealand citizens are equal before the law. Furthermore, the common law system is selected by the Treaty as the basis for that equality although human rights accepted under international law are incorporated also."

Draft principle 27 seems to the New Zealand Government to be unacceptably weak. It simply states that there is a "right to claim that states honour treaties and other agreements with indigenous peoples". New Zealand believes this principle should also refer to the obligation to provide a mechanism to ensure that states honour their treaty commitments. In the New Zealand context, the Treaty of Waitangi Tribunal was established in order to hear grievances and make recommendations about alleged breaches of the Treaty by the Crown. There are other means of resolving grievances available including the courts and direct negotiations. The important point is that the Government accepts its responsibility for providing a process for the resolution of grievances arising from the Treaty.