THE DRAFT DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: THREE CASE STUDIES

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I. INTRODUCTION

From the earliest of times, indigenous peoples have been fighting to keep their cultural heritage and their rights as individual peoples. Recently indigenous peoples have progressed towards that goal. In 1993, the United Nations declared the Year of Indigenous People and made progress toward adoption of a Draft Declaration on the Rights of Indigenous Peoples. This paper focuses on the effects the Draft Declaration may have on three indigenous groups and their respective nations: the Ainu of Japan, the Saami of Sweden, and the Aborigines of Australia. This paper examines the history, current rights, and rights in conflict of each group. Finally, the paper will also look at the effect of the Draft Declaration on each group, as well as the overall effectiveness of the document.

The Ainu of Japan, who are examined in Part II, are located mainly in Hokkaido and have recently been very active and successful in protecting their cultural heritage. The Saami, the subject of Part III, are located in Sweden, Finland, Norway, and parts of Russia. Each of these countries treats their Saami differently, therefore this paper will focus on the Saami of Sweden only. Finally, the Aborigines, who are examined in Part IV, are found throughout Australia, except in Tasmania, and are currently fighting for land rights.¹

II. THE AINU OF JAPAN

In May of 1997 the Japanese took a step towards the acknowledgment of the Ainu people. The Japanese Diet, Japan’s national legislature, passed a law allowing for the Ainu to protect their culture.² Unfortunately, the Diet did not declare the Ainu an indigenous group. One of the main problems with declaring the Ainu as indigenous is the

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² See Bringing them Home - Community Guide, (visited Apr. 8, 1998) <http://www.austlii.edu.au/rsjlibrary/hreoc/stolen_summary/stolen04.html>. White settlers who had been given permission to shoot them killed most of the indigenous people who lived on Tasmania. See id. The remaining aborigines from Tasmania were relocated to Cape Barren Island. See id.
governmental stance stating that Japan is a homogenous population. As evidenced in the Prime Minister of Japan’s 1986 statement that “Japan is a homogeneous nation,” and with the follow-up that the United States’ “lower than average intelligence level” was due to the minority population; Japan may believe heterogeneous populations are less intelligent. The Ainu reacted to these statements with a boosted effort for recognition.

The “homogenous nation” problem is further reinforced by the Japanese creation and origin myths. According to these myths, the Japanese islands were formed and then populated by the gods, who are ancestors of the emperors. The myths state that Amaterasu was the goddess who began the imperial family. Amaterasu was given a jeweled necklace by her father, Izangi, a sword by her brother and a mirror by the other gods; these items are a part of the three imperial treasures of Japan. Amaterasu gave the sword to her grandson when he descended to become the ruler of Japan. The Ainu have no place in the history of Japan according to these myths. Interestingly, though, the Ainu are mentioned throughout the Nihongi. In one particular early story, it is said that the Japanese slew the Ainu and that none were left alive.

A. History

Anthropologists have yet to propose one universally accepted theory on the origin of the Ainu people. There are several theories based on their language patterns, their skeletal structure, and their relationship to the aboriginal populations of Japan, but

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6 J. Hackin et al., Asiatic Mythology 389-390 (1932).
7 See id. at 391.
8 See id. Izangi and Izanami produced as their offspring the islands of Japan and other deities. See id. When Izanami died after giving birth to the god of fire, Izangi went to the places of the dead to retrieve her. See id. When he failed, Izangi went to the river to wash and produced Amaterasu out of his left eye. See id. at 390.
9 See HACKIN, supra note 6, at 395.
10 See id. at 395-396.
11 See TERENCE BARROW, PH.D., INTRODUCTION TO NIHONGI: CHRONICLES OF JAPAN FROM THE EARLIEST TIMES TO AD 697 v-vi (W.G. Aston trans., vol. I and II, Charles E Tuttle Co. 1972). The Nihongi is a compilation of Japanese history to 697 AD. It is considered a classic work and an authority of early Japanese history.
12 Id. at vol. I 123-124.
13 Id. at vol. II 149 n. 1. Japan may also be referred to as Nihon, which literally means, origin of sun; the people would then be called the Nohinjin and the Japanese
none of these theories have been adopted as to their origin.\textsuperscript{14} The Ainu themselves say they are related to the Koropok-un-guru, the peoples recognized as the earliest settlers of Japan.\textsuperscript{15} There is some controversy with this as well because of problems with translation. These differing opinions on the ancestry of the Ainu are relatively important. If the Ainu can prove ancestry with the aboriginal population of Japan, then the Japanese might have to recognize them as rightful owners of land the Japanese claimed during the Meiji regime.\textsuperscript{16} The earliest written information on the Ainu is from an eighth century account of a second century emperor, Yamato; the next accounts are found in Chinese records which mention a Japanese ruler conquering fifty-five countries to the east.\textsuperscript{17}

In any case, the Ainu were forced North to Hokkaido to get away from the fighting on the main islands of Japan.\textsuperscript{18} After the Eighth Century, Japanese immigrants from the mainland began coming to Hokkaido to get away from the wars as well.\textsuperscript{19} As the wars on the mainland increased resulting from a struggle for power, the immigrants to Hokkaido also increased.\textsuperscript{20} As the immigration increased, conflicts between the Ainu and Japanese resulted with the Ainu forcing most of the Japanese from Hokkaido.\textsuperscript{21} In 1550, after years of fighting, peace came to Hokkaido and the immigrants won favor with the Ainu through gifts, thereby obtaining permission to stay on the island.\textsuperscript{22} During the seventeenth and eighteenth centuries, there was escalating unrest because of a depletion of resources and the rivalry between the Ainu and the immigrants.\textsuperscript{23} In 1868, the Japanese government annexed Hokkaido and started to use it as an agricultural base for Japan and as a defensive barrier against enemies to the North.\textsuperscript{24}

Under the Meiji regime the Japanese began the integration of the Ainu into Japanese society. To control discrimination against the Ainu and to protect the Ainu, Japan enacted an assimilation policy.\textsuperscript{25} The Former Native Protection Law of 1899 (the “1899 Act”) had several articles, including ones focusing on the promotion of agriculture, language, Nihongo.

\textsuperscript{14} See SJÖBERG, supra note 3, at 84-91.
\textsuperscript{15} See id. at 91.
\textsuperscript{16} See id. at 93. The Meiji regime began in 1868 when Japan annexed Hokkaido.
\textsuperscript{17} See id. at 93-94. The Chinese records are called “The Account of the Three Kingdoms.” See id. The fact that the conquered territories are to the east is important because research has shown that the Ainu were the people in the east. See id. at 94.
\textsuperscript{18} See id. at 98. All of the islands south of Hokkaido will hereinafter be referred to as mainland Japan.
\textsuperscript{19} See SJÖBERG, supra note 3, at 98.
\textsuperscript{20} See id. at 98-99.
\textsuperscript{21} See id. at 99.
\textsuperscript{22} See id.
\textsuperscript{23} See id. at 104.
\textsuperscript{24} See id. at 117-118.
and on medical, educational, and housing policies, all of which were intended to assimilate the Ainu. The act was specifically noteworthy because the Ainu were not allowed the right to alienate the land allotted under the Act. Any land transferred had to be approved by the governor prior to transfer. Now, the Ainu only hold 1,315 hectares of land out of a total of 9,061 hectares allotted under the 1899 Act. The emperor held that he loved all of his subjects equally and that he adopted the 1899 Act, allegedly preventing discrimination, to prove his love for the Ainu. The Ainu were not resistant to the assimilation because of their religious beliefs. The Ainu believed that their problems were a direct result of bad relations with their god. The Ainu further believed that the assimilation would lead them to “an ideal life in the future.” The discrimination inherent in the Act continues today.

B. Current Rights and Rights in Conflict

The 1899 Act is no longer in effect today because of a new law that was passed by the Diet in May of 1997. The new law recognizes the Ainu as an ethnic minority with a need to protect its cultural heritage; it does not however, protect their indigenous rights. The law came into effect after a court case involving two Ainu who were fighting to stop the building of a dam on their property. The case is known as the Nabutani Dam Case.

In the 1960’s the Japanese government began plans to build a dam and flood an area owned by two Ainu. After the Ainu repeatedly tried, without success, to get administrative remedies, the case was finally brought to trial in 1993. Although the court dismissed the plaintiffs’ claim, the court declared that the expropriation was illegal and that the Ainu were an indigenous people by international definition. The claim was

26 See SJÖBERG, supra note 3, at 114.
28 See id.
29 See id.
30 See id.
31 See SJÖBERG, supra note 3, at 114-15.
32 See id. at 115.
34 Ainu Law, supra note 2, at 1.
35 See Sonohara, supra note 33, at ¶15.
37 See id.
dismissed because the dam was complete and therefore it would be against the public interest to have the dam dismantled. The Ainu claimed, however, that the dam had “lost its public importance” because its necessity had been decreased due to other economic reasons. The agency, in August of 1996, drained the dam so that the Ainu could perform a traditional rite. The court found that the area expropriated was used by the Ainu in an annual ceremonial ritual and therefore was indispensable to their culture.

The court further held that according to the ILO Convention on Indigenous Peoples the Ainu are, by definition, an indigenous group. Because the claim was dismissed, the rhetoric used by the court was a positive move towards removing discrimination, but is not directly helpful to the Ainu’s cause.

The 1997 Act may be considered an answer to the court’s decision. Unfortunately, the Act only abrogates the Former Native Protection Law and promotes the teaching of Ainu culture. It does not, however, protect the Ainu culture, make guarantees for any indigenous rights, nor declare the Ainu an indigenous group. The Ainu have only begun the process of protecting their rights as an indigenous group. The Ainu are still discriminated against, but they are fighting for their rights. The Ainu have begun making themselves better known through Internet sites, museum collections and other projects used to promote the importance of the Ainu culture.

Currently, the Ainu number approximately 25,000, although, the true number may be twice that, no one can be certain because many Ainu hide their heritage due to fear of discrimination. Currently, the Ainu are fighting the hardest for recognition as an indigenous peoples, return of their land and freedom to teach their culture and language. Shigeru Kayano, who published an eleven-hour CD set of Ainu tales and myths, won a recent triumph in this fight. Ten volumes of text and a forty-minute video lecture accompany the set. The recordings were made to preserve the Ainu language, which does not have a writing system and is quickly becoming extinct. Kayano also began

38 See id.
39 Id.
40 See Sonohara, supra note 33, at ¶ 28, 29.
41 See id.
42 See id. at ¶19.
43 See id. at ¶41.
44 See id. at ¶ 42.
45 See id.
48 See id.
classes for the Ainu language in 1982 and currently there are 14 classes teaching children the Ainu language.  

III. THE SAAMI OF SWEDEN

A. History

The Saami of Sweden have been living in northern Sweden for over 10,000 years. Around 700 AD a Roman author called them “fenni” and described them as wearing animal skins and sleeping on the ground. The Greek historian Procopius also mentioned the Saami in 555 AD. During the Viking eras, the Saami actively traded with both the Vikings and groups from northern Europe, although there is some Saami history, which claims an ongoing conflict with the Vikings.

Around the fifteenth century the Saami lands were flooded with an increasing number of immigrants so that in 1542 the Swedish King declared, “all unused lands belong to God, us and the Swedish Crown.” This was a problem for the nomadic Saami but it was not until 1635, when silver was discovered and mines were established that the atrocities against the Saami began. The Saami were coerced to work in the mines, with threats of brutal punishment for those who refused to work. From then on the assimilation of the Saami began, first with taxation, then with persecution of those who practiced the Saami religion, and finally with a policy of race segregation.

In 1928, the Swedish government began promulgating a series of reindeer herding regulations that have lead to two trials, one in 1981 and one in 1996.

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49 See id.
50 See History of the Saami (visited Mar. 15, 1998) <http://www.samtinget.se/english/sapmi/ehistor.html>. “Saami” is spelled two different ways depending on the text, either as “Saami” or “Sami.” They are also known as the Lapps, although this is a derogatory term.
51 See id.
53 See id.
54 See id.
55 See id.
56 See id.
57 See Important Years, supra note 52.
58 See id.
B. Current Rights and Rights in Conflict

The most damaging regulation was enacted in 1971. This statute is a unique attempt to not only preserve the cultural heritage of the Saami, but also to phase it out.\(^{59}\) The Act of 1971 protects the Saami’s culture by narrowly defining it as reindeer herding.\(^{60}\) The Act then entitles the Saami to continue herding and raising reindeer as long as this is their primary source of income.\(^{61}\) If their primary source of income changes they are no longer protected by the Act of 1971 and they lose their membership status.\(^{62}\) Once they are unemployed, they are no longer members.\(^{63}\) It is difficult to regain membership and it must be done within three generations or they will no longer be eligible to herd.\(^{64}\) Obviously, any environmental changes causing bad farming years make this Act disastrous for the Saami because of the resulting loss of reindeer; for example, the Chernobyl disaster greatly affected the herds, causing thousands of reindeer to be killed without restitution.\(^{65}\) Also, other regulations were enacted to limit grazing rights. Both of the court cases discussed below dealt with this type of legislation.

The first trial involving reindeer herding regulations was known as the Taxed Mountains case and was ultimately lost by the Saami in 1981 in a Swedish Supreme Court decision.\(^{66}\) The Court held in the Taxed Mountains case that the Saami were not the owners of the mountain in question.\(^{67}\) The issue in the case was whether the Saami had ownership rights for this mountain and, if not, then could the Saami make a claim for use of the properties for grazing, hunting, fishing, harvesting, cultivation, mining, lumber, migration, minerals, and hydraulic power.\(^{68}\) The Court determined the ownership rights of the Saami by looking at the historical perspective starting in the 1600’s.\(^{69}\) During the 1600’s the only basis for establishing land ownership was through evidence of taxation, because the people who were taxed for a piece of land, must have owned that piece.\(^{70}\) The Saami however, did not pay any taxes and tried to claim ownership through


\(^{60}\) See id.

\(^{61}\) See id.

\(^{62}\) See id.

\(^{63}\) See id.

\(^{64}\) See id.

\(^{65}\) See Important Years, supra note 52.

\(^{66}\) See id.

\(^{67}\) See id.


\(^{69}\) See id. at 118.

\(^{70}\) See id.
possession. The Court held this was not sufficient.\textsuperscript{71} The Court further held that the other rights mentioned above couldn’t be given to the Saami unless the Saami are a part of the Reindeer Farming Act.\textsuperscript{72} The Swedish government helped to take away the land of the Saami by changing the names of the “taxed mountains” over a series of years.\textsuperscript{73} The “taxed mountains” were first renamed the “reindeer pasture lands,” then the “landed tenement” and finally were referred as “Crown lands in private use.”\textsuperscript{74} These name changes further support the Court’s decision. The final name is especially useful because it indicates that the Crown is the rightful owner of the land. This court decision was devastating to the Saami, not only for the rejection of their property rights as owners, but also for the rejection of their grazing rights.

A second court case was decided in 1996 with regard to similar land rights and the Saami lost again.\textsuperscript{75} In this instance the Saami also lost their grazing rights, which will eventually affect their entire livelihood.\textsuperscript{76} Other exclusive rights have also been taken away from the Saami, namely hunting and fishing rights.\textsuperscript{77}

Thankfully, the Saami now have a voice in parliament.\textsuperscript{78} In 1997 they held their second election for the Saami parliament, which is fighting for the rights of the Saami nationals.\textsuperscript{79} The idea of a Saami parliament began after the last court battle as a way for the Saami to achieve political resolutions.\textsuperscript{80} The parliament is mainly an administrative body with the power to initiate issues they think are of importance to Saami.\textsuperscript{81}

The most recent issues facing the Saami have been in regards to herding.\textsuperscript{82} The Saami have concerns over the great loss of herds due to bad weather conditions during the winter of 1997.\textsuperscript{83} The Swedish government refused to help with additional food for the reindeer.\textsuperscript{84} With a decline in the reindeer population the Saami will have to look for

\textsuperscript{71} See id. at 169.
\textsuperscript{72} See id. The Reindeer Farming Act is also known as the Reindeer-Herding Act [hereinafter The Act of 1971].
\textsuperscript{73} See id. at 128-29.
\textsuperscript{74} See id.
\textsuperscript{75} See id.
\textsuperscript{76} See id.
\textsuperscript{77} See id.
\textsuperscript{78} See The Act of 1971, supra note 72, at 128-29.
\textsuperscript{79} See id.
\textsuperscript{81} See id.
\textsuperscript{84} See id.
other jobs to subsidize their income. The Saami are also concerned with compensation for damages sustained to herders for loss of reindeer due to predators. The government has refused, thus far, to fully compensate the herders for their loss and consider it a risk of protecting Sweden’s fauna.

IV. THE ABORIGINES OF AUSTRALIA

A. History

The continent of Australia has been inhabited for 45,000 years. Rock engravings found in Southern Australia have been dated to this time. As early as 1451 there is a record of trade between Macassans and Aborigines off the northeast coast. It was not until 1770 that Lieutenant James Cook claimed the east coast of Australia for Britain, and within eighteen years Britain began colonization. The Aborigines immediately began to fight back.

The situation in the territory quickly went from bad to worse. In 1814 the governor attempted to send aboriginal children to boarding schools. Their families caught on to the government’s aim of distancing the children from their families and quickly withdrew their children from these programs. Between 1824 and 1838 there was rampant hunting and killing of Aborigines throughout Australia; the massacres were credited with decimating the aboriginal people of Tasmania. From 1860 on, there were a series of Boards established to watch over the interests of the aboriginal peoples. Unfortunately, most of the Boards did not work and by 1969 all of the Boards were

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85 See id.
86 See Current Saami, supra note 82.
87 See id.
89 See id.
90 See id.
91 See id.
92 See id.
abolished. It was not until 1992 that the aborigines began the process of reconciliation with the Mabo court decision, which abolished the doctrine of *terra nullius*.

**B. Current Rights and Rights in Conflict**

The first major victory for the aborigines was the Mabo decision by the High Court in 1992. The Mabo decision abolished the idea of *terra nullius* and acknowledged the existence of aboriginal title. *Terra nullius* defines land as belonging to no one, thereby letting the British come and take over the land rightfully belonging to the Aborigines. The court further held that native title was different because it depended on the “customs and law of the indigenous people who hold it.” Finally, the court held that native title was fragile and could be extinguished by government action. Shortly after the decision, the Australian government enacted the Native Title Act of 1993. This Act provided: (1) that native title was extinguished on “validated freehold grants, residential, commercial, pastoral and agricultural leases, and other Crown acts involving permanent public works;” (2) “a process for determining native title,” and (3) “a future act regime to allow for development affecting native title.”

In 1996, the Australian High Court made a decision regarding pastoral leases and native title in the *Wik* case. The *Wik* case developed from the claims of the native peoples of Cape York. The natives claimed that lands with pastoral lease grants were theirs under native title. The court held in *Wik* that the grant of pastoral leases did not necessarily extinguish native title and that each case would have to be taken individually, but the leases and the rights the leases conferred were valid. The court also held that any co-existing rights yielded to the leaseholders’ rights and that the leaseholders rights prevailed over native rights. The *Wik* case, however, did not give native title nor did it consider the provisions of the Native Title Act.

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94 *See id.*
95 *See id.*
97 *See id.* at ¶ 5.
98 *See id.* at ¶ 5-6.
99 *Id.* at ¶ 9.
101 Minchin, *supra* note 96, at ¶ 34.
102 *See id.*
103 *See id.* at ¶ 36.
After the Wik decision there was a great concern to amend the Native Title Act and in 1997 the government issued a ten-point plan to that end. The ten-point plan more clearly defines when native title is extinguished and puts into action a series of negotiations to determine native title on non-extinguished lands. The problems from the Wik case and the ten-point legislation seem to be with compensation. According to the Australian Constitution, any property right taken away by the federal government must be accompanied by “just terms compensation.”

The ten-point plan went to the Australian Senate and has been declined twice, so the Prime Minister now may call a general election to determine the fate of the legislation. There seems to be a split in the country regarding this legislation and the election is being called “race-based.” On other fronts, the Native Title Act, as now enforced, has caused major headaches in South Australia where thirty overlapping claims may take twenty years to resolve.

V. THE DRAFT DECLARATION ON INDIGENOUS PEOPLES RIGHTS

In 1985, the Working Group on Indigenous Populations wrote a preliminary text of the UN Draft Declaration on the Rights of Indigenous Peoples. Since that time, the Working Group has heard and accepted information from some “300 million indigenous people” and in 1993 the Final Draft of the Declaration was announced. In 1994, the Draft was given to Sub-Commission on Prevention of Discrimination and Protection of Minorities and was adopted without change. Since that time, the Working Group for the Commission on Human Rights has been working on the Draft Declaration.

The Draft Declaration only applies to peoples who are recognized as indigenous peoples in their homeland. Neither the Ainu nor the Saami are considered to be indigenous by their respective countries; the Aborigines are considered indigenous. For the sake of this paper, it will be assumed that each of these groups is indigenous by definition and would be recognized as such in the international community.

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104 See id. at ¶ 54.
105 See id. at ¶¶ 58-108.
106 Woodford, supra note 100.
108 Id.
111 See id. at 210.
112 See id.
113 See id at 210, 211.
A fundamental problem with the Draft Declaration is the lack of a definition for “indigenous peoples.” The World Bank defines indigenous by five characteristics: “(1) close attachment to ancestral lands, (2) self-identification, (3) indigenous language, (4) social and political customs, and (5) subsistence-oriented production.” The Independent Commission on International Humanitarian Issues defines indigenous people with four elements: “(1) pre-existence; (2) non-dominance; (3) cultural difference; and (4) self-identification.” The most widely accepted definition is as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing...and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. . . .

One of the main parts of the Draft Declaration is the affirmation of the rights of indigenous peoples. Specifically, it mentions freedom from discrimination, promotion of land rights and culture, indigenous political autonomy, self-determination, and demilitarization of indigenous lands and territories.

All of the groups discussed in this paper would benefit from the implementation of the Draft Declaration. The Ainu, for example, would specifically benefit from Part Two, Articles seven through ten, which state they have a right not to be subjected to ethnocide, they have a right to be identified as indigenous, they have a right to belong to an indigenous community, and they have a right not to be forced from their land without consent or at least fair compensation. These articles would have been particularly useful in the Nabutani Dam Case. In the Nabutani Dam case the Ainu plaintiffs’ land was illegally expropriated, according to the Court, but nothing was done to remedy the illegality. If the Draft Declaration had been applied, Article 10 would have required

115 Id. at 2.
118 See id.
119 See Sonohara, *supra* note 33, at ¶¶17, 37.
Ainu consent before the Japanese built the dam and then just compensation for the loss of land. The Draft Declaration would also help the Ainu in being declared indigenous. Article 8 states that indigenous groups have a right to be identified as indigenous. Although the court in the Nabutani Dam case did declare the Ainu indigenous, the Japanese government has not made this declaration, and continues to call them an ethnic minority.

Part VI, Articles twenty-six through twenty-eight, would benefit the Saami in their land rights and ownership cases. Specifically, under Article twenty-six, the Saami would be able to get land ownership rights to the taxed mountains. In Article twenty-six the Draft Declaration states that indigenous peoples have a right to own and control their own lands with full recognition of their culture and land-tenure systems.\(^{120}\) If this Declaration had been in effect in 1981, the Saami would have owned the taxed mountains. They held the mountains by right of possession under their own laws. Since Article twenty-six was not in effect when the case was decided, the Saami could now use Article twenty-seven, which gives restitution to the indigenous group by either the return of the land, and if that is not possible, then just compensation.\(^{121}\) In both the 1981 and 1996 cases the Saami could use this Article to get the land returned to them or at least to receive compensation for their loss.

Part VII of the Draft Declaration would be beneficial to the Aborigines. Although the Aborigines are starting to get land rights back, they are not allowed self-determination. Article thirty-one specifically provides indigenous peoples the right to self-determination.\(^ {122}\) Articles thirty-two through thirty-six provide for the right to determine their own citizenship, to develop and maintain their own institutions, to determine responsibilities of their peoples and to the “recognition, observance, and enforcement of treaties, agreements and other constructive agreements concluded with States.”\(^ {123}\) The Aborigines may be able to use Article 36 to have the Mabo case become more than just the abolishment of *terra nullus* but also a constructive agreement with the State that the lands taken during colonization were taken wrongly and would require the payment of fair compensation. Of course, the Aborigines could use Article 27, which states that indigenous peoples have a right to restitution of lands and territories they previously owned or occupied.\(^ {124}\) If the Australian government would not able to give the land back, then it would need, under Article 27, to compensate the Aborigines.

Other parts of the Draft Declaration would help all three groups, specifically the Articles regarding self-determination, participation in decisions affecting their lives, and autonomy at the local level.\(^ {125}\) There are several other very promising Articles in the

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\(^{121}\) See id. at art. 27.
\(^{122}\) See id. at art. 31.
\(^{123}\) Id. at arts. 32-36.
\(^{124}\) See id. art. 27.
\(^{125}\) See id. at arts. 3, 4, 19, 20, 31.
Draft Declaration, but there are also some Articles that will cause problems if put into effect. Under the land restitution articles it will be difficult to remove people already existing on the land to return the land to the relevant indigenous group.\textsuperscript{126} Article 11 would be particularly difficult to maintain, because it provides that countries cannot draft indigenous peoples.\textsuperscript{127} It would therefore require discrimination in the draft by only drafting other citizens of the State and not indigenous citizens.

Another major problem with the Draft Declaration is that there are no remedies for failure to comply. The only remedies are mentioned in Article 39, which gives indigenous groups access to mutually acceptable procedures for resolution of conflicts.\textsuperscript{128} The Draft Declaration further states in Article 41 that the UN will take necessary steps to implement the Draft Declaration by creating a body with special competence in the field.\textsuperscript{129} There are no penalties for disregarding the Draft Declaration and the UN has no real power of enforcement. Thus even if an indigenous group were to receive a favorable resolution of a conflict, there are no enforcement procedures to guarantee the resolution is put into effect.

Finally, the Draft Declaration has been in the drafting stage since 1985 and it is not clear when the Draft Declaration will become a formal declaration of the UN.\textsuperscript{130} Earlier in this paper it was stated that the Draft Declaration is now with Working Group of the Commission on Human Rights.\textsuperscript{131} Once this Working Group adopts the declaration it then must be submitted to the Sub-Commission on Human Rights.\textsuperscript{132} When the Sub-Commission adopts the Draft Declaration, which could take years because this is a group of thirty-five people who may revise and rewrite it, it then will be submitted to the Human Rights Commission.\textsuperscript{133} The Human Rights Commission may also revise and rewrite the Draft Declaration before adopting it, but once the Commission adopts the Draft Declaration it will move on to UNESCO.\textsuperscript{134} UNESCO may also amend the document. Once UNESCO adopts the Draft Declaration, the Draft Declaration will then go to the General Assembly for approval.\textsuperscript{135} This process could realistically take several more years and the final Declaration may not be even close to the Draft Declaration now under consideration.

\textsuperscript{126} See Draft Declaration, supra note 120, at art. 27.
\textsuperscript{127} See id. at art. 11.
\textsuperscript{128} See id. at art. 39.
\textsuperscript{129} See id. at art. 41.
\textsuperscript{131} See id.
\textsuperscript{132} See id.
\textsuperscript{133} See id.
\textsuperscript{134} See id.
\textsuperscript{135} See id.
VI. CONCLUSION

The Draft Declaration is a good step towards the protection and preservation of indigenous peoples, but there are still numerous areas that need to be more clearly specified and specific remedies and implementation procedures need to be outlined. As this paper has described, most of the problems these groups face are with land rights, self-determination, and cultural genocide. The Ainu have won a minor battle in the 1997 Act, but they are far from stopping the discrimination against them or having a strong base for their culture to grow. The Ainu are small in number and the work to keep their culture and language alive will be difficult and time consuming. The Saami are continually battling for preservation of their way of life. The reindeer herding of the past is becoming more and more difficult with the laws Sweden has implemented regarding land use. Thankfully, the Saami now have a voice in the government, the Saami Parliament. The Parliament has minimal power but it is still a step in the right direction. The Aborigines, though, have a long way to go before they will even get land rights. The Native Title Act is hard to decipher and the new amendments do not make getting Native Title any easier. The Aborigines have no self-determination and their only voice in government actions is through their popular vote.

As promising as the Draft Declaration seems, the reality is far from the dream. With a lack of enforcement measures and no clear definition of indigenous peoples the Draft Declaration is simply rhetoric. Indigenous peoples are being given a Declaration that aims to protect their rights and culture with no way to force countries to agree. Without enforcement measures the violations of the Draft Declaration will turn into wars of words without any solution. Recently, for example, the European Union called upon Australia to withdraw from uranium mining on Australian land that held cultural significance to Aborigines. In response, the Australian deputy Prime Minister stated “I will listen to the European parliament and their advisory resolutions on these matters when the Saami people are treated as the Australian governments of both persuasions treat Aboriginals.” Unfortunately, any advisory actions in response to violations of the Draft Declaration could be handled in similar ways. The Draft Declaration is a beginning in recognizing and protecting the rights of indigenous peoples. However, significant work is needed to realize the purpose of this Declaration.

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137 Id.