



2120 L Street, NW, Suite 700
Washington, DC 20037

T 202.822.8282
F 202.296.8834

HOBBSSTRAUS.COM

June 18, 2010

GENERAL MEMORANDUM 10-078

United States Reconsideration of Position on United Nations Declaration on the Rights of Indigenous Peoples

In April, the U.S. Ambassador to the United Nations, Susan E. Rice, announced that the Obama Administration has decided to review the position of the United States regarding the United Nations Declaration on the Rights of Indigenous Peoples (Declaration). In September 2007, when the U.N. General Assembly adopted the Declaration, the U.S. was one of four U.N. member states that voted against the Declaration. See our General Memorandum 07-124 (Sept. 21, 2007).

The State Department has established a website with information about the review of the U.S. position on the Declaration, including press releases and a schedule of events. See www.state.gov/s/tribalconsultation/declaration/index.htm. As of this date, the schedule of events is:

June 21 – Initial Tribal Consultation – Rapid City, SD (in conjunction with the mid-year conference of the National Congress of American Indians)

July 7 – Second Tribal Consultation – Washington, DC

July 8 – Meeting with Nongovernmental Organizations – Washington, DC

Late September-October (date TBD) – Second Meeting with Nongovernmental Organizations

Late September-October (date TBD) – Final Tribal Consultation – Washington, DC

The State Department is accepting written comments, and requests that comments be submitted by July 15. Comments can be sent by email to declaration@state.gov or by mail to:

S/SR Global Intergovernmental Affairs
U.S. Department of State
2201 C Street NW, Suite 1317
Washington, DC 20520

DISCUSSION

History of the Declaration. The adoption of the Declaration by the U.N. General Assembly in 2007 was a landmark event in the international recognition of the human rights of the world's indigenous peoples, the culmination of more than two decades of negotiations among the Member States of the UN, representatives of indigenous peoples, and nongovernmental human rights organizations. The origins of this process can be traced to 1971, when the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities appointed a "Special Rapporteur" to study the problem of discrimination against indigenous peoples. Another key event was a major

conference in Geneva, Switzerland, in 1977, at which representatives of indigenous peoples proposed a declaration comprised of thirteen principles and called for the UN to conduct a study of indigenous peoples throughout the world. That study was completed by the Special Rapporteur in 1983. In 1982, the UN Economic and Social Council (the parent body of the Sub-Commission) established the Working Group on Indigenous Populations. That Working Group developed a number of drafts of a Declaration on the Rights of Indigenous Peoples and then, in its eleventh session, in 1993, approved a draft and forwarded it to the Sub-Commission. In 1994, the Sub-Commission approved the draft and passed it on to the UN Human Rights Commission. In 1995, that Commission established its own working group. After another decade of negotiations, the Declaration was approved by the Human Rights Council (the successor to the Commission) and was then adopted by the General Assembly in September 2007.

Significance of a Declaration in International Law. In the United Nations system for the development of international law, principles that are considered to have the stature of law may be established through multi-lateral treaties. In addition, some legal principles may become recognized as customary international law without being incorporated into a treaty. A declaration is generally considered not to be a statement of law but rather a step in the law development process. A declaration may lead to the adoption of an international treaty that enshrines principles of international law, but declarations are generally said to be "aspirational" legal instruments.

In the context of international human rights law, there are some existing international treaties that are particularly relevant to the rights of indigenous peoples, including the International Covenant on Civil and Political Rights and the Convention on the Prevention and Punishment of the Crime of Genocide. The process of developing a Declaration on the Rights of Indigenous Peoples reflected a widespread recognition that the existing human rights treaties are not adequate for protecting the human rights of indigenous peoples. The standards that are adopted in the Declaration are, in part, intended to render the legal principles of existing human rights law meaningful in the context of indigenous peoples. As such, it is arguable that some of the principles enshrined in the Declaration are in fact statements of legal principles.

Overview of the Declaration. The Declaration consists of 23 "preambular" paragraphs and 46 articles. The Declaration and related documents can be downloaded from the web site of the UN Permanent Forum on Indigenous Issues: www.un.org/esa/socdev/unpfii/. In this Memorandum we briefly touch on many, but not all, of the articles.

Although the text has been revised since the Working Group on Indigenous Populations finished its draft in 1994, the Chairperson of that Working Group offered some general comments on the substance of the Declaration that still largely hold true. She said that three main elements of the Declaration are "legal personality, territorial security and international responsibility." By these concepts she meant that indigenous peoples must be recognized as "peoples," each of which has a collective legal character; that each indigenous people needs security within its own territory in which to maintain its distinctive identity; and that to protect the integrity of their relationships with nation-states, indigenous peoples need access to international fora.

The first several articles address principles dealing generally with relations between indigenous peoples and nation-states. Article 1 proclaims that indigenous peoples have all the rights that are recognized in international human rights law, both as individuals and as collective entities.

One of the most contentious issues has been the right of self-determination. As stated in 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 3 is qualified by language in Article 46 which makes it clear that indigenous peoples do not have the right to secede from nation-states that are members of the UN.

Article 8 states the right to not be subjected to forced assimilation or destruction of culture. Article 10 is the right not to be forcibly removed from lands and territories. Article 11 is the right to practice and revitalize cultural traditions. Article 12 is the right to practice religious traditions, and also includes the right to repatriation of ceremonial objects and human remains. Article 14 addresses education, and includes the right to establish and control educational institutions and to teach in indigenous languages. Article 18 proclaims the right to participate in governmental decision-making that affects indigenous rights, and to maintain and develop indigenous decision-making institutions. Article 19 calls for states to consult with indigenous peoples and seek their free and informed consent before taking administrative or legislative measures affecting them.

Article 20 proclaims the right of indigenous peoples to their own political, economic, and social institutions, and also says that indigenous peoples shall not be deprived of their means of subsistence. Articles 25 through 32 concern rights in traditional lands, territories, and resources. Article 28 says that indigenous peoples have a right to redress, through restitution or compensation, for lands taken without free and informed consent. Article 29 is the right to conservation and environmental protection programs. Article 32 includes the right to set development priorities.

Article 33 includes the right to determine membership. Article 34 is the right to develop and maintain institutional structures, including juridical systems that are "in accordance with international human rights standards." Article 35 is the right to determine responsibilities of individuals to their communities.

Article 36 address indigenous peoples whose territories are divided by international borders. Article 37 proclaims the right to have treaties honored. Articles 41 and 42 address the roles of UN agencies and bodies in promoting and applying the Declaration. Article 42 states:

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 46 includes certain qualifying language, including the statement: "Nothing in this Declaration may be ... construed as authorizing ... any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states." As noted earlier, this means that the right of self-determination for indigenous peoples does not include the right to become an independent state, but rather means the right to autonomy within a state.

2007 Statement of the U.S. in Voting against the Declaration. In 2007, in announcing the U.S. vote against the Declaration, U.S. Advisor Robert Hagen made a statement to the General Assembly in which he referred to document captioned "Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples" (herein "Observations Document"). The Observations Document. We have attached a copy of the Observations Document, since it is the public statement of the position that the Obama Administration has announced its intent to review.

In the Observations Document, the U.S. rejected the view that some of the principles enshrined in the Declaration are more than aspirational, and are in fact statements of legal principles. The U.S. said: "With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force. It is not in itself legally binding nor reflective of international law."

The Observations Document briefly sets out U.S. objections to certain aspects of the Declaration. The U.S. opposed the use of the term "self-determination" in Article 3, saying that it supported the articulation of a new concept: "self-government within the nation-state." Saying that "self-determination" has an accepted meaning as it is used in the common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and that "self-determination" sometimes includes the right to establish an independent state, the U.S. said that it is confusing for the Declaration to use the term "self-determination" in a sense that does not include such a right to become an independent state. The limiting language in Article 46 was not enough to satisfy the U.S. on this point. The U.S. also made a comment that although the Declaration refers throughout to indigenous peoples as "peoples," in the U.S. view this does not mean that they "automatically qualify as 'peoples' for purposes of common Article 1" of the two International Covenants.

In the Observations Document, the U.S. also took issue with various provisions of the Declaration addressing such subjects as: lands, resources, and redress; collective rights; general welfare; repatriation of human remains; and the lack of a definition of "indigenous peoples." We have not analyzed those comments in this Memorandum.

Please let us know if you would like further information or assistance in preparing comments to be filed with the State Department.

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Inquiries may be directed to:
Dean Suagee (dsuagee@hobbsstrauss.com) or
Bobo Dean (bdean@hobbsstrauss.com)



General Assembly

Distr.: General
2 October 2007

Sixty-first session
Agenda item 68

Resolution adopted by the General Assembly

[without reference to a Main Committee (A/61/L.67 and Add.1)]

61/295. United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Taking note of the recommendation of the Human Rights Council contained in its resolution 1/2 of 29 June 2006,¹ by which the Council adopted the text of the United Nations Declaration on the Rights of Indigenous Peoples,

Recalling its resolution 61/178 of 20 December 2006, by which it decided to defer consideration of and action on the Declaration to allow time for further consultations thereon, and also decided to conclude its consideration before the end of the sixty-first session of the General Assembly,

Adopts the United Nations Declaration on the Rights of Indigenous Peoples as contained in the annex to the present resolution.

*107th plenary meeting
13 September 2007*

Annex

United Nations Declaration on the Rights of Indigenous Peoples

The General Assembly,

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

Affirming that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

Affirming also that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

¹ See *Official Records of the General Assembly, Sixty-first Session, Supplement No. 53 (A/61/53)*, part one, chap. II, sect. A.

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

Reaffirming that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

Concerned that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

Recognizing also the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

Welcoming the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

Convinced that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,

Recognizing that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

Emphasizing the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

Recognizing in particular the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well-being of their children, consistent with the rights of the child,

Considering that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

Considering also that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights² and the International Covenant on Civil and Political Rights,² as well as the Vienna Declaration and Programme of

² See resolution 2200 A (XXI), annex.

Action,³ affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

Bearing in mind that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

Encouraging States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

Emphasizing that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

Believing that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

Recognizing and reaffirming that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

Recognizing that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,

Solemnly proclaims the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

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 Rights⁴ 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.

³ A/CONF.157/24 (Part I), chap. III.

⁴ Resolution 217 A (III).

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 4

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.

Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

Article 6

Every indigenous individual has the right to a nationality.

Article 7

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.

2. 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, including forcibly removing children of the group to another group.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.

2. States shall provide effective mechanisms for prevention of, and redress for:

(a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;

(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 9

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the

community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. 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

1. 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.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 13

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.

2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

Article 14

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

Article 15

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

Article 16

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

Article 17

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

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 decision-making 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 20

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

Article 21

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

Article 22

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 24

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.

2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

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 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. 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.

3. 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 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. 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.

2. 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.

Article 29

1. 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 establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

2. 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.

3. 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

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

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 31

1. 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, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. 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.

2. 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.

3. 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 33

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.

2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

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.

Article 36

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.

2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

Article 37

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.

2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

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.

Article 39

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

Article 40

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

Article 41

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

Article 42

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

Article 44

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

Article 45

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

Article 46

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



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USUN PRESS RELEASE # 204(07)
September 13, 2007

Office of Press and Public Diplomacy
United States Mission to the United Nations
140 East 45th Street
New York, N.Y. 10017

AS DELIVERED

Explanation of vote by Robert Hagen, U.S. Advisor, on the Declaration on the Rights of Indigenous Peoples, to the UN General Assembly, September 13, 2007

Thank you Mr. President, we regret that we must vote against the adoption of the declaration on the rights of indigenous peoples. We worked hard for 11 years in Geneva for a consensus declaration, but the document before us is a text that was prepared and submitted after the negotiations had concluded. States were given no opportunity to discuss it collectively. It is disappointing that the Human Rights Council did not respond to calls we made, in partnership with Council members, for States to undertake further work to generate a consensus text. This declaration was adopted by the Human Rights Council in a splintered vote. This process was unfortunate and extraordinary in any multilateral negotiating exercise and sets a poor precedent with respect to UN practice.

The declaration on the rights of indigenous peoples, if it were to encourage harmonious and constructive relations, should have been written in terms that are transparent and capable of implementation. Unfortunately, the text that emerged from that failed process is confusing, and risks endless conflicting interpretations and debate about its application, as already evidenced by the numerous complex interpretive statements that were issued by States at its adoption at the Human Rights Council. We cannot lend our support to such a text.

Mr. President, our views with respect to the core provisions of the text can be found in a separate document entitled Observations of the United States with respect to the Declaration on the Rights of Indigenous Peoples, which will be available in the room, and posted on the website of the US Mission to the United Nations, and will be circulated as an official UN document. This document is incorporated by reference herein and discusses the core provisions of the declaration, including but not limited to self-determination, lands and resources, redress, and the nature of the declaration. Because the flaws in this text run through its most significant provisions, the text as a whole is rendered unacceptable.

Although we are voting against this flawed document, my government will continue its vigorous efforts to

promote indigenous rights domestically. Under United States domestic law, the United States government recognizes Indian tribes as political entities with inherent powers of self-government as first peoples. In our legal system, the federal government has a government-to-government relationship with Indian tribes.

In this domestic context, this means promoting tribal self-government over a broad range of internal and local affairs, including determination of membership, culture, language, religion, education, information, social welfare, maintenance of community safety, family relations, Economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.

At the same time, the United States will continue its work to promote indigenous rights internationally. In its annual human rights report, the United States Department of State reports on the situation of indigenous persons and communities throughout the world. In our diplomatic efforts, we will continue our opposition to racial discrimination against indigenous individuals and communities and continue to press for full indigenous participation in democratic electoral processes throughout the world. We will also continue with out international assistance programs involving indigenous peoples.

Mr. President, we are deeply disappointed that in seeking to make a practical difference in the lives of indigenous people around the globe, the international community has not been presented with a text that is clear, transparent or capable of implementation. These fundamental shortcomings, unfortunately, mean that this document cannot enjoy universal support to become a true standard of achievement.

Thank you.

OBSERVATIONS OF THE UNITED STATES WITH RESPECT TO THE DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES

The United States was an active participant throughout the long history of the negotiations to draft a declaration on the rights of indigenous peoples. Many other countries did not, however, participate in these negotiations in Geneva and may not be fully aware of what participants intended in its drafting. We can, therefore, provide an understanding of the intent of participating States on the core issues:

Nature of the Declaration:

With respect to the nature of the declaration, it was the clear intention of all States that it be an aspirational declaration with political and moral, rather than legal, force. Its persuasiveness and usefulness to the international community therefore critically depends upon the extent to which it enjoys unqualified support among States. This text contains recommendations regarding how States can promote the welfare of

indigenous peoples. It is not in itself legally binding nor reflective of international law.

The United States rejects any possibility that this document is or can become customary international law. We have continually expressed our rejection of fundamental parts of the former Subcommittee text, and of this text, as have numerous other States. As this declaration does not describe current State practice or actions that States feel obliged to take as a matter of legal obligation, it cannot be cited as evidence of the evolution of customary international law.

This declaration does not provide a proper basis for legal actions, complaints, or other claims in any international, domestic, or other proceedings.

Self-Determination:

The right of self-determination is addressed in Article 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. This common Article 1 right of self-determination is understood by some to include the right to full independence under certain circumstances. Under existing common Article 1 legal obligations, indigenous peoples generally are not entitled to independence nor any right of self-government within the nation-state. It was not the mandate of the Working Group (nor was it within its power) to qualify, limit, or expand the scope of the existing legal obligations set forth in common Article 1, and it was never the intent of States to do so.

Instead the mandate of the Working Group was to articulate a new concept, i.e., self-government within the nation-state. It is not the same concept as the right contained in common Article 1. It is therefore confusing that Article 3 of the declaration reproduces the language of common Article 1 when the intention of the States was (i) not to afford indigenous peoples the right to independence or permanent sovereignty over resources; and (ii) not to modify retroactively the scope of existing legal obligations in common Article 1 to include self-government within the nation-state. During the negotiations in the Working Group, many States therefore resisted reproducing the text of common Article 1 in Article 3 of the declaration.

Despite the provisions that limit the scope of Article 3 of the declaration (e.g., Article 4 and Article 46), we are unable to associate ourselves with this text because of the wholly inappropriate approach of reproducing common Article 1 in Article 3 of the text with no intention that Article 3 mean the same thing as common Article 1, nor that it be considered to explain or modify the scope of existing common Article 1 legal obligations. We find such an approach on a topic that involves the foundation of international relations and stability (i.e., the political unity and territorial integrity of nation-states) to be ill advised and likely to result in confusion and disputes.

Simply put, given that the clear intent of the States in the Working Group was to develop aspirational principles dealing with the concept of self-government within the framework of the nation-state, the declaration should have used clear and understandable language to express that goal and to avoid confusion with the common Article 1 right. We also note that preambular paragraphs 2 and 16 as well as Article 2 were not intended to imply that the existing right of self-determination is automatically applicable to indigenous peoples per se or to indicate that indigenous peoples automatically qualify as "peoples" for purposes of common Article 1.

Lands, Resources, & Redress:

The provisions on lands and resources are phrased in a manner that is particularly unworkable. The language is overly broad and inconsistent. For example, Article 26 appears to require recognition of indigenous rights to lands without regard to other legal rights existing in land, either indigenous or non-indigenous. Clearly the intent of the Working Group was not to ignore contemporary realities in most countries by announcing a standard of achievement that would be impossible to implement.

The intention of States in the Working Group was to encourage the establishment of mechanisms at the national level for the full legal recognition and protection of the lands, territories and resources indigenous peoples possess by reason of traditional ownership, occupation, or use, as well those which they have otherwise acquired. Furthermore, it was intended that such recognition should take into account the customs, traditions, and land tenure systems of the indigenous peoples concerned. Similarly, many of the declaration's provisions involving redress are set forth in a confusing manner and are equally unacceptable. Again, the goal of the States in the Working Group was to encourage just, transparent and effective mechanisms for redress for actions taken by States after endorsing the declaration.

The text also could be misread to confer upon a sub-national group a power of veto over the laws of a democratic legislature by requiring indigenous peoples, free, prior and informed consent before passage of any law that "may" affect them (e.g., Article 19). We strongly support the full participation of indigenous peoples in democratic decision-making processes, but cannot accept the notion of a sub-national group having a "veto" power over the legislative process.

Collective Rights: There was discussion within the Working Group regarding whether or not the collective indigenous rights set forth in the declaration were collective human rights. The intent of States participating in the Working Group was clear that, as has always been the case, human rights are universal and apply in equal measure to all individuals. This principle is fundamental to international human rights, and means that one group cannot have human rights that are denied to other groups within the same nation-state.

Moreover, if a collective entity or group -- as opposed to individuals -- could hold and exercise human rights, individuals within those groups would be extremely vulnerable to potential violations of their human rights by the collective. In addition, if groups and individuals could each hold human rights, it would be difficult to reconcile disputes over which human rights should prevail. As preambular paragraph 22 makes clear, the rights set forth in this declaration are collective rights of indigenous peoples as first peoples and are in a distinct category from human rights, which are held by all individuals. Article 46 also makes clear that human rights are not to be violated in the exercise of collective rights.

General Welfare: The aspirational principles and collective rights described in the declaration are typically written in extremely general and absolute terms. It was recognized by the States in the Working Group that it would not be possible to implement such broadly expressed provisions and that debating the restrictions on the exercise of each provision was not feasible given time constraints. It was therefore decided that the ability of democratic States to govern for the good of all their citizens be recognized at the end of the declaration (Article 46) and that such a clause would apply to all the principles and collective rights set forth in this declaration. Article 46 provides individual States with the flexibility needed to design domestic programs to preserve the unique characteristics of indigenous culture, and to ensure the continued integrity of indigenous communities, without disenfranchising other citizens of the State.

There are other provisions in the declaration that are unacceptable, including the article on the repatriation of

human remains. The provisions on this important right have been misconstrued by some countries as allowing them to maintain their holdings of indigenous remains and artifacts. Even more fundamental and debilitating to the effective application and implementation of the declaration is its failure to define the phrase “indigenous peoples.” This obvious shortcoming will subject application of the declaration to endless debate, especially if entities not properly entitled to such status seek to enjoy the special benefits and rights contained in the declaration.

The flaws in this text run through all of its most significant provisions. Because these provisions are fundamental to interpreting all of the provisions in text, the text as a whole is rendered unworkable and unacceptable. Our position on this declaration does not, however, mean that we shall in any way withdraw from continuing to pursue the recognition of rights of indigenous individuals and peoples, internationally or domestically.

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