

AMERICAN INDIAN LAW ALLIANCE (AILA)

PAPER ON THE GENERAL ASSEMBLY ADOPTION OF THE  
DECLARATION OF THE RIGHTS OF INDIGENOUS PEOPLES (DRIP)

10/17/07

The UN General Assembly (GA) voted on September 13, 2007 to adopt the Declaration on the Rights of Indigenous Peoples (DRIP) [UN Document A/61/L.67\*]. The response of many in the indigenous world who have worked long and hard for the day when the GA would adopt a just Declaration of our rights was a mixed one. To understand this ambivalence, it is important to know that the DRIP text differs in 9 places from the text of the Human Rights Council Declaration (CD) that was adopted by the UN human rights body in Geneva in June 2006. The CD text itself, in turn, had been significantly altered from the 1994 Draft Declaration (DD) completed by the UN Working Group on Indigenous Peoples that was chaired by Professor Erica-Irene A. Daes of Greece. Of the three successive texts mentioned, the DD alone commanded the full support of indigenous peoples (IP). AILA circulated, soon after learning that 9 textual changes were being incorporated into the DRIP, a memorandum analyzing the impact of the changes. We re-attach that 9/10/07 memo here at the end of this AILA PAPER. The body of the PAPER itself reports and comments on states' votes and statements in the GA, and also outlines some thoughts on where IP efforts might focus in the post-DRIP period. An ANNEX to the PAPER shows how states voted.

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A. Report and Comment on the GA Vote.

The CANZUS states of Canada, Australia, New Zealand, and the U.S., joined by Russia, asked that action on DRIP be taken by recorded vote. Of 192 UN member-states, 143 voted "Yes", the 4 CANZUS states voted "No", 11 voted "Abstain", and 34 did not participate. About 75% of member-states thus adopted a new norm of indigenous/state relations best described as a partnership. Forty-four states also gave explanations of their votes which we summarize in relevant part below in the order in which they were given, adding our comments as we see fit. It is important to study these explanations as they indicate how the authoring states are likely to interpret DRIP in the years ahead. We place an "!" next to statements that we consider notably positive, and an "?" next to those we find notably negative.

1. Peru. Luis Enrique Chavez Basagoitia, who chaired the Working Group on the Draft Declaration in Geneva for most of its 1995-2006 existence, introduced the resolution to adopt the DRIP by consensus, listing 32 states as co-sponsors. Mexico was notably missing from that list. Ambassador Chavez spoke of IP's vulnerability, the DRIP's 2 decades-long gestation period, and IP's unprecedented and legitimizing role in that process. Various states' opposition to aspects of the prior CD, he said, had compelled revisions of that text which had been communicated to IP "representatives". The changes made, he asserted, do not undermine DRIP's protection of IP.

Comment. First, we find it strange that Mexico – which apparently took the lead, with the assistance of Peru and Guatemala, in negotiating with African states the 9 changes incorporated into the DRIP -- was not a DRIP co-sponsor. Was Mexico, which had pushed IP in NY to accept a weakened DRIP, portraying to IP in Mexico that it stood by the stronger CD? Second, we disagree with Peru's statement on three counts: a) the handful of IP in N.Y. with whom the 3 Latin

American states primarily dealt were NOT given a mandate to represent IP, only to facilitate our access to information regarding Declaration developments in N.Y.; b) legitimate, and legitimizing, IP input into the process effectively ended in Geneva; c) contrary to Ambassador Chavez' view, AILA finds that DRIP's pre-ambular paragraph (PP) 16, and articles 30 and 46, in fact expose IP rights to risk in the key areas of self-determination (SD) and demilitarization. Several states' references to these 3 provisions in the GA, italicized below, corroborate this last point.

? 2. Australia. Robert Hill said his country had worked for a text that could be adopted, observed, and upheld by all. DRIP is not that text. Calls for new negotiations had not been heeded. Australia sees DRIP as aspirational, and not legal or reflective of normative state practice, but fears that it will be invoked in standard-setting anyway. Australia rejects DRIP's references to SD because the right only applies in cases of decolonization, state break-ups, or disenfranchised groups; and because it could impair states' territorial and political integrity. As for lands, territories, and resources (LTR), DRIP unacceptably disregards the property rights of others. Moreover, IP rights in their traditional lands must be subject to national laws like Australia's Native Title Act. As for free, prior and informed consent (FPIC), the right is discriminatory and also excessive in requiring states to consult IP on every aspect of law that might affect them. Finally, Australia opposes extending intellectual property rights to IP; it further holds that indigenous customary law is not law, and cannot supersede national law.

Comment. First, Australia misrepresents the right of SD. International law instruments broadly state that: "All peoples have the right to self-determination...." In practice, the following peoples, struggling in very different contexts, have asserted their right to SD: minorities in Europe after WW I; colonized peoples in Asia, Africa, and Oceania after WW II; Palestinians after Israel occupied their territory; South African blacks rejecting apartheid; subordinate groups in the former Pakistan, Yugoslavia, and U.S.S.R.; and East Timorese after Portugal left their territory and Indonesia occupied it. In each case, the international community came to acknowledge that the right to SD applied. The GA has now done likewise with IP. Second, international norms, when accepted, supplant national ones, and not the other way around. Finally, IP can help make Australia's fears that DRIP provisions will become standard-setting come true by regularly invoking DRIP provisions in all possible domestic and international standard-setting fora!

? 3. Canada. John McNee said Canada has long protected and promoted IP rights at home, consistent with its Constitution and treaties, and also abroad, where its development programs aim at improving IP lives. Active in the Geneva process, Canada proposed a text that could promote IP's fundamental freedoms while fostering harmony between IP and states. The DRIP is vague and fails to do this. Its LTR, FPIC, self-government, intellectual property, and military provisions are especially problematic. FPIC confers a veto power on IP that is inconsistent with Canada's legislative process. Rights of IP, states, and 3rd parties need to be better balanced. Canada considers DRIP to be non-binding, and without domestic effect.

Comment. As a federal state, Canada is familiar with the theory and practice of shared and divided powers. It knows better than to equate the FPIC norm with a simple veto power. The norm, instead, asks that states share, in good faith, decision-making powers with IP on matters that concern them. Moreover, it is troubling that Canada prefers to speak of IP's fundamental freedoms (which impose no positive duty on states) rather than rights (which impose such duties). Finally, Canada's long list of objections to the DRIP indicates that, like the other CANZUS states, it wanted nothing less than that a radically altered text be re-negotiated in Geneva, or buried.

? 4. New Zealand. Rosemary Banks recited that NZ early on supported a Declaration that could promote and protect IP rights. These, she said, are of profound importance to the state, people, and identity of NZ which is uniquely founded on the 1840 Treaty of Waitangi concluded between the Crown and Maori. The place of Maori in society, and their grievances, remain at the centre of NZ debate and state action. About 40% of NZ's fishing quota is owned by Maori. Claims to over 50% of NZ's land area have been settled. NZ supports DRIP principles and aspirations, and has implemented most of its standards for many years. It finds DRIP overdue as IP elsewhere continue to be deprived of basic human rights. NZ was proud to have helped make the text more acceptable to states in Geneva in the last 3 years, and so deeply regrets its inability to vote for DRIP today. Articles 26 on LTR, 28 on redress, and 19 and 32 on FPIC or the right to veto, are the main obstacles. They are discriminatory and incompatible with NZ's constitution, laws, the Treaty of Waitangi, and democratic governance. NZ takes international human rights seriously and cannot responsibly support a non-implementable DRIP, however aspirational. Finally, NZ finds that DRIP neither reflects state practice, nor embodies general principles of law.

Comment. NZ is to be congratulated if it already implements most DRIP standards. However, its charge that DRIP is discriminatory and anti-undemocratic renders a disservice to the concepts of both equality and democracy. A mature understanding of equality under the law takes it to mean that persons living in circumstances that are meaningfully similar must be treated equally. Conversely, where such circumstances are unfairly dissimilar, justice requires that corrective action be taken. IP, who have experienced a long and unique history of loss and subordination, are thus entitled to specific redress and special protection. Finally, human rights law was created to prevent dominant groups, however democratically in control of a government, from violating the rights of the vulnerable.

? 5. U.S. Robert Hagen explained the U.S.' negative vote and submitted an Observations paper ([http://www.usunewyork.usmission.gov/press\\_releases/20070913\\_204.html4.html](http://www.usunewyork.usmission.gov/press_releases/20070913_204.html4.html)) for the record. Claiming that the U.S. worked in Geneva for 11 years for a consensus Declaration, he noted that DRIP was finalized after negotiations in Geneva had ended. The Human Rights Council had not heeded the call of the U.S. and others to continue working for a consensus text but had adopted the CD in a splintered vote instead, setting a poor precedent for UN practice. States had not been given an opportunity to discuss the text collectively since that vote. DRIP's genesis was thus neither harmonious nor transparent, and its terms are not now implementable. US law already recognizes Indian tribes as political entities with inherent powers of self-government. The federal government has a government-to-government relationship with them. It promotes tribal self-government over a broad range of internal affairs including determination of membership, culture, language, religion, education, information, social welfare, economic activities, and land and resources management. The Observations paper further asserts that:

- a. The U.S. rejects any claim that DRIP is/could become customary international law.
- b. While some understand SD to include the right to independence in certain circumstances, IP "generally are not entitled to independence nor any right of self-government within the nation-state". The mandate of the Working Group was to enunciate a new right of self-government only; hence, DRIP should not have included Article 3 on SD which reproduces common Article 1 of the two 1966 International Human Rights Covenants.
- c. DRIP's LTR provisions are so broad, confusing, and inattentive to others' land rights that they cannot be implemented. Moreover, the veto power they confer on a sub-national group is unacceptable.
- d. Collective rights cannot be deemed human rights for the latter are universal and prevail over the collective rights of IP which are in a "distinct category" apart from human rights.

e. DRIP Article 46 applies to “all the principles and collective rights set forth in this Declaration”.

Comment. AILA assumes a special responsibility to refute U.S. assertions:

a. If the Council’s adoption of the CD in Geneva by vote, rather than by consensus, set a bad precedent, the U.S. attempt to then broadly re-open negotiations of the CD in both Geneva and N.Y. sets a far worse precedent inasmuch as it sought to undermine the product of a 2-decade long undertaking of a key UN human rights body. Moreover, both voting and consensus methods of decision-making are used at the UN. While the consensus method is preferred, states cannot be allowed to use it as a tool for indefinitely holding up human rights instruments.

b. It is not true that there was no collective debate of the CD in N.Y. That happened in the Third Committee, where the U.S. remained all but silent! It is also not true that Professor Daes’ Working Group was given the mandate to develop a “self-government” norm for IP. Rather, it was tasked with collecting information on the situation of IP world-wide and with proposing standards for state/IP relations that could assure the survival and well-being of IP. The Working Group concluded that those standards must include IP’s right to SD, as well as states’ duty to engage in a real partnership with IP.

c. Washington by no means promotes the self-government of indigenous nations within U.S. borders. On the contrary, U.S. courts have been steadily reducing the scope of that “self-government” to the areas of tribal membership and cultural practice, thereby forcing Native Americans to turn to the UN for protection and redress.

d. Like other CANZUS states, the U.S. falsely depicts FPIC as a veto power, a distortion that AILA exposes above in its comment on Canada.

e. Finally, the U.S. maintains that IP’s collective rights are not, and cannot supersede, universal human rights. We respond that, whether IP collective rights are characterized as human rights or not, DRIP PP 17 and Article 46 (2) already require that all DRIP rights be exercised in conformity with international human rights law.

6. Russia. Ilya Rogachev stated that Russia supports the rights of IP and related international standards. DRIP, however, is not a balanced document, particularly in its LTR and redress provisions, and does not enjoy consensus. Negotiations in N.Y. lacked transparency and excluded some states with large IP populations. For these reasons, the Russian Federation abstained from voting.

Comment. AILA appreciates Russia’s decision to abstain rather than cast a negative vote on DRIP. At the same time, Russia’s charge of non-transparency in the process requires a response. Unlike the U.S., Russia did in fact use the forum of the Third Committee in N.Y. to register comments. Moreover, unlike many African states, Russia had every means available to it in Geneva, which it used, to express its queries and views. Given that discussions of human rights instruments in N.Y. are not, AND SHOULD NOT BE, in the nature of a de novo (brand new) review of their substance – delegates in N.Y. generally lack the time and human rights expertise that their colleagues enjoy in Geneva – the facilitators of DRIP discussions in N.Y. rightfully focused on addressing the general concerns of states that, for whatever reason, had not been active in Geneva. CANZUS’ repeated demands in N.Y. -- that the text be re-opened for re-negotiation -- were properly set aside as both untimely and out of place.

! 7. Benin. Jean-Marie Ehouzou noted that while Benin recognized the instrument’s flaws, it voted “Yes” believing it desirable that the text be implemented now so that informed improvements could be introduced later.

Comment. We deeply appreciate Benin's call for the implementation of DRIP to begin. Furthermore if, by later improvements, Benin means improvements incorporated in an eventual Convention, AILA could not agree more.

? 8. Colombia. Jairo Montoya asserted that Colombia's 1991 Constitution "stood out as one of the most advanced with regard to recognizing the collective rights of IP". Colombia recognizes some 710 indigenous territories covering about 32 million hectares that, by the end of 2007, should amount to 29% of the country. Colombia abstained on the vote because Articles 19, 30 (military activities), and 32 directly contradict its domestic law.

Comment. Colombia's representative did not mention his government's devastating military activities in indigenous territory. It is these types of activities that compelled AILA to denounce DRIP Article 30's gutting, by deleting a key phrase, of the CD's prohibition of military activities on IP territory: "unless justified by a significant threat to a relevant public interest". The CD prohibition, we point out, was already a much reduced version of the robust set of interdictions contained in the 1994 DD.

? 9. Argentina. Mr. Arguello noted that Argentina had regretfully abstained when the Council adopted the CD in Geneva as it found that references to SD had to be made compatible with the principles of territorial integrity and national unity, and also the structure, of states. Changes since incorporated into DRIP allowed Argentina to vote "Yes".

Comment. A week before the vote, AILA urged, without success, both Latin American and EU negotiators, as well as the indigenous Steering Committee on the Declaration (SCD), to consider adding to DRIP, after its reference to the UN Charter, a simple reference to the 1970 Declaration on Friendly Relations (DFR). This would have made it crystal clear that DRIP preserves the existing balance in international law between the right of peoples to SD and the right of states to territorial integrity recorded in the DFR. The present DRIP Article 46 (1), instead, illegitimately tips that balance in favor of states.

? 10. Japan. Takahiro Shinyo, in explaining his country's "Yes" vote, found that Article 46 correctly clarified that the right of SD did not give IP the right to separate, or become independent, from the states in which they lived, or otherwise impair their sovereignty, national and political unity, or territorial integrity. Overall, DRIP rights must also not harm the human rights of others. Property rights are as stipulated in the domestic laws of each state. DRIP's LTR provisions must thus be harmonized with national law and the need to protect public and third party interests. Finally, Japan understands that it is IP individuals who hold DRIP rights which they may, in some circumstances, exercise collectively.

Comment. It is troubling but not surprising that several states interpret modified DRIP Article 46(1) to limit IP's SD and LTR rights. What is surprising here is that Japan, a country known for its cultural regard for the collective, insists that DRIP rights are held by individuals, rather than the collective.

! 11. Chile. Armin Andereya expressed his country's support for the important role that IP play in the life of all societies. DRIP is a significant step forward that will strengthen the aim of Chile's internal legal system to develop, promote and protect the rights of IP and to support their efforts to build their own communities.

Comment. AILA deeply appreciates both Chile's acknowledgment of IP contributions to society, and its pledge to support IP through domestic legislation.

? 12. U.K. Aren Pierce said the UK welcomes DRIP as an important tool for promoting and protecting the rights of IP and regrets the lack of a wider consensus behind it. The UK fully supports DRIP provisions that recognize that indigenous individuals are entitled to human rights and fundamental freedoms on an equal basis with all other individuals. At the same time, the UK rejects the concept that some groups in society may enjoy human rights that are not available to other groups. Thus, with the exception of the right to SD, the UK does not recognize the concept of collective human rights in international law but appreciates that national law could confer such collective rights. Hence, the UK strongly endorses PP 22 which differentiates between the two sets of rights: “indigenous individuals are entitled ... to all human rights ... indigenous peoples possess collective rights ...”. Furthermore, the UK reads all of DRIP in light of this distinction. Article 3, in turn, promotes a new and distinctive right of SD for IP that is separate and different from the right of all peoples to SD under international law. Subsequent articles in DRIP set out the content of this new “right” which is to be exercised within the territory of a state without impacting in any way on its political unity or territorial integrity. The UK further understands articles 12 and 13 on redress and repatriation to only apply to property, or ceremonial objects and human remains, owned or possessed by the state. DRIP is not legally binding and has no retroactive effect. National minority groups and other ethnic groups within the UK and its overseas territories are not covered by DRIP.

Comment. While the US argues that IP generally enjoy a right to “self-government” rather than a right to SD, and therefore opposes Article 3, the UK, using a somewhat different argument, similarly concludes that IP are only entitled to the limited right of “self-government”. It holds that DRIP Article 3 confers on IP a different kind of SD than that conferred on all peoples by common Articles 1 of the two Human Rights Covenants even though these instruments’ language on SD is faithfully reproduced in DRIP Article 3. The distinctive, or *sui generis*, SD that IP enjoy, the UK continues, is self-government within the confines of the enclosing state. Like the U.S. also, the UK rejects the view that collective rights, with the exception of SD, can be considered human rights. IP need to watch where the US and UK will now take their overlapping jurisprudence, or theory, of IP rights.

! 13. Norway. Johan L. Lovald said that DRIP sets a standard of achievement to be pursued in a spirit of cooperation. Several articles deal with the exercise of SD stipulating that such rights should be exercised in the framework of international law as set out in the 1970 Declaration on Friendly Relations (DFR). The question of land is crucial to cultural identity for IP. The relevant language on this is found in ILO Convention 169. Norway considers that its military activities on indigenous territory meets Article 30’s standard of “a significant threat to a relevant public interest.”

Comment. We welcome Norway’s highly principled intervention on the issues of SD and military activities. It forthrightly accepts the international law right of SD as it finds it; that is, as set out in the 1970 DFR. As we point out in our comment above on Argentina, DRIP Article 46 (1) incorrectly paraphrases, to the detriment of IP, the DFR’s careful contextualization of the right. On the issue of military activities in indigenous territory, Norway quotes the higher CD threshold (“a significant threat to a relevant public interest”), rather than the lower DRIP threshold (“a relevant public interest”). Interestingly, AILA discovered that, on September 6, 2007 UN document A/61/L.67 was distributed to states with the understanding that the DRIP text reproduced there would be acted on in the GA a week later. Significantly, DRIP Article 30 as set out in this document exactly reproduces CD Article 30 which bars all military activities absent “a significant threat to a relevant public interest”. However, on September 12, 2007 a new UN document A/61/L.67\* was issued to states with the phrase “a significant threat to” deleted from DRIP Article 30, thereby lowering the bar for military activities. I.P. may well ask what happened between the

two dates: did a state, indigenous person, or other party initiate this change? If so, who and why? Norway, it is clear, continued to rely on the CD's higher standard, which should never have been lowered.

14. Bangladesh. Ishrat Jahan Ahmed stated that her delegation supports the rights of any group that is disadvantaged, including IP, but abstained in the vote because DRIP lacked a definition of IP, contained other ambiguities, and failed to generate consensus.

? 15. Jordan. Samar Al-Zibdeh reported that her delegation voted "Yes" but emphasized that the right of SD should be exercised within the framework of the UN Charter, and not interfere with the territorial integrity and sovereignty of states.

Comment. The framework of the UN Charter itself raises no problems for IP. However, DRIP Article 46(1), which distorts that framework, is unacceptable.

? 16. Mexico. Ms. Rovirosa welcomed DRIP's adoption. She particularly welcomed provisions that accord with Mexico's Constitution whose Article 2 recognizes the rights of IP to SD, granting them autonomy to determine their internal system for conflict resolution. She understood that the IP right to SD, which she translates as autonomy/self-government, will be exercised in accordance with Mexico's Constitution so as to guarantee Mexico's national unity and territorial integrity.

Comment. Not only did Mexico not sponsor DRIP, it lodged the serious reservations above regarding IP's right to SD. Why?

! 17. Liechtenstein. Patrick Ritter stated that his country long supported innovative approaches to the right of peoples to SD so as to fully explore its conceptual potential for the promotion and protection of human rights. In this regard, DRIP contains provisions that mark an important new step in the UN approach to SD. The right to autonomy or self-government in matters relating to internal and local affairs, including their financial support, genuinely addresses the desire and needs of many peoples to create, without resorting to violence and strife, an environment that protects and promotes their human rights. The reference to "political unity" in Article 46 does not preclude a gradual granting of increasing levels of self-government to IP through a democratic process that promotes and protects minority rights. Article 46 also does not preclude any democratic decision affecting the structure of the State.

Comment. This statement is by far the most politically and jurisprudentially forward-looking made by a state during the vote. We thank Liechtenstein for its contribution.

! 18. Republic of Korea. Hee-Kwon Park said the Republic of Korea voted "Yes" believing that DRIP would become a milestone in the history of IP rights. DRIP's adoption caps 20+ years of work and constitutes a solemn pledge and clear message regarding the survival and well-being of IP. DRIP especially supports IP's threatened cultures, languages and rights to pursue their own visions of development. His government hopes that DRIP will help strengthen international human rights as a whole by assuring equality and non-discrimination for all.

Comment. The above statement carries special value as it comes from the home country of UN Secretary-General Ban Ki-moon, whose stewardship of the world body is already graced by the GA's adoption of the new norm of indigenous/state partnership

? 19. Sweden. Ulla Strom expressed Sweden's pleasure that the GA finally adopted DRIP. Sweden has supported the Declaration throughout and hopes that DRIP's implementation will

improve the situation of IP. Sweden has no difficulty recognizing collective rights outside the framework of human rights law while firmly holding that individual human rights prevail over DRIP's collective rights. Sweden bases its relationship with Sami on dialogue, partnership, and the recognition of their SD and cultural identity, which in turn is intimately tied to their lands. The government, however, must balance the competing interests of the different groups that share the land in the north of the country. DRIP's reference to SD does not authorize or encourage the impairment of the territorial integrity or political unity of sovereign and independent States. SD could largely be ensured through Article 19 which imposes a duty on states to consult and cooperate with IP. The article does not entail a right of veto. Sweden interprets references to ownership and control of land to apply to the traditional rights of the Sami. These are reindeer herding rights and include the right to land and water for the maintenance of herds, to build fences and slaughterhouses for them, and to hunt and fish in herd areas. Article 28 does not give Sami the right to redress for regular forestry by the forest owner.

Comment. Note that, like the US, UK, and Slovakia, Sweden insists that collective rights are not human rights.

? 20. Thailand. Mr. Punkrasin said his delegation voted "Yes" because it agreed with DRIP's intent though some paragraphs remain problematic. Thailand understands that the articles on SD will be interpreted within the framework of the principle set out in the Vienna Declaration (PP 16); that DRIP does not create any new rights; and that any benefit flowing from it would be based on the laws and Constitution of Thailand

Comment. Where states invoke the 1993 Vienna Declaration (which is not law) to interpret the right of SD, IP should remind them that the authoritative interpretive document is, as Norway noted, the 1970 DFR (which is law). Finally, Thailand's view that DRIP creates no new rights in international law (a view also expressed by some in the Indigenous Caucus) is both incorrect (FPIC, for example, has no precedent in international human rights law), and dangerous (it encourages states like Thailand to assert that, since DRIP creates no new rights, domestic law needs no adjustment).

! 21. Brazil. Mr. dos Santos Tarrago said that while Brazil voted "Yes", it believes that the CD adopted by the Human Rights Council, which is the body best situated to deal with such issues, should not have been reopened. His country's IP were crucial to the development of society at every level, including the development of spiritual and cultural life for all. Brazil underscores that IP's exercise of their rights is consistent with the sovereignty and territorial integrity of the states in which they reside. States, he said, should always bear in mind their duty to protect the rights and identity of their IP.

Comment. It appears that the italicized part of Brazil's statement is descriptive and acceptable, rather than prescriptive and unacceptable. In any event, AILA agrees with Brazil's view that the CD should not have been re-opened, at least in substance, precisely because the Council is the UN body most capable of dealing with human rights. Consequently, instruments that it recommends to the GA deserve the highest possible presumption of validity.

! 22. Guyana. George Wilfred Talbot explained that his delegation was motivated to vote "Yes" by its dual commitment to preserve the dignity and well being of all peoples, and to safeguard the rights of all individuals, including Guyana's original inhabitants. He considers DRIP to be a good-faith effort to address the genuine concerns and special needs of IP everywhere. He noted that DRIP was political rather than legal in character, though not without potential legal implications. Some provisions could create expectations that fall outside of DRIP's fundamental



intent. He hoped that DRIP would not generate division within states or societies, and that the international community would eventually arrive at consensus and ensure respect for the rights of IP.

Comment. AILA once again thanks Ambassador Talbot for his customary thoughtfulness in alerting us to the promises and pitfalls ahead. Indeed, perfect instruments are not born overnight, but grow from good faith efforts.

? 23. Suriname. His country, Mr. MacDonald said, highly values the promotion and protection of all human rights and so had voted “Yes” to an amended/improved text. IP are a significant part of Suriname’s population and the government has a responsibility to prevent discrimination against, and marginalization of, every group in society. However, granting special rights to a group could run counter to the concept of equal treatment. DRIP cannot be understood to initiate any activity that jeopardizes the territorial integrity and political unity of states. States should indeed engage in consultations to safeguard human rights and relevant interests but must retain an inalienable right to take full possession of their national resources for national benefit.

Comment. IP need to transform states’ discourse of “granting special rights” into the discourse of “recognizing special needs and redressing specific wrongs”. Suriname, we note, has changed the norm of FPIC into that of consultation only. We need to resist such moves.

? 24. Iran. Baghaei-Hamaneh explained that Iran voted “Yes” because the global protection of IP rights was a matter of principle for it though Iran has no IP. He hoped that the overwhelming vote for DRIP would contribute to the protection of IP who have long been subject to discrimination under colonization. This protection should be within the context of respect for the territorial integrity and political sovereignty of states.

Comment. Iran, together with India and Indonesia, assert that they have no IP. Happily, no other Asian state asserted this reservation when it voted “Yes”. China, for example, which has the world’s largest IP population, made no explanation of its “Yes” vote.

? 25. India. Ajai Malhotra said India has consistently favored the promotion and protection of IP rights. It voted for the CD in 2006 in Geneva. The difficulty in reaching consensus there and in N.Y. reflects the extreme complexity of the issues involved. While DRIP does not define IP, the latter are understood to be as described in ILO Convention 169. That being the case, all in India are indigenous. As for the right to SD, he understands that it applies only to peoples under foreign domination and not those living in sovereign independent states or to a section of these as this would run counter to the essence of national unity. DRIP makes clear that IP’s right to SD consists of a right to autonomy or self-government in matters relating to internal and local affairs, as well as means and ways for financing these. Article 46 further clarifies that nothing in DRIP 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. On that basis, India voted “Yes”.

Comment. First, IP have not been defined, in ILO Convention 169 or elsewhere. However, objective and subjective criteria have been suggested for their identification in, among other places, José R. Martínez Cobo’s classic 1987 Study of the Problem of Discrimination Against Indigenous Populations. The criteria there include: a long and prior occupation of contested territories; distinctiveness from the country’s dominant groups; a desire to remain distinctive; and a vulnerability vis-à-vis the dominant society. Under these criteria India, as well as Iran and Indonesia, harbor both indigenous and non-indigenous peoples. Second, as pointed out in our comment above on Australia, international law maintains an expansive rather than regressive view

of SD. Third, DRIP Article 46 must be interpreted in the context of the 1970 DFR, which imposes the duty to respect the territorial integrity of states on other states only.

? 26. Myanmar. Aye Thidar Myo said that her government was pleased that DRIP included references to SD with the understanding that such rights referred to activities that do not impair the territorial integrity or political unity of States. Her delegation voted “Yes” and would seek to implement DRIP flexibly.

? 27. Namibia. Kaire Mbuende related that his delegation had made clear from the outset that Namibia did not oppose the idea of a Declaration of IP rights. Having suffered the deprivation of rights, Namibia could not do anything that would be construed as denying human rights to others. At the same time, Namibia understands that nothing in DRIP may be interpreted to mean that measures adopted by states to secure equal enjoyment of human rights and fundamental freedoms for IP individuals in turn create new and separate rights. Namibia also understands “law” in Article 46 (2) of the Declaration to mean national law. Accordingly, the exercise of the rights set out in DRIP is subject to the constitutional frameworks and national laws of states.

Comment. Namibia was, along with Mexico, a key negotiator of the changes that transformed the CD into the DRIP. Its views consequently merit careful study. Without a doubt, all individual human beings enjoy, as human beings, internationally recognized individual human rights which, as a result, are rightfully labeled “universal”. Until now, these were the only kind of rights that were thought of as international human rights. With the adoption of DRIP, however, the GA now declares that indigenous peoples, singly and/or collectively depending on the right, also enjoy international collective rights that are specific to them by virtue of their particular history and vulnerability. These newly recognized rights are clearly not UNIVERSAL. That fact alone, however, does not disqualify them from being considered INTERNATIONAL HUMAN RIGHTS. There is no reason why they cannot be referred to as international collective human rights.

28. Nepal. Madhu Raman Acharya said that his government voted “Yes” because it has always protected and promoted IP rights. The country’s interim Constitution reflects this commitment. Nepal understands that DRIP embodies the good intentions of the international community to protect and promote IP rights, but that DRIP itself did not create any new rights.

Comment. See AILA’s comment above on Thailand regarding the fallacy and trap of the “no new rights” argument.

? 29. Indonesia. Muhammad Anshor noted that several aspects of DRIP remained unresolved, in particular the lack of definition of IP. This made it difficult to apply DRIP. Assuming ILO Convention 169’s definition applies, IP are distinct from tribal peoples. This, coupled with the fact that Indonesia’s entire population remained the same before and after colonization, means that DRIP targets IP exclusively and does not apply to Indonesia.

Comment. See AILA’s view that Indonesia harbors indigenous and non-indigenous peoples in our comment above on India. Moreover, while ILO Convention 169 differentiates between IP and tribal peoples to a degree, it recognizes identical rights in both.

! 30. Pakistan. Bilal Hayee noted that his country had voted for the CD and again voted for DRIP. Though DRIP lacked a definition of IP, he hopes that its adoption will fulfill the aims of the International Decade and enable IP to maintain their cultural identity, with full respect for their values and traditions.

? 31. Paraguay. Juan Alfredo Bufa said his country voted “Yes” with the understanding that DRIP’s reference to SD does not interfere with the sovereignty or political unity of states.

Comment. See AILA’s view, in our comment above on India, that the 1970 DFR governs this issue.

32. Slovakia. Dusan Matulay said that his delegation welcomed DRIP in principle for its utility in protecting and promoting IP rights. Slovakia, however, has reservations on how DRIP handles the relationship between collective rights and individual human rights.

Comment. The substance of Slovakia’s reservation is unclear. AILA notes that since DRIP is the first human rights document to recognize collective rights, it is to be expected that good faith confusion, along with bad faith manipulation, co-exist regarding their meaning. See AILA’s comment above on Namibia.

33. Turkey. Serhat Asken was happy that amendments to the text won broader support, including Turkey’s, for DRIP. Though non-binding, it could serve as an important tool. Turkey does not have IP in its territory, and believes that DRIP’s reference to SD keeps it consistent with Charter obligations regarding non-interference in the sovereignty, integrity and political unity of States.

Comment. IP have agreed that the exercise of their rights should be in harmony with the UN Charter. Distortions of the Charter, as in DRIP Article 46(1), are another matter. As for IP in Turkey, see AILA’s comment above on India.

? 34. Philippines. Mr. Insigne said his country has consistently upheld the promotion and protection of IP rights and passed, in 1997, the IP Rights Act. His country’s “Yes” vote was based on the understanding that the right to SD shall not be read to permit any action that would dismember or impair the territorial integrity or political unity of a sovereign or independent State; and that land ownership and natural resources were vested in the State.

Comment. Again, “any action”, as set out in the 1970 DFR, refers to the action of states, not peoples.

? 35. Nigeria. Mr. Akindele welcomed the thrust of DRIP which is consistent with Nigeria’s Constitution. However, Nigeria’s concerns regarding SD and LTR have not been satisfactorily addressed causing it to abstain from voting. Nigeria’s institutions and laws all support national integration. Nigeria would continue to promote IP rights, culture and dignity but such rights apply to all 300 + ethnic groups speaking more than 300 languages in Nigeria.

Comment. AILA appreciates Nigeria’s across-the-board support for its ethno-linguistic diversity, and the historical reason why former colonies tend to emphasize national integration: they needed to resist threats to their national unity that were mounted after independence by external forces. However, it is imperative that states see that IP today assert their own agendas, and not someone else’s; and that IP are compelled to assert them in large part because the elites of too many states now collaborate with global capitalism in endangering IP’s physical and cultural survival.

! 36. Cuba. Claudia Perez-Alvarez noted that ending the isolation and discrimination suffered by IP for more than 5 centuries has been the motive driving DRIP. During the first decade of work, significant results were made in the quest for solutions. These included contributions from the Special Rapporteur and the establishment of the Permanent Forum. DRIP will now shape the

work of the UN and frame the future claims of IP. The Human Rights Council and other bodies should straightaway implement DRIP for the UN should not limit itself to defining rights.

Comment. AILA applauds Cuba for its call to the Council in Geneva to initiate DRIP's implementation. It is the necessary next step.

! 37. Egypt. Soha Gendi said Egypt voted "yes" although DRIP was not perfect. Egypt understands that nothing in DRIP changed the interpretation of the right to SD or of the sovereignty and territorial integrity of States set out in the Charter.

Comment. We fully agree with Egypt's clear, succinct, and informed statement that nothing in DRIP changes the meaning of, or balance between, the SD of peoples and the territorial integrity of states as it is found in the Charter and, we would add, the 1970 DFR.

! 38. Bolivia. David Choquehuanca, Minister of Foreign Affairs, said that the world's IP have waited 25 years for the historic adoption of DRIP. In the interim, Mother Earth continued to endure blows. IP voices will continue to clamor for her protection and preservation. DRIP is a step forward. It does not solve the problems of the planet, nor ease tensions between peoples, but it allows IP to participate in global processes for the betterment of all societies, including their own traditional communities. With DRIP, IP are not trying to live better than anyone else. They are merely trying to "live like" everyone else, i.e. exercise equivalent rights.

Comment. It moves us to hear a Foreign Minister speak in the idiom of IP in the GA. We are uplifted when he asserts, and shares with others, the spirit of our ancestors.

39. Portugal. Joao Salgueiro spoke on behalf of the European Union (EU) and associated states. The EU supported the CD. Today's amended text, the DRIP, aims at ensuring the widest possible support for itself. For this reason, the EU supports it now and is encouraged to see that a broad range of indigenous representatives who had been part of the process also supports it.

Comment. AILA fully appreciates the efforts of all in the EU who have upheld its support for the CD, a text that IP, in spite of our clear preference for the DD, nevertheless overwhelmingly endorsed. Portugal should know, however, that the IP world is divided over the substance of the DRIP, and that many in addition repudiate the 3-day ultimatum imposed on IP by states (as reported to us by the handful of IP persons with whom Mexico/Peru/Guatemala were communicating in NY) to respond to changes incorporated into the DRIP. It was a process that, quite simply, disrespected the world's 370 million + IP.

40. Guatemala. Jose Alberto Briz Gutierrez said that a 20-year struggle ends today with the adoption of a text that is acceptable to most states, and that would strengthen the dignity of IP around the world. While Guatemala would have preferred that the CD not be amended, DRIP is a balanced instrument that can guide the improvement of the circumstances of IP while respecting the principles of international law. DRIP does not create new rights, only reaffirms IP rights, including their collective right to live in freedom, peace and security. Guatemala is convinced that the full realization of human rights is a prerequisite for attaining peaceful and harmonious existence. While DRIP cannot make up for the past, it can prevent discrimination and intolerance, and express the international community's political will to respect IP rights. It is a first step.

Comment. AILA appreciates Guatemala's strong support for some time now for IP rights but is disappointed that, at the end, it joined Mexico and Peru in letting harmful changes into the DRIP. See also AILA's comment above on Thailand regarding the fallacy and trap of the "no new rights" view.

! 41. Finland. Ms. Nuorgam said that the first International Decade had two major goals: the finalization of a UN Declaration, and the establishment of a Permanent Forum. Today's action honors the work of hundreds of representatives of governments and IP from around the world who worked long and hard for a Declaration. The issue of IP rights affects the lives not only of IP, but of all. DRIP is an important tool in assuring the full participation of IP in decision-making processes. It sets out a comprehensive framework of new minimal international standards for IP rights.

Comment. AILA prizes Finland's steady and respectful support for IP rights in N.Y. as in Geneva, and strongly seconds Finland's reminder that DRIP sets but minimal standards.

42. Ecuador. Rodrigo Riofrio said his country was known for its ethnic and cultural diversity and its government strongly supports the adoption of DRIP as a tool for protecting and promoting IP rights worldwide. Flexibility in negotiations had produced a consensus among a majority of states that DRIP would improve IP's situation worldwide.

Comment. AILA notes that the "flexibility" that Ecuador applauds created, in the view of many IP, an unacceptable dilution of our rights in the key areas of self-determination and demilitarization.

! 43. Costa Rica. Randall Gonzalez said the day marked the end of a long process for recognizing IP's fundamental rights. It is also only a beginning for the remedying of many years of injustice. The debt to indigenous brothers and sisters must be settled, not only through the implementation of DRIP, but also with actions to alleviate poverty, improve education, and widen access to decision-making processes.

Comment. We are heartened that Costa Rica, like Cuba, is urging that the next phase begin, and indeed surpass DRIP!

44. France. Fabien Fieschi believed that DRIP was an essential step towards the promotion and protection of human rights for all. France has supported all multinational initiatives for IP, and many DRIP rights are already elaborated in France's Constitution.

Comment. If France has indeed elaborated DRIP rights in its Constitution, we hope that will now take the step of implementing them.

! 45. The GA President (GA Vice-President Aminu Bashir Wali of Nigeria spoke on behalf of GA President Sheikha Haya Rashed Al Khalifa). The GA has come a long way since first opening its doors to IP to launch the International Year of the World's Indigenous Peoples in December 1992. It launched the 1st International Decade of the World's Indigenous Peoples in 1995 and, last year, the 2nd such Decade. These actions demonstrate the GA's continuing commitment to the world's IP. Even so, IP still face marginalization, extreme poverty and other human rights violations. They are often dragged into conflicts and land disputes that threaten their way of life and very survival. They also suffer from lack of access to health care and education. IP should not be cast as victims, however, but as critical assets to the diversity of global humanity. By adopting DRIP, the GA marks progress in improving the situation of IP around the world. It also thereby realizes the important mandate that Heads of States and Governments gave it at the 2005 World Summit. Given that DRIP is the product of over two decades of negotiations, its importance for IP and, more broadly, for the human rights agenda, is inestimable. Finally, DRIP's adoption demonstrates the GA's important role in setting international standards.

Comment. AILA reflects that it is two women, both trained in human rights law, who stood at the start and finish of the UN's elaboration of a Declaration of the Rights of Indigenous Peoples:

Professor Erica-Irene A. Daes of Greece and H.E. Sheikha Haya Rashed Al Khalifa of Bahrain. For her life's dedication to the restoration of dignity and well-being to our peoples, Professor Daes lives forever in our hearts. For her principled and critical role in assuring the timely GA adoption of DRIP, H.E. Sheikha Al Khalifa will live forever in our esteem. We offer both our deepest thanks, and admiration.

### B. The Next Phase.

Like indigenous communities everywhere, AILA and the constituencies we serve are carefully assessing recent events so as to wisely map out the work ahead. We outline below our current thinking, and look forward to learning yours.

#### 1. Assessment:

- We have gained much more (relative to when we started in the late '70s) than we have lost (relative to the 1994 Draft Declaration, and the 2006 CD) in the GA's adoption of DRIP. A majority of states recognize our right to SD, and to a normative partnership with states, which is one of several possible expressions of our SD. Assuming that we invoke these rights regularly, states will find it increasing difficult to repudiate them.
- That DRIP provisions are not legally binding does not detract from their potential for driving cultural and political transformations, which often run deeper than legal change.
- In fact, DRIP's normative, as opposed to legal, nature allows IP to focus on invoking the many provisions that help us while continuing to critique those that harm us, like PP 16, and Articles 30 and 46. This requires us to master DRIP's substance.

#### 2. DRIP's Normative Substance.

- Self-determination. Because this broadest of all human rights legitimizes the other rights we fought for, we must vigilantly defend its scope. The U.S., for one, maintains that SD applies to IP on an exceptional basis only (when the U.S. so wills it, as in Tibet?). The UK, in a variation on the same theme, holds that IP are entitled to SD, but in a unique or sui generis form which it calls "self-government". Bolstering the UK conclusion, the US claims that the UN had only intended for DRIP to proclaim that IP are entitled to a new right of "self-government", and not to SD. To counter these states' jurisprudential moves, IP need to clearly insist that we are among the "peoples" the 1966 Human Rights Covenants speak of, and are not the "indigenous people" or minority that the 1993 Vienna Declaration calls us.
- Territorial integrity of states. Some states are relying on DRIP Article 46 (1) to claim that our SD right is limited by our duty to respect the territorial integrity and political unity of states. To date, international law continues to impose this duty, authoritatively set out in the 1970 DFR, only on states vis-à-vis other states. DRIP lacks the authority or mandate to change the existing international law framework on this matter.
- Human rights and collective rights. The U.S., UK, Sweden, and Slovakia indicate that, perhaps with the exception of the right to SD, they do not recognize that collective rights are human rights. Individual human rights, they say, are universal whereas collective DRIP rights are particular to IP. Moreover, since individual human rights supersede collective rights, whether of the state or of IP, it would unsettle this hierarchy if collective rights were considered human rights. AILA observes that whether or not DRIP rights are categorized as human rights is a matter of human choice, not divine revelation. International law can thus recognize a new subset of collective human rights that do not trump international individual human rights (a view that IP agreed to in the CD) if it wishes. In any event, and this is the important point, once adopted, international collective rights supersede domestic law.

-- Fundamental freedoms. Canada said in the GA that it wanted a text that would promote IP's fundamental freedoms. Because other states (U.S., U.K., and perhaps others) have at times said the same thing in Geneva, we need to know the difference between freedoms and rights in law. A freedom is a so-called negative right. It prevents a state, for example, from forbidding a person to speak her mother tongue. Rights, on the other hand, can be both positive (a person is entitled to receive education in her mother tongue from the state), and negative (the previous example). We must not permit states to transform our broad rights into narrower freedoms.

3. Process. As many of you know, changes to the CD text were negotiated in N.Y. by a handful of states that consulted with a handful of indigenous members of the SCD who in turn excluded other IP from the process until the very end when they presented to us the changes made by states as a fait accompli to which the world's 370 million IP had 3 days to respond! If IP are to act together again as an Indigenous Caucus – whether at the Human Rights Council in Geneva, the Permanent Forum in NY, or other fora – AILA believes that we must start from scratch, as our IP predecessors in Geneva did in the late '70s and early '80s, when they laid down foundational principles for their work which, let us not forget, brought us the optimal 1994 UN text of our rights. Knowing that strength requires unity, and that unity requires mutual respect, our elders insisted at the time that mutual respect be maintained at all times via an adherence to principles of equality, inclusiveness, transparency, and accountability in all that we do. AILA respectfully proposes that we ask these elders to meet with us at the next event at which we will converge – probably the 2008 meeting of the Permanent Forum – to re-instruct us in the values that they honored and that should now direct a much-needed re-organization and re-vitalization of the Indigenous Caucus.

4. Tasks. If such a new Indigenous Caucus can emerge, many collective tasks will await it. These may include: developing a mechanism to monitor DRIP compliance in Geneva; advocating DRIP norms in state and civil society fora; reporting to our communities, states, IGOs, and NGOs on the best and worst practices of DRIP compliance as they occur; making sure that the OAS Declaration makes up for the deficiencies in DRIP.

\* \* \* \*

#### ANNEX: Vote on Indigenous Rights Declaration

The Declaration on the Rights of Indigenous Peoples (document A/61/L.67) was adopted by a recorded vote of 143 in favor to 4 against, with 11 abstentions, as follows:

In favor: Afghanistan, Albania, Algeria, Andorra, Angola, Antigua and Barbuda, Argentina, Armenia, Austria, Bahamas, Bahrain, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Cambodia, Cameroon, Cape Verde, Central African Republic, Chile, China, Comoros, Congo, Costa Rica, Croatia, Cuba, Cyprus, Czech Republic, Democratic People's Republic of Korea, Democratic Republic of the Congo, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Germany, Ghana, Greece, Guatemala, Guinea, Guyana, Haiti, Honduras, Hungary, Iceland, India, Indonesia, Iran, Iraq, Ireland, Italy, Jamaica, Japan, Jordan, Kazakhstan, Kuwait, Lao People's Democratic Republic, Latvia, Lebanon, Lesotho, Liberia, Libya, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritius, Mexico, Micronesia (Federated States of), Moldova, Monaco, Mongolia, Mozambique, Myanmar, Namibia, Nepal, Netherlands, Nicaragua, Niger, Norway, Oman, Pakistan,

Panama, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Republic of Korea, Saint Lucia, Saint Vincent and the Grenadines, San Marino, Saudi Arabia, Senegal, Serbia, Sierra Leone, Singapore, Slovakia, Slovenia, South Africa, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syria, Thailand, The former Yugoslav Republic of Macedonia, Timor-Leste, Trinidad and Tobago, Tunisia, Turkey, United Arab Emirates, United Kingdom, United Republic of Tanzania, Uruguay, Venezuela, Viet Nam, Yemen, Zambia, Zimbabwe.

Against: Australia, Canada, New Zealand, United States.

Abstain: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, Ukraine.

Absent: Chad, Côte d'Ivoire, Equatorial Guinea, Eritrea, Ethiopia, Fiji, Gambia, Grenada, Guinea-Bissau, Israel, Kiribati, Kyrgyzstan, Marshall Islands, Mauritania, Montenegro, Morocco, Nauru, Palau, Papua New Guinea, Romania, Rwanda, Saint Kitts and Nevis, Sao Tome and Principe, Seychelles, Solomon Islands, Somalia, Tajikistan, Togo, Tonga, Turkmenistan, Tuvalu, Uganda, Uzbekistan, Vanuatu.

\* \* \* \*

## AMERICAN INDIAN LAW ALLIANCE (AILA)

### MEMORANDUM ON THE MODIFIED DECLARATION.

9/10/07

#### AILA POSITION

AILA respectfully informs our indigenous brothers and sisters throughout the world as well as NGOs and states that have supported indigenous peoples' struggles that, in our view, the modified Declaration of the Rights of Indigenous Peoples (MD) which the G.A. will act on this Thursday September 13, 2007 contains provisions that are, in the main, acceptable to our peoples, as well as provisions that we must disavow for the record for the following reasons:

1. MD PP 16. This paragraph's reference to the 1993 Vienna Declaration and Programme of Action, which refused to recognize our status as "peoples" and also incorrectly designated us "minorities", re-inscribes the violation of the dignity of our peoples contained in that Declaration.

2. MD Article 30. This article guts the already minimal protection that the text of the Human Rights Council's Declaration on the Rights of Indigenous Peoples (CD) offers our peoples against military activities on our territories. The MD article now permits these activities if justified by a mere "relevant public interest" as opposed to the CD's "a significant threat to a relevant public interest". Our peoples live and die every day in the havoc that attends states' military activities. We cannot, and will not, go back to our communities with the stain of our silence as states continue to tolerate that situation.

3. MD Article 46. International law, since the UN Charter was adopted in 1945, has consistently maintained a scrupulous balance between the principles of the self-determination of peoples and the



territorial integrity of states. See the 1970 Declaration on Friendly Relations. MD Article 46, which is the final "caveat" article in the MD, upsets this balance by highlighting only the second principle AND by placing the duty to respect states' territorial integrity on peoples for the first time in an international law instrument. Until now, that duty had only been imposed on states.

In conclusion, AILA hereby commits to working in good faith partnership with states to implement the provisions of the MD with reservations, as noted here, regarding MD PP 16 and Articles 30 and 46 inasmuch as these provisions incorrectly represent fundamental principles of international law and/or re-inscribe, rather than correct, past indignities and injuries done to our peoples.

In taking this position, AILA adds its disavowal of the MD's harmful provisions to those already expressed in various ways by others including Laguna Pueblo, Owe Aku, Aotearoa Indigenous Trust, Consejo de Todas las Tierras-Mapuche, other Latin American organizations identified by Estebancia Castro Dias and Fortunato Turpo Choquehuanca, Bill Means of IITC, and Tonatierra. In addition, Kekuni Blaisdell as Convenor of Kanaka Maoli Tribunal Komike, and the Seventh Generation Fund for Indian Development, as well as the Flying Eagle Woman Fund for Peace, Justice and Sovereignty add their voices to this disavowal.

#### EXPLANATION.

Through the long years that AILA fought alongside our world-wide indigenous brothers and sisters with the support of our Chiefs, Faithkeepers, and Clan Mothers for a strong Declaration of the Rights of Indigenous Peoples, we have been guided by the following principles:

1. The brutality, injustice, and indignities that our peoples suffered for 500 years must be reversed by securing, among other things, a UN Declaration of the Rights of Indigenous Peoples that advances our rights and the corresponding duties of states, and not vice versa.
2. The process for achieving this instrument must be legitimate, inclusive, transparent, and otherwise respectful of our peoples. In this regard, we find it both unprecedented and most disrespectful that the indigenous peoples of the world were given three days in which to respond to an instrument, the MD, that will affect the course of indigenous/state partnership into the indefinite future. States, we note, gave each other nine months in which to reconcile their differences over the CD.

Having now discussed over the course of ten days the substance of the MD with our communities and experts on international law, indigenous and non-indigenous, AILA has decided to record, before the G.A. acts on the matter, our position regarding specific provisions of the MD, rather than regarding its adoption, which in any event states will decide on their own on Thursday September 13, 2007.

We believe this approach has the following advantages:

1. It preserves a historical record of indigenous peoples' disavowal of the MD's most harmful provisions (PP16, and Articles 30 and 46). This record will be important for us to have when the Human Rights Council begins its task of overseeing the implementation of the MD.

2. It will protect us, when the time comes for drafting a Convention, from allegations that indigenous peoples as a whole agreed to these provisions in 2007.
3. At the same time, it allows us to establish the record that we endorse, and intend to invoke, the remaining provisions of the MD which are generally helpful.
4. Our friends in the world need to know the mixed nature of the MD so that they may continue to support our rights in an informed way, rather than throw their blanket support to the MD.

Finally, we append here our analysis of all 9 changes that states introduced into the MD.

\* \* \* \*

## ANALYSIS OF THE MD

### INTRODUCTION

The Modified Declaration (MD) that Mr. Les Malezer sent out on Friday August 31, 2007 contains 9 changes made to the text of the UN Human Rights Council's Declaration (CD) which that body adopted in June 2006. AILA analyses all 9 changes below. We believe that changes #4 (to PP 16), #7 (to Article 30), and #9 (to Article 46) are harmful to indigenous peoples, while the other 6 changes are not. IN A NUTSHELL: PP16 incorporates into the MD the 1993 Vienna Declaration which calls us "people" rather than "peoples", and also lists us in the category of "minorities"; Article 30 gives states de facto permission to conduct military activities on our territories; and the final "caveat" Article 46 states that the MD cannot be construed to authorize or encourage any action "for any State, people, group or person" that impairs the territorial integrity AND political unity of states. This would be the first time that an international law instrument applies this caveat to peoples, rather than just to states.

### ANALYSIS OF ALL 9 CHANGES

**1. Change:** The initial sentence of the modified Declaration (MD) replaces "Human Rights Council" with "General Assembly" as the adopting unit.

Analysis: Normal and acceptable.

**2. Change:** A new pre-ambular paragraph (MD PP 1) says: "Guided by the purposes and principles of the Charter of the United Nations, and in good faith in the fulfillment of the obligations assumed by States in accordance with the Charter,"

Analysis: Good and acceptable.

**3. Change:** The following CD PP 14 is deleted from the MD: "Recognizing that indigenous peoples have the right freely to determine their relationships with States in a spirit of coexistence, mutual benefit and full respect",

Analysis: Acceptable. The deleted language is vague, and also redundant given that Article 3 recognizes indigenous peoples' right to self-determination.

**4. Change:** MD PP 16 now says (additions CAPITALISED): "Acknowledging that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the

International Covenant on Civil and Political Rights AS WELL AS THE VIENNA DECLARATION AND PROGRAMME OF ACTION, affirm the fundamental importance of the right of self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development",

Analysis: This reference to the Vienna Declaration must be thought through very carefully hence we present a long analysis here.

a) The 1993 Vienna Declaration and Programme of Action (VD) has two parts. Part I (39 articles) is the Declaration and Part II (100 articles) is the Programme. The VD's relevant provisions say:

b) VD Part I, article 2:

"All peoples have the right of self-determination. By virtue of that right they freely determine their political status, and freely pursue their economic, social and cultural development.

\* Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

\*\* In accordance with the Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, this shall not be 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 conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind".

MD Article 46 (see change #9 below) quotes from the two-starred \* \* VD paragraph above (which protects the territorial integrity and political unity of states) without, however, also quoting from the preceding one-starred \* paragraph (which protects the self-determination of peoples) thereby upsetting the present balance recognized in international law between the two principles.

c) VD Part II (B)(2):

"Persons belonging to national or ethnic, religious and linguistic minorities."

[The section's articles 25-27 then discuss minorities in general, after which the section continues, with EMPHASIS added]

"Indigenous PEOPLE.

28. The World Conference on Human Rights calls on the Working Group on Indigenous Populations of the Sub-Commission on Prevention of Discrimination and Protection of Minorities to complete the drafting of a declaration on the rights of indigenous PEOPLE at its eleventh session.

29. The World Conference on Human Rights recommends that the Commission on Human Rights consider the renewal and updating of the mandate of the Working Group on Indigenous Populations upon completion of the drafting of a declaration on the rights of indigenous PEOPLE.

30. The World Conference on Human Rights also recommends that advisory services and technical assistance programmes within the United Nations system respond positively to requests by States for assistance which would be of direct benefit to indigenous PEOPLE. The World Conference on Human Rights further recommends that adequate human and financial resources be made available to the Centre for Human Rights within the overall framework of strengthening the Center's activities as envisaged by this document.

31. The World Conference on Human Rights urges States to ensure the full and free participation of indigenous PEOPLE in all aspects of society, in particular in matters of concern to them.

32. The World Conference on Human Rights recommends that the General Assembly proclaim an international decade of the world's indigenous PEOPLE, to begin from January 1994, including action-orientated programmes, to be decided upon in partnership with indigenous PEOPLE. An appropriate voluntary trust fund should be set up for this purpose. In the framework of such a decade, the establishment of a permanent forum for indigenous PEOPLE in the United Nations system should be considered."

Two points need to be noted here. Notwithstanding indigenous peoples' protest in Vienna in 1993, the VD uses the term "people" to refer to us so as not to suggest that indigenous peoples have the right to self-determination. Second, the VD places indigenous peoples under the heading of "Persons belonging to national or ethnic, religious and linguistic minorities," a designation that indigenous peoples have rejected as inappropriate when applied to us.

**5. Change:** A new MD PP 23 now says: "Recognizing also 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,"

Analysis: Several states had sought wording that required Declaration provisions to conform to national laws. Taking note of "particularities.... backgrounds" is clearly better than conforming to national laws, and thus essentially acceptable.

**6. Change:** MD Article 8 (d) has deleted some language from its CD version: "Any form of forced assimilation or integration by other cultures or ways of life imposed on them by legislative, administrative or other measures;"

Analysis: The deletion actually improves the text by enlarging the prohibition against forced assimilation.

**7. Change:** MD Article 30 (1) has been gutted by a deletion: "Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a significant threat to a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned."

Analysis: The deletion of "significant threat to" is a MAJOR weakening of CD Article 30 which had already greatly weakened the "military activities" wording in the 1994 Draft Declaration. This last change now guts Article 30, i.e., makes it all but useless.

**8. Change:** MD Article 32 (2) now contains a deletion: "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 their mineral, water or other resources."

Analysis. The deletion of "their", while not desirable, is not harmful because the paragraph makes clear that the "mineral, water or other resources" at issue are those on indigenous lands and territories. "Their", we understand, was removed because Latin American states did not want an EXPLICIT conflict between the article and their Constitutions which generally confer ownership of sub-surface resources on states.

**9. Change:** MD Article 46 (1), with additions that we capitalize, now reads: "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."

Analysis: This change raises real problems for indigenous peoples. To see how Article 46 is now tipping the balance, long maintained to this day in international law, between the principles of the self-determination of peoples and the territorial integrity of states, in the favor of states, we need to compare this new language in the MD with two prior international instruments that have used seemingly similar, but not identical, language: the 1970 Declaration on Friendly Relations (DFR), which in 7-8 careful and highly nuanced pages, authoritatively states the complex balancing at issue here; and the 1993 Vienna Declaration and Programme of Action (VD), which retains the balance. Comparable parts in the two documents are CAPITALISED below.

The 1970 DFR, after giving a scrupulously balanced treatment of the two principle, says:

"NOTHING IN THE FOREGOING PARAGRAPHS SHALL BE 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.

\*\*\* Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country".

As for the 1993 VD, it states, as quoted earlier in change # 4 above:

\*\*\* "Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination. The World Conference on Human Rights considers the denial of the right of self-determination as a violation of human rights and underlines the importance of the effective realization of this right.

In accordance with the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, THIS SHALL NOT BE CONSTRUED AS AUTHORIZING OR ENCOURAGING ANY ACTION WHICH WOULD DISMEMBER OR IMPAIR, TOTALLY OR INPART, THE TERRITORIAL INTEGRITY OR POLITICAL UNITY OF SOVEREIGN AND NDEPENDENT STATES conducting themselves in compliance with the principle of equal rights and self-determination of

peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind."

To see the tipping, compare the capitalized parts of MD Article 46 with the capitalized passages in the prior DFR and VD. For one thing, the MD would be the first time that an international instrument explicitly extends the deterrence against violating the territorial integrity and political unity of states to a people. The prior DFR applies the deterrence to states only, and the VD is silent or at least ambiguous as to the target of the deterrence. Second, both the DFR and the VD contain paragraphs (\*\*\*) three-starred above) that make clear that the deterrence is carefully balanced by the right of self-determination of peoples. MD Article 46 (1) omits such paragraphs, and further extends the deterrence to peoples, thereby tipping the balance away from peoples and in favor of states.

## SUMMATION

Reasons for issuing statements endorsing most MD provisions without endorsing the MD as a whole, and for specifically disavowing MD PP 16, and Articles 30 and 46:

- a. These 3 provisions substantively weaken important rights we negotiated in Geneva.
- b. On the other hand, we are ready to immediately collaborate in good faith partnership with states on all the other provisions of the MD to our mutual benefit either because we have already accepted them in Geneva or, if new, because we find that they merely clarify or enhance our rights, but do not weaken them.
- c. The MD's acceptable provisions constitute valuable foundations on which we can begin to repair the lives of our nations and peoples.
- d. States that commit to international instruments that they generally endorse typically express reservations over particular parts. We can do likewise.
- e. A statement preserves a historical record of indigenous peoples' disavowal of the 3 most harmful MD provisions. This record will be important to have when the Human Rights Council begins its task of overseeing the implementation of our rights.
- f. A statement will protect us, when the time comes for working on a Convention, from allegations that indigenous peoples as a whole agreed to these harmful provisions in 2007.
- g. Our non-indigenous friends need to know the mixed nature of the MD so that they may continue to support our rights in an informed way, rather than throw their blanket support to the MD.

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<http://www.tonatierra.org/amoxcalli.html#docs>