

AMERICAN INDIAN LAW ALLIANCE (AILA)

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

10/17/07

(Extract - Full text in attachment)

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 a "?" 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.usunnewyork.usmission.gov/press_releases/20070913_204.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.

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